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( 1901 — 1969 )

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**SRINAGAR MUNICIPAL COUNCIL**

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## VOLUME XL. 1917.

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# CONSOLIDATED

## Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports, for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.

### 39 I. L. R., ALLAHABAD SERIES, FOR JULY-AUGUST, 1917.

| Page. | Names of Parties. | Corresponding Vol. and page of Ind. Cas. | | Page. | Names of Parties. | Corresponding Vol. and page of Ind. Cas. | |
|---|---|---|---|---|---|---|---|
| 379 | Ram Nandan Dhar Dube v. Kaniz Fatima Bibi ... | **39** | 902 | 450 | Madhuri Surendra Sahi v. Bithal Das ... | **39** | 151 |
| 386 | Emperor v. Muhammad Yusuf ... | **40** | 317 | 452 | Lalta Prasad v. Sheoraj Singh ... | **41** | 346 |
| 388 | Baji Lal v. Nawal Singh ... | **39** | 636 | 455 | Abdul Hasan v. Makhdum Bakhsh ... | **39** | 944 |
| 391 | Chunnoo Lal v. Lachman Sonar... | **42** | 841 | | | | |
| 393 | Rifaqat Husain v. Bibi Tawaif ... | **39** | 519 | 460 | Rajendra Kishore Singh v. Bhagwan Singh ... | **39** | 745 |
| 396 | Beni Prasad v. Harnam Das ... | **39** | 630 | | | | |
| 399 | Emperor v. Umar Khan ... | **39** | 703 | 463 | Nandi v. Sarup Lal ... | **40** | 71 |
| 401 | Kulsum Fatima v. Ali Akbar ... | **39** | 730 | 466 | Emperor v. Sita Ram ... | **39** | 998 |
| 412 | Emperor v. Satish Chandra Ghose | **39** | 478 | 469 | Bijai Misir v. Kali Prasad Misir ... | **41** | 912 |
| 415 | Ajudhia Prasad v. Gopi Nath ... | **39** | 578 | 476 | Sundar Nath v. Mallu ... | **39** | 634 |
| 418 | East Indian Railway Company v. Nathmal Behari Lal ... | **39** | 180 | 480 | Kamr-un-Nissa Bibi v. Sughra Bibi ... | **40** | 427 |
| 423 | Khedu Rai v. Sheo Parson Rai ... | **40** | 121 | 482 | Emperor v. Hashim Ali ... | **40** | 107 |
| 426 | Mauladad Khan v. Abdul Sattar | **39** | 666 | 485 | Madan Gopal v. Sati Prasad ... | **40** | 451 |
| 437 | Sahu Ram Chandra v. Bhup Singh | **39** | 280 | 489 | Ajudhia Prasad v. Badar-ul-Husain ... | **41** | 357 |

### 15 ALLAHABAD LAW JOURNAL, FOR JULY-AUGUST, 1917.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 581 | Kawal Nain v. Budh Singh ... | **40** | 286 | 645 | T. A. Balakrishna Udayar v. Vasudeva Aiyar ... | **40** | 650 |
| 584 | Lachman Prasad v. Sarnam Singh | **40** | 284 | | | | |
| 587 | Hira Nand v. Emperor ... | **41** | 310 | 653 | Sri Narain v. Jagannath ... | **41** | 890 |
| 590 | Tapti Prasad v. Emperor ... | **41** | 335 | 654 | Babu Ram v. Emperor .. | **42** | 174 |
| 592 | Malik Akbar Ali Khan v. Shah Muhammad ... | **40** | 443 | 656 | Ratan Dei v. Durga Shankar Bajpai ... | **41** | 892 |
| 594 | Katwaru Rai v. Emperor ... | **41** | 308 | 661 | Pita Ram v. Jujhar Singh ... | **33** | 798 |
| 597 | Sayad Ali Asghar v. The Collector of Bulandshahr ... | **40** | 753 | 666 | Puran Mal v. Brij Lal ... | **41** | 835 |
| 623 | Raghubir Rai v. Madho ... | **41** | 208 | 671 | Lachhmi Narain v. Sajjadi Begam | **41** | 839 |
| 625 | Zaib-un-Nissa Bibi v. Maharaja Parbhu Narain Singh ... | **40** | 345 | 677 | Ilias Ahmad v. Bulaqi Chand ... | **41** | 867 |
| 627 | Dost Muhammad Khan v. Emperor ... | *To be printed.* | | 680 | Manger Chamar v. Gajai Singh... | **41** | 873 |
| 628 | Sarfaraz Khan v. *Musammat* Parbatia ... | **41** | 918 | 684 | Suraj Narain v. Ratan Lal ... | **40** | 988 |
| 629 | Gobind Das v. Bishambhar Das ... | **40** | 641 | 697 | Kandukuri Balasurya Prasadha Row v. Secretary of State for India in Council ... | **41** | 98 |
| 638 | Khushali Ram v Gokul Chand ... | **41** | 352 | 721 | Chidda Lal v. Bhajan Lal ... | **42** | 167 |
| 642 | Madho Gir v. Rashid Ahmad ... | **41** | 141 | 734 | Gajadhar Singh v. Kishen Jiwan Lal ... | **42** | 93 |
| | | | | 738 | Jagrap Sahu v. Ramanand Sahu... | **40** | 373 |
| | | | | 740 | Ram Piari v. Nand Lal ... | **42** | 77 |

## 41 I. L. R., BOMBAY SERIES, FOR JULY-AUGUST, 1917.



## 19 BOMBAY LAW REPORTER, FOR JULY-AUGUST, 1917.



## 10 BURMA LAW TIMES, FOR APRIL-MAY, 1917.



## 9 LOWER BURMA RULINGS, FROM APRIL TO JUNE, 1917.

## 3 UPPER BURMA RULINGS, FROM APRIL TO JUNE, 1917.



## 44 I. L. R., CALCUTTA SERIES, FOR JULY-AUGUST, 1917.



## 26 CALCUTTA LAW JOURNAL, FOR JULY-AUGUST, 1917.

## 21 CALCUTTA WEEKLY NOTES, FOR JULY-AUGUST, 1917.



## 40 I. L. R., MADRAS SERIES, FOR JULY-AUGUST, 1917.

## 40 I. L. R., MADRAS SERIES, 1917—*concld.*



## 33 MADRAS LAW JOURNAL, FOR JULY-AUGUST, 1917.



## 22 MADRAS LAW TIMES, FOR JULY-AUGUST, 1917.

## 22 MADRAS LAW TIMES, 1917—*concld.*



## 6 LAW WEEKLY, FOR JULY AUGUST, 1917.

## 6 LAW WEEKLY, 1917—*concld.*



## (1917) MADRAS WEEKLY NOTES, FOR JULY-AUGUST.



## 13 NAGPUR LAW REPORTS, FOR JULY-AUGUST, 1917.



## 20 OUDH CASES, FOR JULY-AUGUST, 1917.

## 4 OUDH LAW JOURNAL, FOR JULY-AUGUST, 1917.



## 2 PATNA LAW JOURNAL, FOR JULY-AUGUST, 1917.



## 1 PATNA LAW WEEKLY, FOR MAY-JUNE, 1917.

## 1 PATNA LAW WEEKLY, 1917—concld.



## 2 PATNA LAW WEEKLY, FOR JULY-AUGUST, 1917.

## 2 PATNA LAW WEEKLY, 1917—concld.



## 18 PUNJAB LAW REPORTER, FOR JULY-AUGUST, 1917.

## 52 PUNJAB RECORD, FOR JULY-AUGUST, 1917.

| | | | | |
|---|---|---|---|---|
| | *Civil.* | | | |
| 57 | *Musammat* Gulabi Bibi v. Aslam Khan ... | **41** | 891 | |
| 58 | Indar Narain v. Nanak Chand ... | **32** | 454 | |
| 59 | *Musammat* Mehr Bibi v. Chanan Din ... | **41** | 932 | |
| 60 | Johnston v. Secretary of State for India ... | **42** | 905 | |
| 61 | Jagan Nath v. Fatteh Chand ... | **41** | 910 | |
| 62 | Sheo Parshad Radha Kishen v. Indore Malwa United Mills, Ltd., ... | **39** | 508 | |
| 63 | *Musammat* Bhag Bhari v. Gujar Mal ... | **38** | 623 | |
| 64 | Ram Singh v. Bakhshi ... | **41** | 895 | |
| 65 | Ghulam Muhammad Khan v. Nur Khan ... | **41** | 897 | |
| 66 | Bhagwan Singh v. Munshi Ram ... | **41** | 915 | |
| 67 | Dhanpat Mal v. Mela Mal ... | **41** | 918 | |
| 68 | Mathra Das v. Nizam Din ... | **41** | 921 | |
| 69 | Chuhar v. *Musammat* Jas Kaur ... | **41** | 927 | |
| 70 | Gokal Chand v. Hukam Chand ... | **34** | 714 | |
| 71 | Gokal Chand v. Hukam Chand ... | **34** | 714 | |
| 72 | Chajju Mal v. Gurmukh Singh-Bhagwan Das ... | **42** | 95 | |
| 73 | Channa Ram v. Kalu ... | **42** | 218 | |
| 74 | Azim v. Gopi ... | **40** | 487 | |
| | *Criminal.* | | | |
| 31 | Ram Richpal v. Crown ... | **41** | 1008 | |
| 32 | Crown v. Sita Ram ... | **41** | 1000 | |
| 33 | Crown v. Gurditta ... | **41** | 1003 | |
| 34 | Crown v. Ajaib Singh ... | **41** | 1005 | |
| 35 | Crown v. Mukandi Lal ... | **41** | 144 | |
| 36 | Crown v. Sardar ... | **42** | 335 | |
| 37 | Pirthi v. Crown ... | **40** | 703 | |
| 38 | Samila v. Crown ... | **42** | 159 | |
| | *Revenue.* | | | |
| 5 | Pokhar Das v. Amir ... | **41** | 907 | |
| 6 | Chanda Singh v. Jiwan Singh ... | **42** | 87 | |

## 12 PUNJAB WEEKLY REPORTER, FOR JULY-AUGUST, 1917.

| | | | | |
|---|---|---|---|---|
| | *Civil.* | | | |
| 61 | Manohar Lal v. Khushi Shah ... | *Not report-able.* | | |
| 62 | Amar Nath v. Bulaki Das ... | **38** | 363 | |
| 63 | Jamna Das v. Bishan Das ... | **41** | 889 | |
| 64 | Mohammad Amin v. Chiragh Beg | **39** | 617 | |
| 65 | Firm of Sheo Parshad Radha Kishen v. Indore Malwa United Mills ... | **39** | 508 | |
| 66 | Gurdit Singh v. Musa ... | **41** | 301 | |
| 67 | Thakar Singh v. Nabi Bakhsh ... | **39** | 735 | |
| 68 | Sultan v. Ghulla ... | **41** | 283 | |
| 69 | Sardara v. Modan ... | **39** | 785 | |
| 70 | Firm of Khushi Ram-Behari Lal v. Mathra Das ... | **39** | 793 | |
| 71 | Budha Shah v. Suleman ... | **41** | 576 | |
| 72 | Muhammad Ibrahim v. *Musammat* Umatullah Jan ... | **39** | 798 | |
| 73 | Amar Nath v. Raghpat Rai ... | **41** | 344 | |
| 74 | Diwan Chand v. Imam Din ... | **41** | 347 | |
| 75 | Partap Singh v. Gurditta Mal ... | **39** | 952 | |
| 76 | Ali Akbar Shah v. Barkat Ali Shah | **39** | 775 | |
| 77 | *Musammat* Bobo Ghulam Fatima v. Ghulam Mohammad Khan ... | **39** | 912 | |
| 78 | Devi Das v. Nathu Mal ... | **39** | 772 | |
| 79 | Mool Chand v. Amar Nath ... | **39** | 971 | |
| 80 | Hira Singh v. Jhanda Singh ... | **42** | 371 | |
| 81 | Mathra Das v. Nizam Din ... | **41** | 921 | |
| 82 | Muhammad Bakhsh v. *Musamm* Karm Ilahi ... | **40** | 246 | |
| | *Civil*—concld. | | | |
| 83 | Mehnga v. Mihan Singh ... | **42** | 244 | |
| 84 | Shib Lal v. Paras Ram ... | **42** | 242 | |
| 85 | *Musammat* Parsani v. Mangal Singh ... | **40** | 237 | |
| 86 | Firm of Buta Mal-Lachman Das v. Secretary of State for India in Council ... | **40** | 280 | |
| 87 | Sri Ram v. Kanshi Ram ... | **40** | 255 | |
| 88 | Rura v. Ganda Ram ... | **42** | 284 | |
| 89 | Sher Singh v. Dalip Singh ... | **42** | 282 | |
| 90 | Ram Singh v. Roda ... | **42** | 279 | |
| 91 | *Musammat* Gulab Bibi v. Aslam Khan ... | **41** | 891 | |
| 92 | *Musammat* Zinat Bibi v. *Musammat* Emna ... | **40** | 240 | |
| 93 | Bishen Singh v. Feroz Chand ... | **40** | 618 | |
| 94 | *Musammat* Nikki v. Gujar Mal ... | **42** | 54 | |
| 95 | Hari Chand v. Maghi Mal ... | **40** | 675 | |
| 96 | Abdul Karim v. Upper India Bank, Ltd, ... | **40** | 684 | |
| 97 | Nanak Chand v. Lachhman Das ... | **40** | 775 | |
| | *Criminal.* | | | |
| 23 | Wir Singh v. Emperor ... | *Not report-able.* | | |
| 24 | Mehr Singh v. Crown ... | **39** | 801 | |
| 25 | Prem Singh v. Crown ... | **39** | 805 | |
| 26 | Nur Bakhsh v. Crown ... | **39** | 1001 | |

## 11 SIND LAW REPORTER, PART 1, 1917.

| Page. | | | | Page. | | | |
|---|---|---|---|---|---|---|---|
| 1 | Tayabji Mulla Mahomedbhoy v. South British Insurance Co. ... | **42** | 636 | 43 | Seth Naraindas v. Kewalram ... | **42** | 706 |
| 12 | Re-Inquiry Against Mr. M. Pleader for Professional Misconduct ... | **41** | 643 | 46 | Mazar Walad Attamahomed v. Crown ... | **42** | 141 |
| 17 | Radhibai v. Dr. Vassanmal ... | **41** | 571 | 49 | Tejumal Khanchand v. Collector of Larkana ... | **42** | 6 |
| 27 | F. W. Soler v. Crown ... | **41** | 658 | 52 | Crown v. Dosu ... | **42** | 145 |
| 29 | Bombay Company Limited v. Karachi Port Trust ... | **42** | 659 | | | | |

# Alphabetical List of cases reported in Volume XL of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

# Table showing seriatim the pages of Volume XL of Indian Cases and the corresponding pages of other Law Journals and Reports.

| Page. | Names of Parties. | Corresponding pages of other Reports and Journals. |
|---|---|---|
| 1 | Lalji Singh v. Girja Prasad Singh ... | *Patna High Court. |
| 2 | Mohan Krishna Dar v. Har Prasad ... | *Patna High Court. |
| 13 | Krishna Dayal Gir v. Abdul Gaffur ... | 2 P. L. J. 402; 2 P. L. W. 229. |
| 35 | Lakhpat Singh v. Babu Ram ... | *Allahabad High Court. |
| 36 | Sikhamani Pandithar v. Ammani Ammal ... | *Madras High Court. |
| 37 | Lakpat Pandey v. Jang Bahadur Pandey ... | *Allahabad High Court. |
| 38 | Rahat Ullah Khan v. Ibad Ullah Khan ... | 4 O. L. J. 131. |
| 40 | Brij Narain Rai v. Ram Dhari Rai ... | *Allahabad High Court. |
| 41 | Parmeshar Dat v. Bisheshar ... | 4 O. L. J. 146. |
| 42 | Charu Chandra Biswas v. Lallan Singh ... | 4 O. L. J. 148. |
| 45 | Mahesh Charan v. Muhammad Baqur Ali ... | 4 O. L. J. 154. |
| 47 | Bharath Indu v. Tilok Kunwar ... | *Allahabad High Court. |
| 48 | Shankar Khan Dat Puri v. Sheo Singh ... | 4 O. L. J. 158. |
| 50 | Subbaiya Pandaram v. Mahamad Mustapha Maracayar ... | 21 M. L. T. 62; 5 L. W. 690; 32 M. L. J. 85. |
| 57 | Kashmiri Bank, Ltd. v. Gokul Chand ... | 4 O. L. J. 160. |
| 58 | Kallu v. Bhagirath Lal ... | *Allahabad High Court. |
| 60 | Lihazunnissa Khanam v. Dadhich Singh ... | 4 O. L. J. 162. |
| 61 | Giani Ram v. Mari ... | 24 P. R. 1917. |
| 63 | Sukhpal Singh v. Brij Kishore ... | 4 O. L. J. 166. |
| 63 | Rajindra Singh v. Abdul Ghani ... | 25 P. R. 1917. |
| 64 | Mehdi Hasan Khan v. Brij Bhushan Misra ... | 4 O. L. J. 167. |
| 65 | Imdad Ali Shah v. Sayed Ali ... | 26 P. R. 1917. |
| 66 | Sheshman Prasad v. Bindeshuri Misir ... | 4 O. L. J. 170. |
| 67 | Rameshwar v. Gauri ... | 4 O. L. J. 171. |
| 68 | Imam Ibrahim v. Bhau Appaji Jadhav ... | 19 Bom. L. R. 389; 41 B. 510. |
| 70 | Kottayat Gopala Menon v. Kolat Narayana Kurup... | 5 L. W. 339; (1917) M. W. N. 289 |
| 71 | Nandi v. Sarup Lal ... | 15 A. L. J. 509; 39 A. 463. |
| 72 | Ata Ahmad v. Niaz Ali ... | *Punjab Chief Court. |
| 73 | Mahabali v. Sahdeo ... | *Allahabad High Court. |
| 74 | Suraj Mal Kharad v. Akshoy Kumar Roy ... | 21 C. W. N. 585. |
| 76 | Krishna Sah v. Collecter of Bareilly ... | 15 A. L. J. 450. |
| 77 | Basudeb Narayan Singh v. Kadambini Dassi ... | *Calcutta High Court. |
| 78 | Jaya Madhav Kalavant v. Manjunath Tai Chandu... | 19 Bom. L. R. 320. |
| 78 | Keramat Ali v. Nagendra Kishore Roy ... | 21 C. W. N. 571. |
| 79 | Bhagela Kuer v. Abdul Rahman ... | *Patna High Court. |
| 81 | Fleming Shaw and Co. v. Haji Yusif Ellias ... | 10 S. L. R. 190. |
| 82 | Srinivasa Aiyangar v. Meddaikara Abdur Rahim Sahib ... | 6 L. W. 108; (1917) M. W. N. 584. |
| 83 | Chhottalal Aditram Travadi v. Bai Mahakore ... | 19 Bom. L. R. 322; 41 B. 466. |
| 86 | Khoo Eo Khwet v. Nanigram Jaganath Firm ... | *Lower Burma Chief Court. |
| 94 | Haripada Rakshit, *In re* ... | 44 C. 374. |
| 96 | Ramchariter Sahu v Ram Narain Sahu ... | 2 P. L. J. 350. |
| 96 | Midnapur Zemindary Co. v. Secretary of State ... | 44 C. 352; 21 C. W. N. 834. |
| 97 | Shambhu Nath v. Hari Ram ... | *Allahabad High Court |
| 100 | Hasiswari Debi v. Hari Nath ... | *Calcutta High Court. |
| 101 | Sharfuddin v. Maqbulunnisa ... | 4 O. L. J. 174. |
| 107 | Ahmad v. Rahmatan ... | 32 P. W. R. 1917. |
| 108 | Sheolal Sahu v. Sagar Mal ... | 1 P. L. W. 650; (1917) Pat. 239. |
| 110 | Kallyan Singh v. Kanhiya Lal ... | *Allahabad High Court. |
| 111 | Ali Naki v. Damodar Das ... | 33 P. W. R. 1917. |
| 111 | Partab Bali v. Bindeshri Prasad Singh ... | 4 O. L. J. 187. |
| 113 | Satis Chundra Mustafi v. Amanulla Bepari ... | *Calcutta High Court |
| 114 | Hafiz Ali v. Mumtaz Husain ... | 4 O. L. J. 190. |

| | | | |
|---|---|---|---|
| 799 | Haribangsa Shibdas Rakshit v. Nalini Mohan Shaha | ... | *Calcutta High Court. |
| 803 | Badu Mia v. Badrannessa | ... | *Calcutta High Court. |
| 805 | Champsey Dossa v. Gordhandas Kessowji | ... | 19 Bom. L. R. 381. |
| 809 | Gita Prosad Singh v. Ragho Singh | ... | 1 P. L. W. 777. |
| 811 | Srinivasa Ranga Roy v. Rajah of Karvetnagar | ... | 5 L. W. 725. |
| 816 | Munsur Ali v. Abhoya Charan Das | ... | 21 C. W. N. 1147. |
| 819 | Nilmadhab Mahapatra v. Keshab Lal Mahapatra | ... | 26 C. L. J. 94. |
| 820 | Sethurama Sahib v. Chotta Raja Sahib | ... | (1917) M. W. N. 327. |
| 826 | Manjeshwara Krishnaya v. Vasudeva Mallya | ... | *Madras High Court. |
| 830 | Nathamuni Mudali v. Parthasaradi Mudali | ... | 22 M. L. T. 39; 6 L. W. 188; 33 M. L. J. 203. |
| 833 | Basiruddi v. Afsarannessa Bibi | ... | 21 C. W. N. 860. |
| 836 | Kali Kanta Das v. Mohesh Chandra Kanta | ... | *Calcutta High Court. |
| 838 | Muhammad Ehia v. Ganga Dayal Ojha | ... | *Patna High Court. |
| 839 | Jagannath Mondel v. Jaladhar Mondul | ... | 26 C. L J. 317. |
| 841 | Nochuliyil Eazhuvan Theethi's Son v. Eralpod Rajah | | 32 M. L. J. 442; 21 M. L. T. 401. |
| 845 | Piran Bibi v. Jitendra Mohan | ... | 25 C. L. J. 553; 21 C. W. N. 920. |
| 846 | Subba Pillai v. Rangasami | ... | (1917) M. W. N. 306. |
| 848 | Muhammad Yakub Khan v. Durga Prasad | ... | 4 O. L. J. 384. |
| 849 | Nand Kishwar Sahai v. Kedar Nath | ... | *Patna High Court. |
| 851 | Banghy Abdul Razack Sahib v. Khandi Rao | ... | *Madras High Court. |
| 853 | Ram Lochan Singh v. Jatadhari Singh | ... | *Patna High Court |
| 854 | Maung Ba Maung v. Maung Pyu | ... | *Lower Burma Chief Court. |
| 856 | Official Trustee of Bengal v. Nim Chand Marwari | ... | *Patna High Court. |
| 858 | Yagappa Chetty v. Mahomed | ... | *Lower Burma Chief Court. |
| 860 | Janardhan Prosad v. Jankibati Thakurain | ... | *Patna High Court. |
| 863 | Maung Ma La v. Maung Chot | ... | *Lower Burma Chief Court. |
| 864 | Saiyiduddin v. Avadh Behari Singh | ... | 2 P. L. W. 64. |
| 865 | Syam Peary Dassya v. Eastern Mortgage & Agency Co., Ltd. | ... | *Calcutta High Court. |
| 888 | Sukhlal Rai v. Lachmi Narayan Rai | ... | 15 A. L. J. 276. |
| 889 | Mathar Dravia Sahaya Ela Nidhi Co., Ltd. v. Subramania Pillai | ... | 5 L. W. 644. |
| 890 | Ko Kyaw Zan v. Daw Mya | ... | *Lower Burma Chief Court. |
| 891 | Lal Man Naik v. Kanhaya Lall | ... | *Patna High Court. |
| 893 | Bommanaboyina Kotinagulu v. Ramaraju Ankayya | | 6 L. W. 44; (1917) M. W. N. 447. |
| 894 | Badal Molla v. Chemai Mondal | ... | *Calcutta High Court. |
| 896 | Secretary of State v. Rajah of Vizayanagaram | ... | 22 M. L. T. 57. |
| 904 | Chhunnu Lal v. Bank of Upper India, Ltd., Delhi | ... | 106 P. W. R. 1917. |
| 907 | Kunti Dai v. Jharu Lal Das | ... | 2 P. L. W. 16; (1917) Pat. 247; 2 P. L. J. 567. |
| 909 | Seshachala Chetty v. Para Chinnasami | ... | 32 M. L. J. (Sup.) 1; 40 M. 410 **F. B.** |
| 975 | Sundram Ayyar v. Ramachandra Ayyar | ... | 32 M. L. J. 333; (1917) M. W. N. 383; 40 M. 389; 5 L. W. 789 **F. B.** |
| 931 | Ranjit Singh v. Kali Dasi Debi | ... | 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1 **P. C.** |
| 987 | Raghubir Misser v. Bhajan Singh | ... | 2 P. L. W. 27. |
| 988 | Suraj Narain v. Ratan Lal | ... | 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509 **P. C.** |
| 996 | Nanda Lal v. Umes Chandra Das | ... | 26 C. L. J. 328. |
| 999 | Ketokey Charan Banerji v. Sarat Kumari Debi | ... | 21 C. W. N. 826; 26 C. L. J. 44. |
| 1002 | Parshottam Veribhai v. Chhatrasangji Madhavsangji | | 19 Bom L. R. 545; 41 B. 546. |
| 1003 | Kaura v. Kalu Ram | ... | 36 P. W. R. 1917. |
| 1005 | Kedar Nath Dey Roy v. Lakhi Kanta Dey | ... | 21 C. W. N. 868; 26 C. L. J. 115. |
| 1006 | Moti Lal v. Ram Narain | ... | 15 A. L. J. 549. |
| 1007 | Satagopa Bhattar v. Venku Nayudu | ... | *Court of the Board of Revenue, Madras. |
| 1008 | Rama Nand v. Emperor | ... | 26 P. R. 1917 Cr.; 18 Cr. L. J. 688; 31 P. W. R. 1917 Cr. |

# TABLE
OF
# Cases Cited in Volume XL of Indian Cases, 1917.

A—contd.



A—concld.



B

B—contd.



B—contd.

C—concld.



D

## D—contd.



## D—concld.



## E



## F

F—concld.



## G



G—contd.

G—contd.



G—concld.



H

## H—contd.



## H—concld.



## I

J—concld.



K



K—contd.

## K—contd.



## K—concld.

## L



## M

## M—contd.



## M—contd.

M—contd.



M—contd.

## M—concld.



## N



## N—contd.

## N—contd.



## N—concld.



## O



## P

## P—contd.



## P—concld.



## Q

R—contd.



R—contd.

## R—concld.



## S

S—contd.



S—contd.

S—contd.



S—contd.

S—contd.



T



T—contd.

## T—concld.



## U



## U—concld.



## V

V—concld.



W



Y



Z

# INDIAN CASES.

## 1917.

## VOLUME XL.


### PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 254 OF 1916.

April 16, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

LALJI SINGH—DECREE-HOLDER—APPELLANT

*versus*

GIRJA PRASAD SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Decree, adjustment of—Decree-holder, right of, to release some or all judgment-debtors from liability.*

Under Order XXI, rule 2 of the Civil Procedure Code, a decree-holder and his judgment-debtor can adjust their respective rights and liabilities in regard to the decree in any manner agreed upon by them, including the discharge of the judgment-debtor. [p. 1, col. 2]

There is nothing in Order XXI, rule 2, or any other provision of the Civil Procedure Code to prevent the release by the decree-holder of some of the judgment-debtors from their liability under the decree. [p. 2, col. 1.]

Appeal from an order of the District Judge, Monghyr, dated the 29th July 1916.

Mr. *Sivnandan Rai*, for the Appellant.

Messrs. *Ganesh Dutta Singh*, *Atul Krishna Roy* and *Jugernath Persad*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This is an appeal by the transferee of a decree for Rs. 2,200 against certain judgment-debtors including the respondents in this case. The decree was transferred in favour of the appellant on 27th August 1905. On December 2nd, 1905, the decree-holder filed a petition of satisfaction to the extent of Rs. 275 out of the decretal amount as having been received from the respondents. In that petition the decree-holder absolved the respondents from the liability of the decree. The payment of the aforesaid Rs. 275 as well as the discharge of the respondents were duly recorded by the Court under Order XXI, rule 2, of the Code of Civil Procedure. The appellant executed the decree, ignoring the adjustment and the discharge mentioned above. The judgment-debtors-respondents objected to the execution of the decree as against them. The lower Appellate Court has upheld their objection and has disallowed the execution of the decree against them. The transferee of the decree has appealed to this Court

It is contended on behalf of the transferee that the release of the respondents from the liability of the decree amounts to varying the terms of the decree and is invalid in law. No authority directly applicable to this contention of the appellant has been shown to us. The two authorities reported as *Kelu Nair* v. *Meenakshi* (1) and *Ladd Govindoss* v. *Ramdass Vishnadoss* (2), do not apply at all to the facts of this case. In the latter case facts even have not been fully stated. In my opinion the terms of the decree have not in any way been altered by the petition of satisfaction referred to above, nor does the petition contravene any provisions of the Code of Civil Procedure. In my opinion under Order XXI, rule 2, the decree-holder and the judgment-debtor can very well adjust their respective rights and liabilities in regard to the decree in any manner agreed upon by them, including the discharge of the judgment-debtor.

The learned Vakil for the appellant then

(1) 21 Ind. Cas. 639; 25 M. L. J. 586; 14 M. L. T. 574.

(2) 28 Ind. Cas. 376; 17 M. L. T. 222; (1915) M. W. N. 225.

contended that it is not competent for the decree-holder to release some of the judgment-debtors from the liability of the decree, which was against all the judgment-debtors jointly including the judgment-debtors released. There is nothing in Order XXI, rule 2, or any other provision of the Code of Civil Procedure to prevent the release by the decree holder of some of the judgment-debtors from the liability under the decree. The decree is being executed by the assignee of the decree-holder and the judgment-debtors can very well rely upon the release and discharge given by the decree-holder. The question raised by the appellant is one that really concerns the rights and obligations of the judgment-debtors *inter se*. I, therefore, agree with the view of the Court below and dismiss the appeal with costs.

CHAPMAN, J.—I agree.

*Appeal dismissed.*

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PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 313 AND 412 OF 1914.

March 27, 1917.

*Present*:—Mr. Justice Mullick and Mr. Justice Atkinson.

*Pundit* MOHAN KRISHNA DAR AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Chowdhuri* HAR PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS IN F. A. No. 313 OF 1914

AND

INDERDEO RAI AND OTHERS—PLAINTIFFS—RESPONDENTS IN F. A. No. 412 OF 1914.

*Hindu Law—Mitakshara—Joint family—Alienation—Necessity—Debt incurred by managing members—Liability of family—Decree, setting aside of, for fraud—Irregularity in initial procedure, effect of—Jurisdiction—Objection, when to be taken—Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3)—Minor—Guardian* ad litem.

Where a debt is contracted on behalf of a joint family governed by the Mitakshara Law by its managing member or members and it is proved that the debt was contracted for the benefit of the joint family, any judgment obtained against such managing member or members in respect of such debt is binding upon all the members, adults and minors, and the joint property of the family is liable for the satisfaction and discharge of the same. [p. 12, col. 1.]

Where in a case which a Court is competent to try, the parties, without objection, join issue and go to trial upon the merits, the defendant cannot subsequently dispute the jurisdiction of the Court upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to dismissal of the suit. [p. 9, col. 2.]

*Ledgard* v. *Bull*, 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 761 (P. C.), followed.

The jurisdiction to impugn a previous decree on the ground of fraud is established law. But such jurisdiction should be exercised with care and reserve and proof must be required that there was actual and positive fraud, that is, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and a decree obtained by that contrivance. [p. 10, col. 2; p. 11, col. 1.]

The provisions of rule 4 (3) of Order XXXII of the Civil Procedure Code are mandatory and imperative in their nature and it would amount to want of jurisdiction in the Court to appoint a guardian *ad litem* on behalf of a minor without his consent. [p. 11, col. 2.]

Appeals from the decision of the Sub-Judge, first Court, Arrahs Shahabad.

Messrs. *P. R. Dass*, *Kulwant Sahai* and *Parmeshwar Dayal*, for the Appellants.

Mr. *Sushil Madhav Mullick*, for the Respondents.

JUDGMENT.

ATKINSON, J.—These two first appeals arise from the decision of the Subordinate Judge of Arrah, dated the 29th of May 1914. Appeal No. 313 has reference to Original Suit No. 168 of 1912; and Appeal No. 412 is concerned with Original Suit No. 169 of 1912. The plaintiffs in both these suits are members of a joint Hindu family governed by the Mitakshara Law residing within the district of Shahabad in this Province. The plaintiffs in Suit No. 168, *i. e.*, the respondents in First Appeal No. 313 of 1914, are the adult members of this joint Hindu family; and the plaintiffs in Suit No. 169, who are the respondents in First Appeal No. 412 are the minor members of the same Hindu family. This Hindu family appear to have been the *maliks* or proprietors of four separate denominations of land; *viz.*, the real estate or properties known as Mangraon, Sangraon, Ismailpur and Sonsarpur and in respect of which they used to pay a revenue rent to the Government. They were also owners of another denomination of land known as Pankipur which is in reality part of the Mangraon Estate. The ancestors of these plaintiffs, on the 19th of June 1887, made a usufructuary mortgage of the lands of Sangraon to one Abdul Ghani to secure a loan of Rs. 25,000. Abdul Ghani in pur-

suance of that mortgage, entered into possession of this property. Subsequently, on the 25th of November the plaintiffs or some of their ancestors entered into another mortgage-bond with the same Abdul Ghani to secure an advance of Rs. 5,000. This latter charge was a simple mortgage-bond. No question arises as to the validity of these mortgages.

Abdul Ghani was desirous of realizing the amount due on the simple mortgage-bond of the year 1889, and he instituted a suit to recover the principal sum advanced with interest; and he obtained a decree, *ex parte*, against the plaintiffs on foot of this mortgage-bond in the year 1903. It is significant to note in this connection that the plaintiffs also endeavoured to have the *ex parte* decree, which was obtained by Abdul Ghani, set aside upon the same ground as they now seek to have the *ex parte* decree obtained by defendant No. 1 set aside. The plaintiffs were successful in their attempt to have the *ex parte* decree obtained by Abdul Ghani set aside; and on the 27th of July 1908 the High Court of Calcutta set aside the decree obtained by Abdul Ghani; but on condition that the plaintiffs should pay to Abdul Ghani the sum of Rs. 15,904-5-4 by way of principal and interest due on foot of the simple mortgage-bond.

The plaintiffs at the same time also embarked upon a redemption suit to ascertain what was due to Abdul Ghani on the usufructuary mortgage of the 19th of June 1887 and after a considerable time it was ascertained, on the 19th of March 1909, that the amount due by the plaintiffs to Abdul Ghani in the redemption suit on foot of the usufructuary mortgage was Rs. 71,116-7-3. In the month of March 1909 the plaintiffs were in very low water, financially, and they were anxious to pay off Abdul Ghani the amount due on foot of the decree of the 27th of July 1908, decreed by the Calcutta High Court, together with whatever sum was due in the redemption suit. Accordingly early in March 1909 the plaintiffs obtained an introduction to the predecessor-in-title of defendant No. 1, referred to in these proceedings as the Pundit, who was a resident of the United Provinces, and who was, at that time, on a visit to Arrah; and the adult plaintiffs induced the Pundit to agree to advance to them and their family to discharge a pressing necessity the sum of Rs. 40,000, Rs. 15,904-5-4 of which was to be paid immediately in full discharge and satisfaction of the debt due on the simple mortgage-bond to Abdul Ghani; and the balance, Rs. 24,000 odd, was to be retained by the Pundit in his own hands until it had been ascertained exactly what was the amount due in respect of the redemption suit, or what sum Abdul Ghani would take by way of compromise to satisfy his claim in that suit. The plaintiffs, it is alleged, represented to the Pundit that although the redemption decree was for Rs. 71,000, nevertheless Abdul Ghani would accept a sum far less in satisfaction of both decrees, and they believed that it would not exceed in all the sum of Rs. 40,000. The plaintiffs are further alleged to have represented that if more money was necessary than the sum agreed to be advanced by the Pundit that they, the plaintiffs, would procure same and thus discharge the debt due to Abdul Ghani immediately and release the lands from all claims; and incidentally, the plaintiffs also represented that there were no other charges by way of mortgage upon the properties in suit. In so far as this latter representation made by the plaintiff is concerned it was subsequently discovered to be false; as the Pundit ascertained that there was a mortgage due to another person for the sum of Rs. 4,000 which the Pundit had subsequently to redeem. The Pundit agreed to advance to the plaintiffs the sum of Rs. 40,000 on the condition that he was to get an usufructuary mortgage of the properties of Sangraon and Mangraon; and that as collateral security he was also to have a simple mortgage in respect of all the four properties mentioned. And there was a further agreement that in the event of the Pundit's not getting possession of the properties contracted to be given to him under the usufructuary mortgage, that then he should be repaid the whole of the principal of Rs. 40,000 by June 1920 with interest at 12 per cent., *i.e.*, 3 per cent. over and above the rate contracted to be paid if the agreement as to usufructuary mortgage became fully accomplished and completed. The

original interest agreed upon was 9 per cent., but the Pundit stipulated that if he did not get possession, then the interest should be increased, until the whole of the principal sum advanced by him should have been repaid.

The contract, in the terms set out by me above, was embodied in a mortgage-deed, dated the 24th of March 1909. I have given a summary of the terms of the contract; save as to one provision contained in clause 14, to the effect that if the sum of Rs. 40,000 should prove insufficient to discharge and satisfy the money due to Abdul Ghani in full, that then the plaintiffs in these suits would make up the deficiency necessary out of their own pockets and would deliver clear possession to the Pundit of the lands of Mangraon and Sangraon agreed to be given to him in usufructuary mortgage.

There is no doubt that the Pundit was very anxious to enter into possession of these properties. From the moment the mortgage was executed by the plaintiffs he was pressing—and pressing strongly—that they should discharge the obligation due to Abdul Ghani under the contract which the plaintiffs had made with him, and should secure the release of the properties from all claims, and give him (the Pundit) clear possession.

The contract was executed by all the plaintiffs who were adult members of the family; and also by plaintiffs Nos. 1 and 3 in First Appeal No. 412. The other members, who are minors, did not execute the mortgage in question.

The object and purpose for which the contract and the mortgage-bond were made by the plaintiffs in favour of the Pundit was to raise money for a family necessity, for the purpose of discharging a debt which involved the risk of the whole of the joint family property being put up for sale and their rights therein extinguished for ever, and the obligation so contracted was consequently a debt binding the property and interests of all the members of the joint family.

The Pundit, finding that the plaintiffs were unwilling to pay up Abdul Ghani the amount due on the redemption decree, on the ground that the amount found to be due by the decree was excessive, induced them, the plaintiffs, in May 1909 to appeal to the Calcutta High Court against the redemption decree sanctioned by the Subordinate Judge, and that appeal was successful in the year 1915 and the amount of the decree was reduced to the sum of Rs. 31,000. From that order of the Calcutta High Court Abdul Ghani has appealed to the Privy Council; and the Pundit and his respresentatives have never got possession of the lands contracted to be given to him in usufructuary mortgage.

Finding it impossible to get possession or to induce the plaintiffs to perform their part of the contract by raising more money to satisfy Abdul Ghani's claim and deliver clear possession to defendant No. 1, or to his predecessor-in-title, the Pundit or rather defendant No. 1 brought a suit in October 1909 seeking to recover judgment for the amount of Rs. 15,904 odd, which he or his predecessor-in-title had admittedly paid to satisfy Abdul Ghani's claim in the suit on foot of the simple mortgage-bond. That money was paid and applied to the discharge of Abdul Ghani's claim against the plaintiffs in the present suits. Abdul Ghani's claim, which had crystallized into a form of a decree, constituted a pressing family necessity binding on the plaintiffs and all the members of the joint family, and the money which was borrowed by the plaintiffs from the Pundit to discharge that pressing necessity was a debt binding in all equity and good conscience upon the entire joint Hindu family and of which the plaintiffs in these two suits constituted the entire and exclusive members.

Prior to instituting his suit, defendant No. 1, who was the plaintiff in the former suit, served the present plaintiffs with a notice dated the 16th of September 1909 requiring them within 15 days to give him (defendant No. 10) clear possession of the property contracted to be given to him by the mortgage-deed; and stating that if they did not comply with the requirements of the notice, he (defendant No. 1) would be forced to seek the protection of the law. Upon the plaintiffs failing to comply with the requirements

of the notice as stated, the defendant No. 1 instituted a suit based on the allegation that he had been induced to contract to lend Rs. 40,000 by reason of the plaintiffs' misrepresentation and fraud. The notice was admittedly served and admittedly received by the plaintiffs; because it was proved that defendant No. 10 in the former suit came, on receipt of that notice, to the Pundit and said: 'we are sorry we cannot give you possession of all the lands at present; will you kindly take possession of a part only until such time as we are able to give you the rest of the property discharged from Ghani's claim?' Therefore, it may be taken as conclusively proved that the notice of the 16th of September 1909 was duly and properly served upon the plaintiffs in these suits and was received by them.

On the 11th of October 1909 the plaint in the former suit was filed. Defendant No. 1 in this action instituted proceedings against the plaintiffs in these two appeals as defendants, and all the members of the joint Hindu family were named as parties. Five of these were minors, and the remaining members were adults. The plaint was served on the 11th of October 1909. There was no appearance on behalf of the present plaintiffs, who were defendants in that suit; and by reason of default in appearance a decree for Rs. 16,9 8-10-0 was obtained by defendant No. 1 in that suit against all the members of the joint Hindu family on the 3rd of December 1909. Immediately following the obtaining of that decree, defendant No. 1 took steps forthwith to execute the decree; and in January 1910 execution proceedings were commenced, and all necessary steps were taken to execute the decree which defendant No. 1 had obtained *ex parte*. Notices of attachment of the property to be sold pursuant to the decree are alleged to have been duly served upon the defendants in that suit; and the property was duly attached on the 10th of March 1910; and notices to assess the value of the property to be sold were also alleged to have been served upon them. In the absence of any objection on the part of the defendants in that suit the property was advertised for sale on the 6th of June 1910. The property attached, namely, *Mauzas* Mangraon, Sangraon, Ismailpur and Sansarpur, was put up for sale and was purchased on the 6th of June 1910 by the defendant No. 1, the decree-holder himself, for the sum of Rs. 15,450, being a sum less than the amount actually due on foot of the *ex parte* decree of the 3rd of December 1909. As I have pointed out, the Pundit's claim was for the amount actually advanced by him, *viz.*, Rs. 15,904 together with interest due to him thereon at 12 per cent., making in all Rs. 16,000 odd. The defendant No. 1. could not, and did not, claim to recover the full sum of Rs. 40,000 which was contracted or agreed to be advanced on foot of the mortgage of the 24th of March 1909. The amount realized by the sale was Rs. 15,450. Thus there was a deficit of about Rs. 1,498-10-0 between the sale price and the amount due under the *ex parte* decree. But in the course of the sale, it was discovered that there was another incumbrancer on the property sold to defendant No. 1 who was not mentioned at all at any stage of the proceedings by the present plaintiffs; and the Pundit had to discharge the debt due to that incumbrancer, *viz*, Rs. 4,000 which brought the Pundit's claim, after crediting realization of the sale-proceeds, to Rs. 5,498-10-0 as the amount of the deficit due on foot of the decree. Matters proceeded and on the 27th of August 1910 the Court gave the Pundit symbolical possession of the property which was sold in pursuance of the *ex parte* decree. Abdul Ghani, however, was in possession of the lands of Sangraon pending the adjustment of his claim in the redemption suit.

The next step to notice is that immediately after defendant No. 1, as purchaser, had acquired possession of the property under the Court sale, he took steps as against the plaintiffs in these suits for the recovery of the amount due by way of deficit, amounting to about Rs. 5,498-10-0, seeking to make them personally liable for the amount of the deficit. Proceedings were instituted under section 69 of the Bengal Tenancy Act by the Pundit against the plaintiffs on the basis that the decree obtained by him was a valid and binding decree; and on the assumption that the plaintiffs were aware and had knowledge

of the existence of the *ex parte* decree which, it must be presumed, had been validly obtained. In January 1911 the plaintiffs compromised with the Pundit, in so far as the Pundit was seeking an order against them under section 69 of the Bengal Tenancy Act to satisfy the undischarged deficit due on foot of the *ex parte* decree.

The next step taken was that on the 2nd of December 1912 these actions were launched by the plaintiffs to set aside the decree procured by the Pundit on the 3rd of December 1909 exactly 3 years but one day after the decree was obtained; and the ground on which it is sought to set aside the decree is that it was procured by fraud, the fraud alleged being suppression of notices and filing of false returns.

The learned Judge who tried the case has found as a fact that there was suppression of service of notices, and that the returns of service filed were false returns; and he has found as a fact that there was fraud practised in the procuring of the decree. In the face of this finding of fraud, it is quite impossible to understand how the learned Subordinate Judge made the order he did, requiring the plaintiffs to pay to defendant No. 1 the amount the Subordinate Judge ascertained to be properly due to defendant No. 1 as a condition to setting aside the *ex parte* decree which the Judge found as a fact had been procured by fraud.

No doubt it is always difficult for a Court of Appeal to differ from any Judge who hears and sees the witnesses who have been examined, and who has the best opportunity of measuring the degree of credit to be attached to their testimony: but in this case I feel that there are ample and sufficient reasons why we should depart from this general principle and reverse the finding of the learned Subordinate Judge on the question of fraud; and I have little hesitation in doing so.

Let us examine, step by step, the allegations of fraud relied upon. The first is that the plaint was never served; and that the return of service that was made by the peon was a false and incorrect return. Mr. Mullick on behalf of the respondents now alleges that the plaintiff in the former suit, in conjunction with the identifier, conspired to procure this false return to be filed. Let us see what is the evidence relied upon to support this startling charge. The main ground put forward in support of the charge is that the identifier, Hariramji, was not called as a witness although present in Court. At first blush I was inclined to attach great weight, in support of the charge of fraud, to the fact that the identifier, who was supposed to have identified the persons who were served, although present in Court, was not called to prove the identification of the persons on whom the summons was served. But I think that although it was a grave error on the part of the legal advisers of the Pundit not to have called the identifier, there are sufficient reasons to explain why he was not called; or at least to destroy the impression that on account of the identifier not being called one would be entitled to infer, or justified in inferring, under the circumstances that the whole proceeding connected with the service of the summons was fraudulent or dishonest.

The second ground relied on in support of the contention that the summons was not served is that the two witnesses, alleged to have been present when the summons was served as stated in column 3 of the return made by the peon, were called and denied the allegation contained in the peon's return that they were present when the summons was served. These two persons, Dulip Dusadh Chowkidar and Ramgobind Chamar, are inhabitants of Mangraon and intimately connected with the plaintiffs, and it is only natural that they should endeavour to serve the interests of the plaintiffs rather than assist the defendant who was an utter stranger in support of his case. The evidence of Dulip Dusadh witness No. 3 for the plaintiffs and Ramgobind witness No. 9 for the same party does not appear to me on its face to be honest or sincere; on the contrary it is stamped with falsity and exaggeration in addition to being contradictory and unreliable.

But a short answer to these two points seems to be that the plaintiffs themselves have not come forward to depose that they

were not served with the plaint. None of the plaintiffs, except two, came forward to swear that they were not served with summons; while on the other hand there is documentary evidence to show that they were served; and the evidence which shows that they were served has not been rebutted or impeached.

The next point that is alleged in proof of non service of summons is that one Basudeo Pande, who was present when one of the plaintiffs Ramnares Rai was served with the summons and who in writing acknowledged receipt of the summons on behalf of this plaintiff, was not called. I do not know why he was not called. If the plaintiffs were anxious to establish that he was not there they could and should have called him, but they did not do so.

The fourth and last ground on which it is scught to prove that the summons was not served is the discrepancy in the details given in the peon's return as compared with those set forth in the identifier's affidavit:—namely, the peon reported that he served the summons by affixing it to the walls of two houses one facing North and the other facing West; whereas the identifier in his affidavit says that the notices were fixed to one house only and that facing East. I think that the discrepancy in the identifier's affidavit with the peon's report may be excused in this case by the fact, which is not denied, that the identifier knew very little of this Province; that he comes from the United Provinces, and that he was not primarily concerned with the surroundings or situation of the property to which the summons had been affixed but with the identification of the persons to be served with the summons.

Now these are the grounds and reasons upon which we are asked to hold that there was fraudulent suppression of service of the summons in the former suit on the plaintiffs in the present suits, and the filing of false returns. The peon was called by the Pundit's legal advisers and he proved the service as stated in his return; but the plaintiffs have deliberately held themselves back, and have refrained from giving any evidence to prove that they were not served with the summons as alleged by the peon. One of the plaintiffs, namely original defendant No. 10, was called but he says nothing about it. Another, original defendant No. 15, was also called but not one word was asked of him as to whether he was served with summons or the plaint or not. He was only asked his age, *viz.*, whether he was a minor or whether he was a major. But what does appear to me to be of great importance in this aspect of the case is the evidence of Ramsaran Lal the Pleader, witness No. 12, who was examined for the defence. It is not suggested that he was in conspiracy with defendant No. 1. or with his identifier or with the peon. His evidence has not been impeached or challenged in any one respect. He is a respectable gentleman practising as a Pleader in the Court at Arrah, and there is no reason to doubt that the evidence given by him is genuine and reliable; and once we accept and believe his evidence, as we do, the plaintiffs' case is established to be transparently false—false from start to finish. The learned Judge who tried the case finds that this witness, Ramsaran Lal, is a truthful and reliable witness; and what does the witness say? At page 154 of the paper-book this witness says: "I had nothing to do with the service of processes in the locality. I have personal knowledge of the service of processes. After the service of summons Deoki and Brij Mohan came to me, and said that they were respectable men and the suit would ruin them, and that hearing of that suit other creditors might bring suits." Is that not an admission by at least two members of the plaintiffs' family that they had been served with the summons; and that they begged of this Pleader to save their respectability and honour because they were apprehensive that this suit might induce other creditors to bring other suits against them? This witness, as I have said, is a truthful witness; and on this point touching service of summons, irrespective of other matters, we accept his evidence as trustworthy. Therefore, we hold that the summons and the plaint were duly served; and that the discrepancy between the peon's report and the identifier's affidavit does not outweigh or discredit the evidence and value of this Pleader's testimony; more especially as none of the plaintiffs have come forward to prove that they were not served, which was the foundation of

their case, and their right to the relief they seek. Therefore, we hold the present plaintiffs were duly and properly served with the summons in the former suit instituted by the defendant No. 1 and their case must fail on that ground.

Secondly, it is alleged in support of the plaintiffs' case that the notice nominating guardians of the minors was not duly served. However, one is inclined to view this ground of alleged fraud with suspicion, when the main case put forward as to non-service of the summons or plaint has failed and utterly broken down.

The ground put forward in support of this contention is that the identifier who identified the persons to be served was not called. However, the peon's report satisfies us that the notice nominating the guardians of the minors was duly served.

The third process, the service of which is alleged to have been suppressed, is the notice to assess the valuation of the property to be sold. Here again the main allegation relied on is the fact that Hariramji, the identifier, was not called to prove identification of the persons served with the notice. Again, the three witnesses who were alleged to have been present at the time of service of notice have been called by the plaintiffs; and they say that they were not present when the service of notice was alleged to have been effected. These three persons are residents of Mangraon and probably tenants of, or connected in some way or other with, the plaintiffs: and there are very good reasons to suggest why they should be friendly disposed towards the plaintiffs as against the defendant who is a stranger to this Province. However, the evidence of these witnesses, who are the same persons as were called to prove non-service of the summons or plaint, is in my opinion utterly lacking in conviction, or certainty that their evidence is true or reliable. If the fact was, as alleged, that there was a conspiracy between defendant No. 1 and his servants to effect false service of all processes in the suit, surely the conspirators would not have named persons as being present at the time of service when they were not there at all. A conspiracy so designed would be a clumsy proceeding easily capable of being detected.

Much capital is made of the fact that one person is wrongly named as being present at time of service in the peon's report. There is a man with a slightly different name somewhat like the name given in the report, known as Bedaisi Bhar: and he is called. He deposes that there is no man by the name of Bindeswari Bhar (the name given in the return) in the village; and that if the person named in the return has reference to himself, he was not present when the notice was served.

Much capital is also made out of the use by the peon of the words, *zemindari kachahri*; because the witness No. 13 for the defence who followed the peon deposes that in this particular village of Mangraon there is no *zemindari kachahri* at all. We are asked to infer from these facts that the peon is lying when he makes the statement that he wrote his report in the *zemindari kachahri* after serving the notice. But assuming that this statement was erroneous, the question is, did the peon make this statement fraudulently and in the interest of defendant No. 1 who was the plaintiff in that suit; and did the plaintiff know that he (the peon) was fraudulently acting in making a wrong entry as to the place where he filled in the report and the persons upon whom he served the notice. The peon's report may have been irregular, but did the defendant No. 1 know and induce the peon to file a false report and return as to service? The onus of proving this lay heavily upon the plaintiffs in these suits, which onus they have completely failed to discharge.

The next ground urged in support of fraud is that the manner in which the notices attaching the property to be sold were served was altogether wrong, *viz.*, that there were five properties to be attached but only four notices are alleged to have been served and that, therefore, the attachment and sale held pursuant thereto are illegal and not according to law. However, this argument is misconceived, as there were only four and not five properties attached; inasmuch as Pankipur forms part of Mangraon. It is stated that notices of attachment were served by affixing same to a *peepal* tree in one of the villages attached. This may have been an irregular

method of service; but was it fraudulent? I have little doubt that all the plaintiffs well knew, as their subsequent conduct shows, that the notices of attachment had been affixed to the *peepal* tree. If, however, these notices had been irregularly served, the illegality affecting the question of service could have been dealt with under the provisions of Order XXI, rule 90, of the Code of Civil Procedure and the sale set aside. But the plaintiffs refrained from taking any steps under that order to impeach the sale on the ground of irregulatity; but they seek now to rely on the alleged irregularity to support a substantive charge of fraud.

It is urged that the service of all notices was suppressed and that false returns were filed. This is the main ground upon which the plaintiffs seek to set aside the *ex parte* decree of the 3rd of December 1909 on the ground of fraud.

Let us look at the evidence adduced on behalf of the defendant to rebut the allegation of fraud put forward by the plaintiffs. I have dealt with the evidence of the Pleader. I think that it conclusively established that the summons or plaint was served. But apart from that evidence there are other circumstances in this case which support that view.

The defendant's claim was a claim for money, undoubtedly advanced by him to the plaintiffs or for their benefit. No doubt clause 6 of the mortgage-bond might be considered to suggest that the defendant No. 1 was not justified in bringing the suit at the time he did; that he should have postponed bringing his action even though he did not get possession of the mortgaged property until June 1910; and that he had no cause of action at the time, and that, therefore, the suit was not maintainable. We have considered th t aspect of the case, and we think that the plaintiffs are not entitled to raise this point now, although it might have been quite a good ground of defence to urge at the trial; and the Trial Judge would then have been bound to consider it. I think the law on this point is very clearly laid down by their Lordships of the Privy Council in a case reported as *Ledgard* v. *Bull* (1). Their Lordships say: "But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit." Thus if the plaintiffs in the present suits, who as we have held were duly served wi h the summons or plaint, had raised the point that the claim of the plaintiff in the former suit was not ripe, it might have been incumbent upon the learned Judge who tried the suit to reject the plaint in that action; but having held back and having abstained from taking part in the proceedings and allowed issues to be framed, the trial to proceed and judgment to be obtained against them, and the debt having in consequence merged into the decree, it is not competent for the plaintiffs now to say that the Judge had no jurisdiction to try the suit. But irrespective of this contention there are other reasons for holding that the amount due was properly recoverable at the time that the suit was brought. Defendant No. 1's claim in the former suit is an honest claim for money paid by him for the benefit and on behalf of the plaintiffs. Moreover the plaintiff in the former suit, *i. e.*, the Pundit, on the 16th of September 1909, demanded the fulfilment of the defendants' (*i. e.*, the present plaintiffs') part of the contract, by giving him (the Pundit) clear possession of the mortgaged property; and in default the Pundit held out the threat that he would be compelled to institute legal proceedings against them. Admittedly this notice of the 16th of September 1909 was served, this is not denied. The plaintiffs must have been aware that proceedings had been taken against them by the defendant No. 1 pursuant to the notice of the 16th September 1910; and that there had been symbolical possession given of the property purchased under the Court; because from August 1910 onwards these plaintiffs never paid one pice in discharge

(1) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.).

of Government demands by way of revenue or cesses, etc., although admittledly these charges fell due quarter by quarter for two years and three months after the 6th June 1910 when the sale was effected and the 2nd of December 1912 when this suit was instituted. During these two years and three months these plaintiffs must have known very well that they were not paying anything towards Government demands in respect of this property. Who did they think was paying the Government revenue during this period? One is irresistibly led to the conclusion that the plaintiffs must have known that it was the defendant No. 1 who was discharging these claims as auction-purchaser of the property. Furthermore defendant No. 1, immediately after getting possession on the 27th of August 1910, proceeded by way of execution against the plaintiffs personally to take steps to realize the balance due on foot of the decree, which amounted to Rs. 5,498-10 0, and the plaintiffs compromised with him on the basis that he was making a valid claim on foot of the decree he was seeking to execute. The defendant in this action relies strongly upon the compromise effected in the proceedings under section 69 of the Bengal Tenancy Act for the purpose of showing that he was recognised by these plaintiffs as having a valid title under the decree; and he asks us to come to the conclusion or draw the inference that the plaintiffs' laches in seeking redress negatives the idea that these plaintiffs are now *bona fide* claiming relief against a wrong fraudulently done to them by defendant No. 1. For three years all but one day they took no step whatsoever to challenge or impeach the decree of the 3rd December 1909. For two years and three months from the time that defendant No. 1, as purchaser, took possession of the plaintiffs' property they took no steps to pay the Government revenue, or to enquire who was discharging the obligations primarily imposed on them. The law likes a man who has been wronged to seek redress at the earliest possible moment and lay bare his claim openly and candidly; and not, as in this case, to allow time to lapse and then come forward and seek to set aside a decree on the ground of fraud. If such a person hangs back, and refrains from taking action, with knowledge of the wrong alleged to have been done to him, he cannot complain that the *bona fides* of his claim should be viewed with suspicion. The fraud alleged in this case mainly is the suppression of the service of notices; and yet not one of the plaintiffs have come to the box to give any evidence in respect of the non-service of the summons or notices, or to offer any evidence concerning any matter connected therewith. It is perfectly certain having regard to the frame of the suit that the plaintiffs were not bound to apply for redress under Order IX, rule 13, of the Code of Civil Procedure. If their case had been confined merely to non-service of the summons, then they would be bound to apply under Order IX, rule 13; and no action would have been maintainable independent of the summary remedy provided by the rules of the Code. But that is not their case. It is a case in which fraud is alleged in the procuring of the decree; and it has been held in the cases to which I shall refer that where fraud is alleged in the procuring of a decree the parties may institute a suit for fraud independent of the provisions of Order IX, rule 13. The cases reported as *Pran Nath Roy* v. *Mohesh Chandro Moitra* (2), *Ram Narain Tewari* v. *Shew Bhunjan Roy* (3) and *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (4) all establish this. But the learned Chief Justice Sir Lawrence Jenkins says that "The jurisdiction to impugn a previous decree for fraud is beyond question....But it is a jurisdiction to be exercised with care and reserve," otherwise there would be no finality in legal proceedings and judgments of the Court would be rendered vague and uncertain and the administration of the law might readily be converted from an instrument of justice into an instrument of grave oppression; as I think the plaintiffs in this case are trying to make it. The plaintiffs have alleged fraud; I think that they must be required to give proof that there was actual and positive fraud on the part of the plaintiff in the former suit, namely, "a meditated and intentional contrivance to keep the parties and the Court in ignorance

(2) 24 C. 546, 12 Ind. Dec. (N. S.) 1032.
(3) 27 C. 197; 14 Ind. Dec. (N. S.) 130.
(4) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.

of the real facts of the case, and obtaining a decree by that contrivance," *Patch* v. *Ward* (5) lays down the standard of fraud necessary to be established in such cases. And the nature of proof that is required to be given is stated in the decision reported as *Kunwar Bahadur* v. *Bindraban* (6). We have considered the argument addressed to us on behalf of the plaintiffs very fully and with the greatest care and we come to the conclusion that on the established fact the plaintiffs are not entitled to succeed.

Other questions have been raised in this case, but the main question addressed to us was the question of fraud with which we have dealt so fully. We think it is necessary to deal briefly with the other points. It is necessary to consider the argument addressed to us on behalf of the minors. It is contended by Mr. Mullick on behalf of the minor plaintiffs in Appeal No. 4 2 of 1914 that the decree obtained on the 3rd of December 1909 is not valid or binding on them because the minor plaintiffs were named as defendants in the former suit, inasmuch as they were not properly represented in the course of the proceedings, and consequently that they were not parties to the action; and that, therefore, the decree was not a binding decree at least to the extent of their interest in the property in suit; and that the suit should have been dismissed as against them. Much argument has been addressed to us by learned Counsel on the question of the propriety and legality of joining the minors as defendants in the former proceedings. It was contended by Mr. Mullick that the nominated guardians of the minors had not been properly appointed under the provisions of the rules and orders of the Code of Civil Procedure. It appears that on the 11th October 1909, after the summons and the plaint had been served defendant No. 1, who was the plaintiff in that suit, nominated, as he was entitled to do, certain persons as guardians of the minors and he caused notices to be served on these persons of their nomination requiring them to act as the guardians of the minors and stating that in default the Court would appoint some other fit and proper person to represent the minors. The persons upon whom the notices had been served, namely, Har Prasad Rai and Kali Charan Rai, defendants in the suit, were requested to express their willingness to act as guardians by the 24th November 1909 and to state if they accepted the responsibility of action as guardians of the persons named, namely, defendants Nos. 4, 5 and 10. The nominated guardians filed no answer to the notice served on them; and on the 3rd of December when the case came on for final disposal the defendant No. 1 applied to the Judge to appoint Har Prasad Rai and Kali Charan as the guardians of the three minors named; and the learned Judge, without receiving the assent of these persons, upon whom the notices had been served, added them as defendants and guardians of the minors in the suit. We think that the procedure adopted by the learned Judge in so adding these persons as guardians without their assent was without jurisdiction. Order XXXII, rule 4, sub-rule 3, provides that "No person shall without his consent be appointed guardian for the suit." It is now clear that no person can be appointed as guardian on behalf of a minor without his consent. This Order is mandatory and imperative in its nature; and it is quite clear that it would amount to nothing short of want of jurisdiction in the Court to appoint such a person without his consent. We adopt the law which we think was accurately laid down in the cases reported as *Dinabandhu Nandi* v. *Mashuda Khatun* (7) and *Talukraj Koer* v. *Choolachooa Koer* (8). The Orders of the Code of Civil Procedure which apply to this case are Order XXXII, rule 3, sub-rule 4; and rule 4, sub-rule 3. Mr. Dass who appears on behalf of the defendant relies strongly upon the decision of the Privy Council reported as *Walian* v. *Banke Behari Pershad Singh* (9). But I do not think that their Lordships of the Privy Council in that case went or intended to go so far as Mr. Dass endeavoured to argue before us; but it appears

(5) (1868) 3 Ch App. 203; 18 L. T. 134; 16 W. R. 441.

(6) 26 Ind. Cas. 737; 37 A. 195; 13 A. L. J. 196.

(7) 17 Ind. Cas. 263; 16 C. L. J. 318.

(8) 20 Ind. Cas. 578.

(9) 30 C. 1021; 30 I. A. 182; 7 C. W. N 774; 5 Bom L R. 822; 8 Sar. P. C. J. 512 (P. C.).

to us that the facts of the present case are different from the facts of the case reported as *Walian* v. *Banke Behari Pershad Singh* (9) and having regard to the particular facts of the case before us and to the recent changes in the law as to the appointment of guardians of minors enacted by the Legislature since the decision of the Privy Council in the case reported as *Walian* v. *Banke Behari Pershad Singh* (9), we hold that the minor defendants in the former suit were not "effectively represented" and that consequently they were not parties to the suit.

However, at the last moment in reply Mr. Dass for the appellant for the first time suggested that it was a matter of indifference whether the minors were made parties or not as defendants in the former suit; and that even if we held that the minors were not parties to the suit he is entitled nevertheless to maintain the decree *in toto* not only as against the adult plaintiffs, but also against the interests of the minor in the property in suit even though they were not joined as parties; because, he says, the defendant No. 1 admittedly advanced his money in discharge and satisfaction of a debt due by the plaintiffs for a family purpose and necessity, and that consequently all the members of the joint family, adults and minors, would be bound by any decree obtained against the family for the recovery of such a debt. This view of the law is not disputed on behalf of the plaintiffs; and the law seems now to be fairly settled that in a joint Hindu family governed by the Mitakshara Law, if a debt is contracted on behalf of the family by the "*karta*" or managing member or members and it is proved that it was a debt contracted for the benefit of the joint family, that any judgment obtained against such managing member or members in respect of such a debt is binding upon all the members of the joint family, adults and minors, and that the joint property of all the members of the joint family is liable to satisfy and discharge the same. The authorities for this preposition are to be found in the cases reported as *Musammat Bebee Bachun* v. *Sheikh Hamid Hossein* (10), *Sheo Shankar Ram* v. *Jaddo Kunwar* (11), *Hori Lal* v. *Nimman Kunwar* (12) and *Kishen Parshad* v. *Har Narain Singh* (13). To the same effect is the law stated by the Chief Justice of this Court in *Ranjit Prasad Tewari* v. *Ramjatan Pandey* (14). There are numerous authorities all tending to show that a decree obtained against the managing member of the joint Hindu family in respect of a debt incurred for the benefit of the joint family is binding on all the members of the family, whether adult or minors. Mr. Mullick argues that in this case the debt was not a debt contracted for a family necessity. But we are of opinion that the debt was incurred for a family necesssity, as we have already pointed out in the earlier portion of our judgment; and that the decree obtained for the recovery of the same was binding on all the members of the joint family, both adult and minors. Mr. Mullick, however, further contends that the judgment and decree in this case is a personal judgment and decree against the persons named as defendants to the suit; and that inasmuch as the minors were not effectively represented and were not in consequence parties to the suit that, therefore, their interests were not affected. Well I think that this argument is also unsustainable having regard to the recent decisions reported as *Sripat Singh* v. *Prodyot Kumar* (15), which followed *Mahabir Pershad* v. *Moheswar Nath Sahai* (16).

Mr. Mullick also argues that only the right, title and interest of the adult members of the joint family was sold in pursuance

(10) 14 M. I. A. 377; 10 B. L. R. 45; 17 W. R. 113; 20 E. R. 828; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39.

(11) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

(12) 15 Ind. Cas. 126; 34 A. 549 at p. 560; 9 A. L. J. 819.

(13) 9 Ind Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.).

(14) 37 Ind. Cas. 833; 1 P. L. W. 197.

(15) 39 Ind. Cas. 252; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290 (P. C.).

(16) 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. S.) 929 (P. C.).

of the decree and not the right, title and interest of the minors in the property in suit and that the decree was a mere money-decree against the properly represented defendants and not a decree against the joint family property or a decree in which the joint family property was liable for the discharge of the family debt. Looking to the plaint, and that is the best test, one sees that what the plaintiff in the former suit claimed was a decree as against all the members of the family and in respect of the entire joint property and what the judgment of the 3rd December in effect did grant was the relief claimed by the plaintiff in that suit.

As to the question of inadequacy of price for which the property was sold to the defendant No. 1 on the 6th of June 1910, no argument has been urged or pressed before us beyond the mere suggestion that the property was worth two-and-a-half to three lakhs of rupees and that thus by inference the sum of Rs. 15,405 was an inadequate price for a property of such considerable value. However, any real evidence as to inadequacy of price is conspicuous by its absence; and we see no reason whatever for holding on the evidence that the property in suit sold on the 6th June 1910 was sold and purchased by the defendant No. 1 for an inadequate price.

With regard to the question as to whether the minor plaintiffs Nos. 1 and 3 were estopped by their conduct from disputing the validity of the decree obtained on the 3rd of December 1909 it is unnecessary to decide having regard to our decision on the other issues in the case. I have no hesitation in saying, therefore, that the decree obtained on the 3rd of December 1909 was legally binding on the plaintiffs as a joint Hindu family and that what passed to the present defendant No. 1 as purchaser at the sale in execution of the decree was the entire joint family interest and estate in the four properties which I have mentioned, two of which have since been sold, *viz.*, Ismailpur and Sansarpur, for arrears of Government revenue and were of little value.

We have heard this case at great length and have received considerable assistance from the Counsel for the appellant and the learned Vakil for the respondents.

We have carefully considered the arguments addressed to us on both sides and have come to the conclusion that the judgment of the learned Subordinate Judge dated the 29th of May 1914 decreeing the suit of the respondents in these appeals cannot stand. We accordingly set it aside and allow this appeal with costs in both Courts.

*Appeal allowed.*

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PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 3682 OF 1914.
March 27, 1917.
*Present*:—Mr. Justice Chapman,
Mr. Justice Mullick and
Mr. Justice Atkinson.
*Mahant* KRISHNA DAYAL GIR—PLAINTIFF—APPELLANT
*versus*
*Syed* ABDUL GAFFUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Land Revenue Sales Act (XI of* 1859*)*, *ss.* 6, 33—*Sale notification, defective, construction of*—*Revenue sale, annulment of*—*Limitation*—"Ijmal," *meaning of*—*Collector, duty of*—*Sale-certificate, value of*—*Evidence Act (I of* 1872*)*, *ss.* 94, 95, 96, 97—*Limitation Act (IX of* 1908*)*, *Sch. I, Art.* 142.

Per *Curiam* (*Chapman, J.*, dissenting).—Where a notification under section 6 of the Bengal Land Revenue Sales Act is not sufficient in itself to tell intending purchasers what they are invited to bid for, it renders the sale void. [p. 26, col. 2; p. 34, col. 1.]

*Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka*, 28 Ind. Cas 699; 42 C. 897 at p. 908; 2 L. W. 355: 19 C. W. N. 481; 17 M. L. J. 321; 21 C. L. J. 412; 13 A. L. J. 501; 28 M. L. J. 583; 17 Bom L. R. 442; (1915) M. W. N. 559; 42 I. A 79 (P. C.), followed.

Case-law discussed.

Whenever a residuary share is advertised for sale under section 6 of the Bengal Land Revenue Sales Act the *mouzas* comprising that share must be correctly described by the Collector. [p. 26, col. 2.]

Per *Chapman, J.*—Where a *bona fide* attempt has been made to describe the share or shares to be sold in the notification under section 6 of the Bengal Land Revenue Sales Act, the sale is not void but the mistakes should be treated as irregularities which may form the basis of a suit within the limitations of section 33 of the Act. [p. 20, col. 2.]

Section 33 of the Bengal Land Revenue Sales Act provides that no sale shall be annulled by a Court except on the ground of its having been made contrary to the provisions of the Act, and that no sale

shall be annulled upon such a ground unless the ground relied upon has been declared and specified in an appeal made to the Commissioner under section 25 of the Act. [p. 15, col. 1.]

The word "*ijmal*" is accepted in Bihar as the vernacular equivalent of the residuary share contemplated by the Revenue Sales Act. The word is never used as meaning the residue of a separate account. [p. 16, cols. 1 & 2.]

Per *Mullick, J.*—The word "*ijmal*" means nothing more than "joint." It is an adjective and not the name of any particular thing or part of the estate. It is a relative term and has not even the fixity attached to the word residuary. [p. 24, col. 2.]

Where a sale notification contains defects, the Collector has no jurisdiction to amend anything in the original notification under section 6 of the Bengal Land Revenue Sales Act. [p. 28, col. 1.]

A sale-certificate is not a certificate of title in the case of a purchaser under a sale under Act XI of 1859 and the statements contained therein are not conclusive to show what was offered to and purchased by the auction-purchaser. [p. 28, col. 1.]

Under the Bengal Land Revenue Sales Act the Collector is not required to specify the *mauzas* when selling an entire estate or a separate account, but he is required so to do when selling the residuary share. [p. 29, col. 1.]

The Bengal Land Revenue Sales Act is a complete Code in itself and is quite independent of the general law of limitation. [p. 30, col. 1.]

Therefore, when a sale is not one under the provisions of the Revenue Sales Act, a suit to set aside the sale is not affected by the provisions which require an appeal to the Commissioner but falls under Article 142 of the Limitation Act. [p. 30, col. 2.]

Appeal from the decision of the District Judge, Gaya.

Messrs. *P. C. Manuk*, *Atul Chandra Dutt*, *Kailash Pati*, *S. N. Palit* and *Gobardhan Mitra*, for the Appellant.

Messrs. *Pugh*, *Jayaswal* and *Mahomed Mustafa Khan*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—A revenue paying estate, bearing Tauzi No. 4601, was held by co-sharers. Some had opened seprate accounts under the Revenue Sales Act entitling them to pay their shares of the Government revenue separately. The residuary share which remained after the opening of these separate accounts was put up for sale on account of arrears. The highest offer made at the auction did not equal the amount of the arrear due. Thereupon, the Collector stopped the sale and declared that the entire estate would be put up for sale unless the several recorded sharers or one or more of them were willing to purchase the share in arrear by paying to Government the whole arrear due. On the 15th June 1911, Nathuni Narayan Singh, one of the co-sharers, purchased the residuary share by paying the amount of revenue in arrear. Mahanth Krishna Dayal Gir, claiming to hold eight-annas shares in two villages included in the residuary share, appealed to the Commissioner against the sale. His appeal was rejected on the ground of limitation. On the 23rd of May 1912 Mahanth Krishna Dayal Gir filed the suit out of which the present appeal arises. He prayed that the sale should be set aside upon the ground that no notice under sections 6 and 7 of the Revenue Sales Act and no writ of delivery of possession were duly and legally served; and that there was no arrear of revenue due from him. He further asked the Court to hold that the sale to Nathuni Narayan and the sale-deed under which one Syed Abdul Gaffur had purchased the share from Nathuni Narayan had not conveyed the eight-annas share held by the Mahanth in the two villages above referred to. The plaintiff Mahanth's case, so far as the latter portion of his prayer is concerned, is based upon the ground that his shares in these two villages, Khaira Khurd and Sao Khurd, were omitted from the list of *mouzas* mentioned in the sale-certificate.

The Subordinate Judge held that the plaintiff had failed to prove that there were no arrears of revenue due; and had also failed to prove that the requisite notices had not been served. He, therefore, held that upon the case made in the plaint the sale could not be set aside.

Upon the question as to what passed by the sale, raised in the second portion of the plaintiff's case above referred to, he held that the entire residuary share passed, although the list of shares of *mauzas* comprised in the share was not complete. He also held that as there had been no appeal to the Commissioner within sixty days of the sale, the suit was barred under section 33 of the Revenue Sales Act.

The District Judge dismissed the appeal to him, upon the sole ground that the suit was barred by section 33 of the Revenue Sales Act above referred to.

The plaintiff has now appealed to this Court. He does not contend before us that

he can succeed upon the ground either that no arrear of revenue was due or that the requisite notices were not served. We are, therefore, no longer concerned with either of these two points.

The first contention in appeal is that the sale should have been set aside upon the ground that the description of the property in the notification under section 6 was either insufficient or incorrect. This was not the case in the plaint but apart from that, I am of opinion that the contention must fail. Section 33 of the Act says that no sale shall be annulled by the Court except upon the ground of its having been made contrary to the provisions of this Act; and that no sale shall be annulled upon such a ground unless the ground relied upon shall have been declared and specified in an appeal made to the Commissioner under section 25 of the Act. Section 25 of the Act has now been replaced by section 2 of Act VII of 1868; that section requires that the appeal to the Commissioner shall be presented within sixty days of the sale. It is admitted in the present case that the appeal to the Commissioner was presented long after the sixty days had expired. It is clear, therefore, that there has been no appeal to the Commissioner under the section and that, therefore, a suit to set aside the sale on the ground of misdescription would be barred.

We have been asked to call in the aid of section 5 of the Indian Limitation Act, which permits a Court to entertain an appeal after time for sufficient cause. If in the present instance the Commissioner had applied section 5 and had entertained the appeal upon the statement of the appellant that he came to know of the sale for the first time within sixty days of his appeal, then possibly it might have been open to us to say that the appeal was an appeal under section 2 of Act VII of 1868. In the absence of any order by the Commissioner to that effect, I am unable to say that the appeal made to the Commissioner was an appeal under section 2 of Act VII of 1868. I am, therefore, clearly of opinion that we cannot in this case go into the question whether the sale should be set aside upon the ground of any irregularity in the notifications or in the description of the property which was put up for sale.

It is significant to note that the plaint makes no mention of any defect in the notification under section 6. Nor is it alleged that the failure of the bidding resulted from any imperfection in the description of the property in the sale notification. It was necessary for the plaintiff, if he wished to succeed on this ground, to specifically state the case, *first*, in his appeal to the Commissioner and, *secondly*, in his plaint in this suit. But he did neither.

So far as the failure of the bidding is concerned, the allegation in the written statement to the effect that there was a mortgage decree due to the plaintiff himself for more than one and-a-half lakh of rupees against this residuary share is significant. It suggests that it was impossible for the plaintiff to say that the failure of the bidding was the result of misdescription, for the failure would be attributable to the existence of this mortgage decree. The suggestion is that the omission to make the case of inadequate bidding in the plaint was intentional.

I am clearly of opinion that both having regard to the provisions of section 33 and having regard to the nature of the case made in the plaint, it is not now open to us to set aside the sale upon the ground of any imperfection in the description of the property given in the sale notification.

Nor would it be possible to declare the sale a nullity on the ground of defect in the notification under section 6. The plaint makes no mention of any defect in the notification, and if it did it would not afford ground for declaring the sale a nullity.

The plaintiff can then only succeed upon the second part of his case; namely, upon the ground that his shares in the two villages mentioned in the plaint did not pass at the sale to Nathuni Narayan. To this part of his case section 33 is clearly not a bar; and the learned District Judge fell into error in summarily dismissing the entire suit. He should have determined the question raised by the plaintiff as to what passed at the sale. All the materials for the decision of this question, however, have been placed before us. The matter has been argued for two days

and we propose to determine the question ourselves.

Before proceeding to enter into details of the evidence as to what passed at the sale, it is desirable to begin with a short explanation of certain matters involved.

The first point is that under the Revenue Sales Act nothing can be sold which is not a revenue-paying estate or a share in a revenue-paying estate. If there are two descriptions in the sale notification the description which purports to state the share in the revenue-paying estate will, therefore, be the dominant description.

The second point upon which some explanation is desirable is the use of the word "*ijmal*" in the papers I shall have to consider. Under sections 10 and 11 of the Sales Act and section 70, Land Registration Act, a sharer in a joint estate, who desires to pay his share of the revenue separately, may apply to the Collector specifying the interest held by him in the estate, and the share of the revenue payable on account of it. The Collector then causes to be made a general publication of the fact of this application; and if no objection is made by any other co-sharer, the Collector opens a separate account with the applicant and credits separately to his share all payments made by him. The residuary share of the estate after excluding these separate accounts is called the "*ijmal*" share. "*Ijmal*" is the vernacular term which represents the term residuary share. The word has for years been recognised in Bihar. The word is used in that sense in the plaint by the plaintiff himself and the meaning was not questioned before us in argument. In the case reported as *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (1) the Privy Council say "Residue, commonly called the *ijmal* or joint share." "*Ijmal*" means joint and the word means that portion of the estate, the proprietors of which remain jointly liable for the land revenue after excluding the proprietors who pay separately. "*Ijmal*" is a perfectly definite thing. It is the right of the proprietors who have not separated, stated in the term of a share of the Tauzi number. A purchaser of the *ijmali* share takes the estate and can oust every interest which is not covered by a separate account and which is not excluded for that reason under section 13 from the sale. It is important to notice two matters in this connection. The first is that Government is interested only in obtaining the revenue and is not responsible for the statements of the applications for separate accounts as to the extent of the interest held by each in the estate; and next that in an estate where several separate accounts have been opened, some in respect of specific portions of the estate under section 11, Revenue Sales Act, some in respect of shares in specific portions under section 70, Land Registration Act, 1876, and some in respect of shares in the estate held in joint tenancy, it may be difficult, even if the interests have been accurately stated, to specify in detail what the "*ijmal*" share consists of. It is, therefore, a very common practice to describe the interests of the proprietors who have remained jointly liable for revenue simply by the word "*ijmal*" (residuary share) without any specification in detail, it being understood that the proportion which the "*ijmal*" share bears to the entire estate is sufficiently indicated by stating the proportion of the revenue shown to be payable for the "*ijmal*" share. This procedure is what was originally contemplated by the Act of 1859. It has been held by the Calcutta High Court to be a sufficient compliance with the law where the separate accounts have all been opened in respect of shares of the estate held in joint tenancy: *Ram Narain Koer* v. *Mahabir Pershad Singh* (2), *Dilchand Mahto* v. *Baijnath Singh* (3), *Ismail Khan* v. *Abdul Aziz Khan* (4).

The practice has been said to be materially irregular where the separate accounts have been opened in respect of specific portions of the estate under section 11 of the Revenue Sales Act or in respect of shares in specific portions under section 70 of the

(1) 28 Ind. Cas. 699; 42 C. 897 at p. 908; 2 L. W. 355; 19 C. W. N. 481; 17 M. L. T. 321; 21 C. L. J. 412; 13 A. L. J. 501; 28 M. L. J. 583; 17 Bom. L. R. 442; (1915) M. W. N. 559; 42 I. A. 79 (P. C.).

(2) 13 C. 208; 6 Ind. Dec. (N. S.) 638.
(3) 8 C. W. N. 337.
(4) 32 C. 509; 9 C. W. N. 348; 1 C. L. J. 91.

Land Registration Act: *Nibaran Chandra Chowdhry* v. *Chiranjib Prasad Bose* (5).

The third matter upon which some preliminary explanation is desirable relates to the list of villages or shares in villages, which appears in the sale proclamation. The first point to notice is that the Act of 1859 does not require a village list to be given. What the Act of 1859 did require was a notice under section 13 that the separate accounts would be excluded from the sale. Originally this was done by giving the details of the separate accounts and saying they were excluded. After 1876 when more complete lists of the villages in each *tauzi* number had been obtained, section 13 was sometimes complied with by deducting the separate accounts from the estate list and giving a list of villages in the residuary share. The Act of 1859 could not have required village lists, for applicants for separate accounts were not required to base their applications on village lists till section 69, Act VII of 1876. It is well to remember that the revenue unit in Bengal commonly described by a *tauzi* number has no direct connection with any village unit. It signifies merely that a separate engagement was made in the 18th century for the payment of the land revenue in respect of the land or lands designated by the *tauzi* number. The *tauzi* number may be a piece of land partly in one village and partly in another or it may contain several villages. In 1795 and in 1800 an attempt was made to prepare lists of villages and to show which village or which portion of a village belonged to which *tauzi* number. This attempt proved abortive and anything like complete lists of villages were not obtained till fifty years later after the revenue survey and it was not till the Act of 1876 that an applicant for a separate account was bound to refer to the entries in the lists of villages.

The fourth matter which should be mentioned here is that it is possible for the Government to say what revenue is payable in respect of an "*ijmal*" share; but it is not possible to say what revenue is payable for an undivided portion of the *ijmal* share or to say that there were arrears of revenue due from a particular portion of the *ijmal* share. With these preliminary considerations in mind, I propose to deal with the details of the evidence as to what passed at the sale.

The first matter we have to consider is the notification under sections 6 and 13 of the Act. This purports to be a notification declaring that the share is to be sold. In the headings of this form, the meaning of the word "share," it must be carefully remembered, can only mean a share in the *tauzi* number. It cannot mean a share in any village or villages in respect of which a complete separate account has not been opened, for such a share cannot be sold under the Act. In columns 7 and 9 of this form the *sudder jama* of (*i.e.*, revenue payable for) the share, and the arrears due from the share, are to be entered. As I have said, it is not possible to say what the *sudder jama* of an undivided portion of the *ijmal* share (such as a village or share of a village) is or that arrears of revenue are due from such an undivided portion. So far as the entries in columns 7 and 9 are concerned, therefore, it is impossible to say that it was intended, or that anybody understood, that anything less than the *ijmal* share was to be put up for sale.

Then we have the entry required by section 13 of the Act to the effect that other shares, except those stated above, will be excluded. This can only mean shares in the *tauzi* number other than the *ijmal* share and can have no reference to shares of villages in respect of which complete separate accounts have not been opened.

Then we come to column 5, the heading of which is: "If only a share is to be sold, specification of such share or shares." Again I say "share" can only mean a separate account or a residuary share. Under this heading occurs the word "*ijmal*" or residuary share. This word, as I have tried to show above, is a description in itself which includes and denotes the entire subject-matter. Then follows a list of some 38 villages with specification of the share in each village. In this long list the name of one of the villages, a share in which is claimed by the plaintiff, and a portion of the share claimed by him in another village are omitted. I have been asked to hold that the dominant description in this notification is this list of shares in the villages and that the word "*ijmal*" (residuary share)

(5) 32 C. 542; 9 C. W. N. 487.

which occurs at the top of the column was not an independent description of the property but is intended to indicate merely that each of these shares of the villages which stand below is in the *ijmal* share, I am entirely unable to accept this contention. The contention is inconsistant with the object of the revenue sale notification. It is inconsistent with the entries in columns 7 and 9; it is inconsistent with the only possible meaning which can be attached to the word "share" in the heading of the column 5 under notice; it is inconsistent with the meaning of the word "*ijmal*;" and it was not the meaning which was attributed to this notification in the second paragraph of the plaint. I am equally unable to accept the other suggestion which was offered: *viz*, that the omission of these two villages from the long list of villages was intended to restrict the sale to the villages mentioned; and that the intention was to exclude from the sale of the *ijmal* the sharers in these two villages omitted. In addition to the considerations above set forth the preponderence of probability is all in favour of the omissions being due to mistake and not to intention. For preparing the list of shares in the villages in the *ijmal* share the Collector's Office has no statement to go upon. The village list for the *ijmal* share has to be arrived at by numerous deductions from the lists of shares in villages submitted by the holders of the various separate accounts and when the villages number 39 occasional mistakes will occur. It must be carefully borne in mind, moreover, that I am not concerned now with the question whether the notice was sufficiently definite and clear to induce likely bidders to come and bid at the sale. That is an independent question, which, the Privy Council have recently held, depends upon the facts of each case. As I have pointed out earlier in this judgment, I am not concerned in the present case with any imperfection of description, for a suit upon that ground is barred by section 33. I am concerned only with the question what was in fact described, however imperfectly. I am of opinion that the dominant description was the word *ijmal* coupled with the proportion of the revenue shown to be payable for the *ijmal* share. This purports to state the share in the *tauzi* number and, therefore, must be taken to be the dominant description in perference to a mere list of shares in villages which does not purport to state the share in the *tauzi* number. If the description was irregular it was nonetheless dominant. The origin of this list of villages is the requirement of section 13 that notice of the intention to exclude the separate accounts must be given. The accidental omission of two shares in villages does not deter me from holding that the entire *ijmal* share was notified for sale.

The interpretation which I have put upon the notification is confirmed by the next step in these proceedings. The next paper in this case is a declaration by the Collector to the effect that no bid having been made for the share exposed to sale, the share being referred to by the simple word "*ijmal*" nothing more or less—he (the Collector) would put up for sale the entire estate unless the other co-sharers, or one or more of them, were willing to purchase the share in arrear by paying within 10 days the whole arrear due from such share. As I have pointed out more than once, it is not possible to say that a mere list of shares in villages is a share in arrear. It can only be possible to speak of "a share in arrear" in respect of a share of the entire *tauzi* number for which a separate account has been opened or which constitutes a residuary share. There can be no doubt, therefore, that this paper confirms the interpretation which I have placed upon the notification under section 6; and as it is nothing more, nor less, than an offer of the *ijmal* share, it follows that the entire *ijmal* share was offered for sale to the co-sharers. Thereafter there was a report by the office to the effect that two of the co-sharers were willing to purchase the *ijmal* share. Of these two, the office recommended the offer made by Nathuni Narayan and his offer was accepted by a formal order made by the Collector on the 15th of June 1911. It appears to me that what was offered, sold and purchased was the entire *ijmal* share.

Incidentally these papers place beyond doubt the meaning of the word "*ijmal*"

and can certainly be referred to for that purpose.

Thereafter, the Collector gave Nathuni Narayan a sale-certificate signed by him; and he caused possession to be delivered, and here we come to the first and only difficulty in the case. In the list of villages given in the sale-certificate some 13 shares of villages were omitted. But the sale-certificate is only one of the pieces or bits of evidence from which the Court is to infer what passed at the sale. In the presence of what appears to me to be conclusive evidence as to what passed at the sale, I am not disposed to attach much importance to the sale-certificate. Moreover, we find that possession was actually delivered of the entire *ijmal* share, and the sale certificate was amended by the Collector himself so as to include the plaintiff's shares. It is true that the amendment was made after the institution of the present suit, but that does not make any material difference. Some reference has been made to the difference between the amount of the arrears as shown in the sale notification and that shown in the sale certificate. It appears from the office report to the Collector that the amount entered in the sale notification was probably a mistake; or the office report may be a mistake. However that may be, the office reported that at the time of the notification for sale the arrear due was the amount which was paid by the purchaser and which was shown in the sale-certificate. The office report makes it quite clear at any rate that there was no alteration in the amount of the arrear such as to suggest an alteration in the property between the time of the notification for sale and the time when Nathuni Narayan purchased.

Upon the point of imperfection it is worthwhile to note that for the purpose of an offer to the co-sharers only, the word "*ijmal*" was obviously a sufficient description, for *ex hypothesi* they all knew exactly what the *ijmal* share was for they or their predecessors had all assented to the separation of the accounts.

I may repeat that the *ijmal* is a perfectly definite thing. It is the rights of the proprietors who have not opened separate accounts stated in the terms of a share in the *tauzi* number. A purchaser of the *ijmal* share purchases the right to take possession of the estate and to oust all interests not covered by separate accounts.

I have not referred to the cases upon the subject of imperfection of description. These cases all say that in order to set aside the sale it must be proved that the imperfection had an adverse effect on the bidding. The assumption, therefore, in every such case is that the description was in fact sufficient to convey the property and that in the absence of proof that bidding was affected, the sale must stand. The case principally relied upon in this connection is the case of *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (1). In that case the revenue paying estate involved was itself a share, a 15 annas 6-*dams* share of a *mahal* named Bisthozari which included as many as 360 villages. The *ijmal* share in the estate was put up for sale, the specification being described, in the terms of the judgment of the Privy Council, as follows:— "*Ijmali* share which cannot be specified excluding the separate accounts." The separate accounts numbered as many as 148 and the sale notification stated that "the *ijmali* share could not be particularised owing to separate accounts having been opened." Their Lordships of the Privy Council decided that the specification was not *sufficiently definite and clear* to induce likely buyers to come and bid at the sale. They went on to find that in consequence of the *irregularity* in the sale notification the sale fetched only one-third of the value of the property. They accordingly set aside the sale. I would note in respect of this decision, first, that the facts of that case were very peculiar and it was decided on its peculiar facts alone. The second point to notice is that their Lordships expressly refrained from dissenting from any of the rulings which had been cited before them. They say merely that these rulings give no assistance and that each case must depend on its own particular facts. The third point to notice is that although it had been contended on behalf of the appellant that the defects in the notification were such as by themselves to entirely

Hify the sale, yet their Lordships say that it is necessary to go into the further question whether substantial injury had been caused by the defects. They point out expressly that no sale shall be set aside unless the plaintiff proves that he has sustained substantial injury by reason of the defect. It is, therefore, clear that if their Lordships had been unable to hold that inadequacy of price had resulted from the insufficiency of the specification they would have held that the description was enough to convey the *ijmal* share to the purchaser. In the case before us the defects in the description are of nothing like the same significance. It is a case merely of minor omission due to carelessness. To calculate the details of the *ijmal* share in the Privy Council case might have involved some 50,000 items of figures.

Is it conceivable that if mistakes even to the extent of 4 per cent., as in the present case, had been made, their Lordships would have held that the question what passsed at the sale would have been affected? I am of opinion that the case referred to affords no authority for holding that in the present instance the description was not such as to have conveyed the entire *ijmal* share to the purchasers if the notification under section 6 had resulted in a sale. Their Lordships had to do with the question whether the property had been sufficiently notified. What I have to determine is whether it was notified at all, a very different matter.

Bearing in mind that when the Act of 1859 was passed there were no complete lists of the villages in each *tauzi* number, the Act itself seems to have contemplated that a residuary share should be notified for sale under section 6 in the following manner:—

Firstly by stating simply: "Residuary share" (*ijmal*) and then by setting out under section 13 in detail every share, whether consisting of an undivided share or of a specific portion of the estate in respect of which a separate account had been issued, and stating that these were excluded from the sale. Supposing that in giving the list of excluded separate accounts under section 13 a mistake of detail was made, would that entirely vitiate the sale? I am of opinion that it would not and that it would merely be an irregularity for which a sale could be set aside by a suit brought within the limitations of section 33. As a result of the Land Registration Act, 1876, and of the recent rulings since 1905, the Collector when putting up an *ijmali* share to sale ought now to set out all the details of the interest of which the share consists. Can I say that the result of this is that if mistakes are made of detail, a notification under section 6 would be bad and the sale would be vitiated. I am of opinion that this cannot and ought not to be held. Where a *bona fide* attempt has been made to describe the *ijmali* share for sale for the purposes of the notification under section 6, I am of opinion that the sale should not be held to be void and that the mistakes should be treated as irregularities which may form the basis of a suit within the limitations of section 33 of the Act. The question of nullity or no nullity should, in my opinion, be determined by reference only to the meaning of sections 6 and 13 of the Act of 1859 in the years in which the Act were passed and not to the rulings under section 33, which did not arrive at their present stage till fifty years later.

The result is that I hold that the plaintiff's shares in these two villages, which admittedly formed part of the *ijmal* share, were conveyed at the sale which affected the entire *ijmal* share; and, therefore, the plaintiff has no title. I would accordingly dismiss this suit with costs in all Courts.

I understand that my learned colleagues will deliver judgments to the contrary effect.

The divergence of opinion can be stated in a few words: (*a*) In my view a sale cannot be held to be void merely on the ground that the notification under section 6 was not prepared in strict accordance with the rulings. If a sale could be held to be void on that ground section 33 of the Act would be rendered of no effect.

(*b*) The word "*ijmal*" has for many years been accepted in Bihar as the vernacular equivalent of the residuary share contemplated by the Revenue Sales Act. This use of the word was recognized by the Privy Council in the judgment I

have cited. The plaintiff himself uses the word in that sense in the plaint and the meaning was not questioned in argument before us and has never been doubted. The word is never used for the residue of a separate account.

(c) Cases on Wills or private Conveyances are unsafe guides to the interpretation of an offer to sell under stautory powers. In the interpretation of a Civil Court sale the dominant consideration is the nature of the suit. In interpreting a statutory sale the dominant consideration will be the nature of the statutory proceedings. The policy of the law does not require the Courts to scrutinize the proceedings of a statutory sale with a view to defeat them. On the contrary every reasonable intendment will be made in their favour so as to secure, if possible, the object they were intended to accomplish. The notification should be construed as applying to the property which should have been notified unless to so construe the notification is to do violence to its terms.

The appeal will be determined in accordance with the opinion of my colleagues.

MULLICK, J.—The plaintiff alleges that he was proprietor of an eight-anna share in *Mauzah* Khaira Khurd and of an eight-anna share in *Mauzah* Sao Khurd, situated within *Mahal* Khaira bearing *Touzi* No. 4601, the *sadr jama* of the entire *mahal* being Rs. 5,281-12 0; that after the opening of several separate accounts in the said *mahal*, an *ijmal* share was formed comprising many *mauzahs*, in which were included the above two *mauzahs* belonging to the plaintiff; that the said *ijmal* share was advertised for sale for arrears of Government Revenue due up to the March *kist* of 1911, and that as a sufficient bid was not offered proceedings under section 14 of Act XI of 1859 were taken with the result that defendant No. 2, one of the recorded proprietors of the estate, purchased on the 15th of June 1911 for a consideration of Rs. 226-3-9 the shares of all the proprietors of the *ijmal mahal* save and except that of the plaintiff.

I have used the words '*ijmal*', '*ijmal* share' and '*ijmal mahal*,' because they have been so used by the plaintiff in his plaint, but in my view the use of these expressions does not imply an admission that the residuary share in the estate was in fact sold.

The plaintiff accordingly sues for a declaration that the sale was illegal and contrary to law and that the auction-purchaser and his assignee No. 1 acquired no title to the eight-anna share of *Mauzah* Khaira Khurd and eight-anna share of *Mauzah* Sao Khurd and the plaintiff prays for recovery of possession and mesne profits.

The Subordinate Judge framed the following issues:—

(1) Is the suit maintainable in its present form?

(2) Is the suit barred under section 33 of the Revenue Sale Law, plaintiff not having appealed within the 60 days of the sale to the Commissioner?

(3) Had the plaintiff any right, title or interest in the disputed property at the time of the revenue sale?

(4) Is the plaintiff entitled to maintain the suit?

(5) Was the revenue sale brought about by the fraud of defendant No. 2?

(6) Is the revenue sale fit to be set aside?

(7) Is the suit bad for defect of parties?

(8) Can the sale in question and the *kobala*, dated 9th July 1911, executed by defendant No. 2 in favour of defendant No. 1 affect the plaintiff's share in the property in suit? What passed by the sale?

(9) Is the plaintiff entitled to recover possession of the properties in suit?

(10) Whether the plaintiff is entitled to mesne profits? If so, how much?

The Subordinate Judge found that the suit was barred by limitation and, therefore, liable to dismissal. He also found that the sale notification published under section 6, Act XI of 1859, which enumerates 38 *mouzahs* or shares of *mouzahs* was defective in omitting all mention of *Mouzah* Sao Khurd and in describing the share of the defaulters in Khaira Khurd to be two annas three pies instead of eight annas, but that this defect did not constitute a contravention of the law and that the description of the defaulting shares was insufficient. He accordingly dismissed the suit.

In appeal the learned District Judge considered only the point of limitation and dis-

missed the suit on the ground that as the plaintiff was required under section 33 of Act XI of 1859 to appeal to the Commissioner before the sale could be set aside and as under section 2, Act VII B. C. of 1868, the time for appeal expired on the 60th day after the sale and as the plaintiff's appeal was in fact lodged before the Commissioner long afterwards, namely, on the 22nd of December 1911, the appeal was clearly out of time. The learned District Judge appears to be of opinion that the appeal was, therefore, not a proper appeal and that the present suit, which was brought on the 23rd May 1912, is under section 33 of Act XI of 1859 not maintainable.

The plaintiff now prefers this second appeal on the ground that the learned District Judge is wrong in holding that his suit is barred by limitation.

If the plaintiff's share in the two *mouzahs* in question did not pass by the sale, clearly the bar of limitation would not apply. The plaintiff was not called upon to appeal to the Commissioner to set aside a sale in respect of property which had not in fact been sold and the provisions of section 33, which require that there shall be a properly framed appeal preferred to the Commissioner before a suit for setting aside the sale and for recovery of possession can be entertained, obviously do not apply. If, therefore, the plaintiff can make good the position that his properties were not sold by the revenue sale of the 15th June 1911, the suit is within time.

In order to determine whether or not the plaintiff's contention is correct, it is necessary to refer, first of all, to the sale notification.

In column 1 of the notification is the *tauzi* number.

In column 2 is the name of the *mahal* and *pergannah*.

In column 3 is the *sadr jama* of the whole estate.

Column 4, the heading of which is 'whether the whole estate is to be sold,' is blank.

The heading of column 5 runs thus:—'If only a share is to be sold specification of such share is shown.' This column is filled in as follows:—The word '*ijmal*' appears first. Then follows a list of shares in 38 villages enumerated by name.

Column 6, the heading of which requires the names of the proprietors of the property to be sold, shows the entry—Mahabir Lal and others.

The heading of column 7 is: 'If only a share is to be sold, the amount of the share is to be sold, the amount of the *sadr jama* of such share." It shows the entry of Rs. 685-11-0.

Column 8 is blank, and column 9 the heading of which is: 'If only a share is to be sold, the arrears due for it,' shows the entry of Rs. 276-10-9.

At the bottom of the notification is an entry in the following words—'other shares except those above stated will be excluded."

It is admitted that in the list of villages the Collector should have included an eight-anna share of Sao Khurd and an additional five-annas nine-pies share of Khaira Khurd.

The question is whether notwithstanding these omissions the whole share in default must be taken to have been advertised for sale.

It is now settled law that if the notification under section 6, Act XI of 1859, is not according to law, but nevertheless a sale is held, that sale is void and a nullity for want of jurisdiction. It is immaterial whether notices under sections 5 and 7 are issued or not, but the authorities are unanimous that the notice under section 6 must be prepared and issued in accordance with law. Defects in service can be cured by section 8 of Act VII B. C. of 1868, but if the contents of the notice are not such as the law demands then the matter strikes at the root of the Collector's jurisdiction and the sale is null and void. If, therefore, the omission to mention the plaintiff's entire share in Sao Khurd and part of his share in Khaira Khurd has resulted in the advertisement of a share less than the share in default, then the notice is contrary to the provisions of Act XI of 1859 inasmuch as the unit in arrear has been split up by the Collector and something less than that unit has been offered for sale. On behalf of the respondents on the other hand, it is urged that this omission is nothing but a mere defect in description and that in fact the whole share in arrear was properly advertised by the Collector.

The question, therefore, is in the first

instance, how should we interpret the sale notification? On behalf of the respondent the learned Counsel urges that the dominant description is contained in the word '*ijmal*' in column 5 and that the subsequent incorrect enumeration of the *mouzahs* is an erroneous description which will be rejected on the maxim *falsa demonstratio non nocet cum de corpore constat* (a false description will not hurt when it co exists with the subject itself), and he relies upon *West* v. *Lawday* (6), in which Lord Westbury held that "Where some subject-matter is devised as a whole under a denomination which is applicable to the entire land and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent, universal, or generic denomination, then .....the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift."

In my opinion this maxim is not applicable to the present case. I think the particular notification which we have to construe falls within that class of documents which was the subject of *Brocket, In re*; *Dawes* v. *Miller* (7). In that case, Joyce, J., reviewed all the authorities including *West* v. v. *Lawday* (6), and made the following observations regarding the rule laid down by Lord Westbury:—

"Now, notwithstanding this, I think, I may say that there is certainly no rule that in a Will where there are two complete descriptions, the former shall prevail over the latter, and I cannot think that Lord Westbury meant to lay down positively that in a Will where you have once got a complete description of a subject-matter in general and collective terms, every or any subsequent enumeration of particulars must necessarily be rejected if it do not include each and every item of the particulars, which would be included in the first or general designation standing by itself."

(6) (1865) 11 H. L. C. 375; 13 L. T. 171; 11 E. R. 1378; 145 R. R. 238.

(7) (1908) 1 Ch. 185; 77 L. J. Ch. 245; 97 L. T. 780.

In *West* v. *Lawday* (6), the words of the testator were as follows:—

"Being possessed of a lease for lives, renewable for ever, of certain lands in the country of Kerry, in Ireland, which said lands are denominated Bailydowney, Clyney, and Farranaspid, all situate in the parish of Adahoe, in the said country of Kerry.....I do, therefore, require that the aforesaid lands should, as soon as after my decease as possible, be sold."

It appeared that some lands called *groyne* were included in the lease and the question was whether those lands had passed by the devise or not. The Court held that the dominant description being contained in the words "being possessed of a lease for lives, renewable for ever," the omission of *groyne* was only a matter of imperfect enumeration of particulars. On the other hand in *Brocket, In re*; *Dawes* v. *Miller* (7), the disputed words were as follows:—

"I devise the real estate to which I under the codicil to the Will of my late father Stanes Brocket Brocket, Esq., became entitled upon the death of Sarah Chamberlayne, widow of my late uncle General Chamberlayne deceased, namely, the residence known as Orford House in the parish of Oakley in the said County of Essex and lands and hereditaments in the parishes of Oakley, Stanstead, Montfitchett and Henham in the same county, etc." The question was whether a property in London, named No. 1, Hare Court, which was subsequently found to be covered by the codicil to the Will of Stanes Brocket Brocket above referred to and to which the testatrix became entitled, passed under the devise together with the properties in the parish of Oakley in Essex. There was no evidence to show that the testatrix was at all aware that she had any title in this property. Joyce, J., held that the specification was analogous to the specification contained in a conveyance by schedule or plan and was not merely an imperfect enumeration of the properties intended to be devised. In other words the specification by name and locality free from all ambiguity constituted the leading description and that 1, Hare Court, did not pass by the specific devise.

Now what is the position here? The list of *mouzahs* as it stands in the sale notification

is perfectly self-contained and clear. There is no latent ambiguity at all. Supposing the word '*ijmal*' did not occur at the top, the notification would in clear and unequivocal terms constitute an attachment of the particular property enumerated in this list and the note that other shares except those stated above would be excluded would merely signify that there were some separate accounts, which were being excluded from sale. The *sadar jama* in column 7 and the arrear in column 9 would merely indicate that they referred to a share in the estate comprising the particular property set out in this list. Section 10, Act XI of 1859, permits a recorded sharer of a joint estate held in common tenancy to open a separate account with the Collector in respect of his joint undivided share. Section 11 permits a recorded sharer whose share consists of the entire area of a specific portion of a land of the estate to open a separate account in respect of that specific portion. In other words, it permits a recorded sharer who has obtained a distinct portion of the estate within a ring fence to open a separate account. Section 70 of the Land Registration Act (VII B. C. of 1876) goes further and permits a proprietor who is recored as a proprietor of an undivided interest held in common tenancy in any specific portion of the land of the estate, but not extending over the whole estate, to open a separate account in respect of this undivided interest.

Taking the list of villages in the sale notification as it stands, it seems to me that it might perfectly well denote a share covered by an account under section 10 or 11, Act XI of 1859, or section 70, Act VII B. C. of 1876, and the entries in cloumns 7 and 9 as well as the note at the bottom of the notification would not be inconsistent with such a view. How then does the addition of the '*ijmal*' at the top affect the matter? This word is not known either to Act XI of 1859, or Act VII B. C., of 1876, nor do I find any mention of the word in the rules published by the Board of Revenue in their Sale Manual of 1906 and their Land Registration Manual of 1909. The Manuals do speak of a residuary share, namely, the share that is left after excluding all separate accounts in the estate, and the direction is that as soon as a separate account is opened then *pari passu* a separate account for the residuary share is also to be opened by the Collector, in his *Touzi* Register. The word '*ijmal*' means nothing more than joint. It is an adjective and not the name of any particular thing or part of the estate. It is a relative term and has not even the fixity attached to the word residuary.

It is certainly not a name like Whiteacre or Blackacre, nor is it an universal or general description. It may apply to the residue left after excluding all other accounts, but it also may apply, when a co-sharer opens a separate account under section 70, Act VII B. C. of 1876, in respect of his undivided interest in a specific portion held jointly with other proprietors, to the residue of that specific portion which would then be capable of description as the '*ijmal*' property of the other co sharers.

Therefore, the word '*ijmal*' of itself does not materially alter the description contained in the list of villages in column 5 and furnish sufficient material for holding that it describes any residuary share at all, let alone the residuary share which it was the duty of the Collector to sell.

Indeed in those cases in which the word has been sought to be translated as meaning 'residuary share in arrear,' the opinion of our Courts is that it does not bear any definite meaning. In the case of *Annada Charan Mukhuti* v. *Kishori Mohon Rai* (8) the Court observed as follows:—

"It is obvious that the term 'residue' is a relative term only, and that it means what is left after excluding from the whole certain specific shares and that unless those specific shares are stated, it is impossible for intending purchasers to know what is being advertised for sale and for what they are supposed to be bidding,...and we think that the meaning of section 6, Act XI of 1859, is clear that the share to be put up for sale must be so described that there can be no mistake about it. Merely advertising that the 'residue' of an estate is to be sold without giving further particulars and stating what that 'residue' is, cannot be considered to be a sufficient description of any share in that estate." In that case separate

(8) 2 C. W. N. 479.

accounts had been opened under sections 10 and 11 of Act XI of 1859 and the residue advertised was the residue after excluding all the separate accounts. The Court held that the description was not a sufficient description of the share in arrear.

To the same effect is *Hem Chandra Chowdhry* v. *Sarat Kamini Dasya* (9). The estate in this case consisted of four *mouzahs* and separate accounts were opened under sections 10 and 11; firstly, in respect of eleven annas odd in two *mauzahs*; secondly, of nine annas odd in the 3rd *mauzah*: and thirdly, of eleven annas in the four *mauzahs*, the remaining share of the four *mauzahs* being left as the residue. In the sale notification the terms were as follows:—"According to Act XI of 1859, the joint share excepting the separate shares is to be sold. Save and except these, all other shares are exempted from sale." The Court held that the description was not according to law and observed as follows:—

"Looking at this notification of sale, we observe that it gave very little or no information to the public, and unless one were to go to the Collectorate and look into the records there, he could not possibly ascertain what was the precise property to be sold, and in what villages that property lay."

In *Amirunessa Khatoon* v. *Secretary of State* (10), the point decided was that it was not necessary when advertising an entire estate to give all the *mauzahs* comprising it, and in *Ram Narain Koer* v. *Mahabir Pershad Singh* (2) the share to be sold was a separate account and the sale notification set out the revenue due from it as well as the extent and nature of the other separate accounts of the estate and Wilson and Porter, JJ., held that it was necessary to name the *mauzahs* comprising the separate account and that the share to be sold was sufficiently described by referring to the other separate accounts of which the necessary particulars had been given. These two last mentioned cases do not in any way touch the first two, which require that whenever a residuary share is sold, the specification shall state the *mauzahs* or shares of *mauzahs* of which it comprises.

(9) 6 C. W. N. 526.

(10) 10 C. 63; 13 C. L. R. 131; 5 Ind. Dec. (N. S.) 44.

In *Ismail Khan* v. *Abdul Aziz Khan* (4), the share sold was the residue left after the opening of a separate account under section 10. The notification contained the number of the estate, the revenue of the entire estate, the revenue of the share to be sold, and the arrear in respect of which the sale was to be held. What fraction of the entire estate this residuary share represented was not stated in the notification. The majority of the Full Bench declined to decide whether *Annada Charan Mukhuti* v. *Kishori Mohon Rai* (8) and *Hem Chandra Chowdhry* v. *Sarat Kamini Dasya* (9) were correctly decided or whether it was sufficient to follow the description accepted in *Ram Narain Kore* v. *Mahabir Pershad Singh* (2), but held that whether in any particular case the specification of the share or shares is sufficient or not must depend on the facts of the case.

In *Bhawani Koer* v. *Afzal Hussain* (11) the *ijmal* share contained 42 villages whereas only 38 villages were enumerated in the sale notification and some villages which ought not to have been included were alleged to have been included, while others which ought to have been included were said to have been excluded, and the Court observed as follows:—

"If it had been proved as a matter of fact that the villages which were excluded were in fact part of the *ijmali* share and if it were proved that in fact this list of villages was an inaccurate list of what constituted the *ijmali* share of the *mahal*, I should have hesitated in saying that the notification complied with the direction of the law which provides that it shall specify the estate or shares of estate to be sold. It appears.....that the intention of that section is to enable the persons who intend to bid to know what it is they are going to purchase. If as a matter of fact the list was inaccurate and misleading, we should find some difficulty in saying that it complied with the provisions of that section. But in this case, we think the matter is more or less of academic interest because it has not been proved as a matter of fact, or at least our attention has not been drawn to evidence that it was established, that these villages excluded did form part of the *ijmal* share of the *mahal* in question."

(11) 34 C. 381; 5 C. L. J. 425.

Finally, I come to the decision of the Privy Council in *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (1). In this case the sale notification described the share to be sold as the *ijmal* share. In the 5th column it was stated that the *ijmal* share could not be specified. A list of 148 separate accounts was attached to the sale notification and it was stated in a note that as separate accounts had been opened village by village, the *ijmal* shares could not be particularised except by excluding the separate accounts, which were given on a seprate piece of paper. It was held by the learned Subordinate Judge who tried the case in the first instance that the sale was a nullity, because the names of all the *mouzahs* had not been specified. The Collector gave the auction-purchaser possession of 44 villages out of which only 31 were found to be included within the *ijmal* share. The High Court of Calcutta were of opinion that the notification was sufficient and that if it was not necessary to enumerate the *mouzahs* in respect of an entire estate, there was no reason why it was necessary to do so in respect of the *ijmal* share. Reliance was placed before the High Court upon certain forms for opening separate accounts prescribed by the Board of Revenue, but the High Court held that these forms were not part of Act XI of 1859 and that they merely contained directions which the Collector was required to follow as nearly as possible. The High Court finally held that the sale was not a nullity.

It appears from the argument before their Lordships of the Privy Council that the following cases were placed before them:— *Hem Chandra Chowdhry* v. *Sarat Kamini Dasya* (9), *Ismail Khan* v. *Abdul Aziz Khan* (4), *Amirunessa Khatoon* v. *Secretary of State* (10) and *Dilchand Mahto* v. *Baijnath Singh* (3). Their Lordships, while accepting the proposition that the sufficiency of the notice must depend on the circumstances of each case, made the following observations:—

"As already observed, each case must depend on its own particular facts. What has to be considered is whether or not having regard to all the circumstances the specifications were sufficiently distinct and clear to invite likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's Office."

"In their Lordships opinion the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for. Their Lordships, therefore, have no hesitation in agreeing with the Trial Judge that the notification in this connection was insufficient and irregular and not in compliance with the requirements of the law."

In my opinion we are completely bound by this authority and as the law now stands, whenever a residuary share is advertised for sale, the *mouzahs* comprising that share must be correctly described by the Collector. Their Lordships declined to accept the argument that it was sufficient to describe the residue by giving a specification of the separate accounts.

If, therefore, the term 'residuary estate' with the assistance of the information in columns 5 to 9 of the notification and specification of the separate accounts opened in the estate does not in the eye of the law convey to intending purchasers what they are bidding for, still less does the term *'ijmal'* convey the necessary information. As I have already observed, the term only means joint and in the sale notification under consideration it wholly fails to denote any particular property or share of any particular property. As the notification stands, I am unable to say whether it means the entire residuary estate after excluding the separate accounts or the residue left after opening an account under section 70 (VII, B. C. of 1876). The word *'ijmal'* in my opinion, is not a complete and distinct description of a subject which would constitute a leading description as in *West* v. *Lawday* (6) to the exclusion of the particulars contained in the list of villages. From this point of view the present case is a stronger one than *Brocket, In re*; *Dawes* v. *Miller* (7), in which there were two descriptions each sufficient to describe a different subject-matter. Here the subject-matter described by the term *'ijmal'* is uncertain, while the subject-matter described by the list of villages is definite and certain. I have no

hesitation in saying that the description given in the list of villages must prevail.

Even if it is held that the term '*ijmal*' is a sufficient description of the entire residuary estate in arrear, I am of opinion that the list of villages must be regarded as an exception or limitation and not a confirmation of the general description. If further authority were needed I would refer to *Tribhovandas Jekisandas* v. *Krishnaram Kuberram* (12). In that case a mortgage-deed transferred all the properties appertaining to 'an entire *bhag*,' but it was held that the particulars which omitted some of the properties comprised therein, constituted the leading description.

Again in *Dwarka Nath* v. *Aloke Chunder Seal* (13), it was held that the declaratory portion of a sale proclamation could not by itself override the description of the property in the body of the notification, although it was argued in that case that as the Court had power to sell only the tenure itself there arose an irresistible presumption in favour of the tenure being sold.

The respondent, however, seeks to supplement the sale notification by the other evidence in the case, and the law upon this point is summarised by Taylor in his work on Evidence as follows:—(section 1226)

(1) "Where in a written instrument the description of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence, including proof of declaration of intention, is admissible to establish which of such subjects was intended by the author."

(2) "If the description of the person or thing be particularly applicable and particularly inapplicable to each of several subjects, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declaration of intention will be inadmissible."

(3) "If the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the correct part is inapplicable to any subject, parol evidence will be admissible to the same extent as in the last case and the instrument will be rendered operative by rejecting the erroneous statements."

(4) "If the description be wholly inapplicable to the subject intended or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe."

(5) "If the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be restored to, in order to show that in some secondary sense of the words, and in which the author meant to use them, the instrument may have a full effect."

Rule 2 corresponds with section 97 of the Indian Evidence Act while the other rules correspond to sections 94, 95 and 96, with the exception that the Indian Law admits the author's declaration of intention in all cases. Although the case before us is a second appeal, the construction of sale notification is a mixed question of law and fact and we are entitled to look at the evidence on which the respondents rely.

Now in support of the contention that the sale notification advertised and attached the whole residuary share the respondents call in aid, firstly, the circumstance that the Collector could not under the law have sold a part of that share and, secondly, his order of the 5th June 1915, declaring under section 14 of Act XI of 1859 that as there was not a sufficient bid for the share advertised to cover the arrear, any of the other recorded sharer or sharers were at liberty within ten days to purchase the share in arrear by paying the whole arrear due from such share. It is true that we are entitled to look at all the circumstances existing at the time of the publication of the notification in order to ascertain what the Court intended to sell and what the purchasers thought was advertised for sale. But it is clearly not sufficient to say that because the Collector was empowered only to sell the unit comprising the residuary share and that because the presumption of everything being correctly done applies

(12) 18 B. 283; 9 Ind. Dec. (N. S.) 696.
(13) 9 C. 641; 4 Ind. Dec. (N. S.) 1076.

to this case, therefore, we must assume that what he did actually advertise and what the public thought that they were buying was the residuary share. In my opinion, the Collector had, under sections 13 and 14 of Act XI of 1859, jurisdiction to sell only that which he had advertised by the notification under sections 6 and 13 and the expression 'share in arrear' in his order of the 5th June 1915 must be read as meaning that which he had advertised in the notification under section 6 and no more.

Mr. Pugh endeavoured to argue that even if the Collector advertised something less than the unit in arrear, he corrected his error by making a fresh proclamation on the 5th June. In my opinion that argument will not avail. The Collector had no jurisdiction to amend anything in the original notification under section 6.

Nor is the position of the respondents improved by the Collector's subsequent proceeding. He gave the auction-purchaser a certificate, first of 25 villages on the 28th August 1911, altogether omitting therefrom Saho Khurd and Khaira Khurd, and on the 10th April 1913, that is, about a year after the present suit had been instituted he made an addition of 8 more *mauzahs* at the instance of the purchasers, correctly describing in his amended certificate the names of the plaintiff's *mauzahs* and his interest therein. The word '*ijmal*' does occur in the sale-certificate, but as I have already observed it conveys no distinct and specific meaning; it is important, however, to note that even this amended certificate does not contain a complete list of villages.

Another circumstance to be noticed is that whereas Rs. 276-10-9 is shown in column 9 of the sale notice as the arrear due against the defaulting share, the arrear for which the share was sold on the 15th June 1911 is Rs. 226-3-9. Again while the *sadar jama* in the sale notification is Rs. 685-11-0 in column 8, the *sadar jama* in the sale-certificate is Rs. 519-10-0.

It may be admitted that the sale-certificate is not a certificate of title in the case of a purchaser under a sale under Act XI of 1859, and that the statements contained therein are not conclusive to show what was offered to and purchased by the auction-purchaser. And although in *Lalla Bissessur Dyal* v. *Doolar Chand Sahoo* (14) the Court refused to go into the facts lying behind a sale-certificate for the purpose of contradicting its terms and held that the sale certificate was the best evidence of what the auction-purchaser purchased, and although in *Tantardhari Sing* v. *Sundar Lal Missir* (15) and in *Barhamdeo Singh* v. *Ram Narain Singh* (16) it was explained that while you can look at the whole proceeding for the purpose of ascertaining what was offered for sale and purchased, you cannot give evidence for the purpose of contradicting the terms of your sale-certificate, I doubt whether the principles applicable to a sale under the Civil Procedure Code are also applicable to a revenue sale in which the sale-certificate is not the title-deed of the purchaser.

Therefore, taking the two sale certificates, the intention of the Collector and all his acts down to the 5th June 1915 as so many items of evidence for the construction of the notification, I am not satisfied that he did not attach something less than the unit in arrear, and that the bidders did not think that they were bidding only for the villages described in column 5. I think, therefore, that as he broke up the unit and advertised something less, the notification was contrary to law and without jurisdiction, and, therefore, the sale on the 15th June 1911 was also without jurisdiction.

The sale certainly did not pass the plaintiff's eight-annas share in *mauzah* Sao Khurd and his five-annas nine-pies share in Khaira Khurd that was omitted from the notification; but I go further and hold that as the whole sale was without jurisdiction, the plaintiff's two-annas three-pies share in Khaira Khurd also did not pass. If the other co-sharers of the residuary share in arrear had joined as plaintiffs, they would have been competent to recover their shares also but as they have not done so, we can only declare that the sale in respect of the plaintiff's property, namely, eight-annas share of Khaira Khurd

(14) 22 W. R. 181.
(15) 7 C. L. J. 384.
(16) 22 Ind. Cas. 280; 19 C. L. J. 182.

and Sao Khurd is bad and that he is entitled to recover the same. The effect of this will be that the plaintiff will be a co-sharer with the purchaser defendant and that the plaintiff and he will be jointly liable for the revenue till a separate account is opened.

In the view that I take of the law the Collector is not required to specify the *mauzahs* when selling an entire estate or a separate account, but he is so required when selling the residuary share. As the word *ijmal* does not convey a sufficiently definite meaning, it might possibly be a salutary precaution to use the expression residuary estate, and to insert a note in column 5 stating that if the residuary share is found after the sale to contain property other than that enumerated in the list, that property also will pass by the sale. Such a note would not cure the irregularity resulting from an omission of *mauzahs*, but it would, I take it, have the effect of making Residuary Estate the dominant description and prevent the sale from becoming a nullity altogether. The sale in such a case would only be set aside upon the grounds prescribed in section 33 of the Act.

I have anxiously considered what the effect of this interpretation of the law will be upon the revenue administration. It is submitted by Mr. Pugh that the Collector will be seriously hampered in the collection of arrears and that it will be almost impossible in practice to bring about the sale of residuary shares. In the absence of evidence it is not possible for me to speak with any direct authority, but I have examined the provisions of the Revenue Sales Act (XI of 1859), Land Registration Act (VII B. C. of 1876) and the registers prepared by Government for administering those Acts, and I do not imagine there will be any serious difficulty.

Register A of revenue-paying estates requires that the *mauzahs* contained in the estate should be fully specified. Register C requires that a *mauzawar* register should be kept. Register D requires that an intermediate register affecting changes in the general and *mauzawar* registers should be kept. Section 30 of the Land Registration Act requires co-sharers to give information to the Collector of the establishment of any village and Registers 12 and 12A prepared under the Land Registration Act require that whenever a separate account is opened under sections 10 and 11 of Act XI of 1859 or section 70 of Act VII B. C. 1876, a specification of the *mauzah* comprising that separate account is to be furnished. There is also authority given to the Collector under the Land Registration Act to require recorded proprietors to furnish whatever information is necessary for the correct preparation of the registers. It is always possible, therefore, for the Collector to ascertain what villages or shares of villages are situated in the residuary share. The Collector incurs no responsibility in the matter and information is furnished at the risk of the recorded proprietors. If the Collector correctly describes the residuary share upon the information given by the proprietors, the notification under section 6 is fully protected. In my opinion, therefore, the Courts are not imposing an impossible task upon the Collector in requiring him to correctly state the *mauzahs* or shares in *mauzahs* that comprise a residuary share offered for sale.

As the plaintiff, however, contends that he is entitled to succeed even if the sale is not a nullity, I will examine also that position. If the residuary share passed and the share in the list of villages was a mere misdescription, then the error could only be impeached by an appeal to the Commissioner under section 25 of Act XI of 1859 and no suit would lie to set aside the sale, unless the ground of irregularity was taken before the Commissioner and substantial injury has resulted from the said irregularity.

In the present case the appeal to the Commissioner was made more than sixty days after the sale and was, therefore, barred. The appellant asks us to hold that under section 5 of the Indian Limitation Act of 1908, the Commissioner was competent to admit the appeal for sufficient cause; that till he decides that the cause is not sufficient the appeal cannot cease to be an appeal and that having been brought within the statutory limit of time from the date of the rejection of the appeal by the Commissioner, the suit is within time. This argument must fail on two grounds

KRISHNA DAYAL GIR v. ABDUL GAFFUR.

The first is that a time-barred appeal is not an appeal till it is admitted for sufficient cause. *Mir Waziruddin* v. *Lala Deoki Nandan* (17) is authority for this proposition. The second ground is that section 5 of the Indian Limitation Act does not apply to Act XI of 1859. The matter depends on the construction to be put on section 29 of the Limitation Act (IX of 1908), which corresponds to section 6 of the Limitation Act of 1877. There has been much conflict upon the question whether the general provisions contained in sections 5 and 7 and other like sections of the Indian Limitation Act are applicable to local and special Acts, but, in my opinion, the correct rule was laid down in *Veeramma* v. *Abbiah* (18) and *Panchkouri Ghosh* v. *Pran Gopal Mukerjee* (19). The latter case is important, because it relates to the Act now under consideration and the test therein applied was whether the Act was self-contained. As to what is a self-contained Act, must depend upon the terms of the Act itself. No general rule can be laid down, but I take it that what is meant is that the enactment must either expressly or by implication suggest that the general provisions of the Indian Limitation Act are not to be applied for the purpose of extending the shorter periods of limitation prescribed by the Act. For instance, it would be impossible to hold that the Indian Limitation Act has any application to fiscal Acts, such as those dealing with customs and income-tax. In my opinion the Revenue Sales Act comes within the same category. Even since Regulation VII of 1799, when a remedy by sale of the estate in arrear was first substituted for the attachment of the person of the defaulter, the constant endeavour of the Legislature has been to perfect the machinery of law, so that the Government demand might be quickly realized and the title of auction-purchasers speedily quieted. Their Lordships of the Privy Council in *Gobinda Lal Roy* v. *Ramjanam Misser* (20) observed that sales for arrears of Government revenue were of constant occurrence and anything which impaired the security of the purchasers at those sales tended to lower the price of the estate put up for sale; that it was, therefore, of the utmost importance in the interest of the revenue paying population of India that all questions that could arise as to the validity of a sale for arrears of revenue should be determined speedily.

Looking at the scheme of the whole Act I have no doubt that it was never intended that the periods of limitation therein prescribed should be extended by the operation of section 5 of the Indian Limitation Act, and I am fortified in this view by *Amirunessa Khatoon* v. *Secretary of State* (10), where it was held that a revenue sale under the Act cannot be set aside on the ground of fraud. The appeal to the Commissioner, therefore, was not an appeal within the meaning of the law, and the present suit would be barred by limitation.

But as I have already held that the sale was not one under the provisions of the Revenue Sales Act, the suit is not affected by the provisions which require an appeal to the Commissioner. It comes under Article 142 of the Limitation Act and is within time.

The learned Counsel for the respondent has drawn our attention to the pleading in the suit and contends in the first place that the entire residuary share was sold. In my opinion plaints in this country must not be too strictly construed and all that the plaintiff means here is that a share called the '*ijmali*' share and alleged to be the entire residuary estate was advertised for sale. That this is so is clear from the judgment of the learned Subordinate Judge. It is quite clear that at the trial the plaintiff raised the contention that the sale was a nullity by reason of the attachment of something less than the unit in arrear. Moreover the point being one of mixed law and fact and no additional evidence being required it is open to us to deal with it in second appeal.

The result, therefore, is that I would allow the appeal and decree the plaintiff's suit for recovery of possession. As the prayer for mesne profits has not been pressed I would not allow the plaintiff any mesne profits. The plaintiff is entitled to his costs in all Courts.

(17) 6 C. L. J. 472.
(18) 18 M. 99; 6 Ind. Dec. (N. S.) 418.
(19) 4 Ind. Cas. 70; 13 C. W. N. 518.
(20) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679 (P. C.).

KRISHNA DAYAL GIR *v.* ABDUL GAFFUR.

ATKINSON, J.—It is unnecessary for me in this case to refer to the facts generally, having regard to the judgments which have been delivered by my learned colleagues. However, I desire to refer to the sale notification issued under section 6 of Act XI of 1859. Column 5 of that notification contains a specification of the share of the property which was offered for sale to satisfy the arrears of Government revenue. The share of the *mahal* offered for sale is described by the general term "*ijmal*"; and following this general denomination there is a description given of what the "*ijmal*" property comprises, namely, a list of shares in 38 villages. In the notification a statement appears that other shares except those stated above will be excluded. The plaintiff is the proprietor of an eight-annas share in *Mauza* Sao Khurd and also an eight annas proprietor in the village Khurd. Both these villages are situated in the *mahal* of Khaira in the District of Gaya. The shares in these two villages to which the plaintiff is entitled formed part of the "*ijmal*" property when the notification under section 6 was published; but in the description given in the specification no reference is made to the plaintiff's eight-annas share in Sao Khurd and only a two-annas three-pies share in *Mauza* Khurd was offered for sale. The sale notification further states that the sale of the property described in the notification was made to satisfy an arrear of Rs. 276-10-9 in respect of which the *sadar jama* is Rs. 685 11 0. The sale notified under section 6 of the Act of 1859 proved abortive; and the Collector subsequently sold the entire "*ijmali*" interest under section 14 on the 15th of June 1911 and the same was purchased by defendant No. 1, who subsequently transferred his interest in the property to defendant No. 2.

Mr. Manuk contends, first of all, that the notification published under section 6 of the Revenue Sales Act of 1859 was irregular; and that the plaintiff is entitled to have the sale set aside under section 33 of the Act, provided that the plaintiff can prove that there was substantial injury caused to him by reason of the irregularity complained of, the irregularity complained of being a misdescription of the property comprised in the "*ijmali*" share. For two reasons I am of opinion that the plaintiff is not entitled to succeed on this ground. In the first place the plaintiff did not appeal to the Commissioner within the period of sixty days from the date of the sale on the 15th of June 1911. An appeal was filed by the plaintiff on the 22nd of December 1911; but the same was summarily dismissed as being out of time on the 24th of January 1912. An appeal filed out of time is no appeal; and consequently the plaintiff's right to have the sale set aside on the ground of irregularity was barred by the special period of limitation provided by the Revenue Sales Act of 1859. Mr. Manuk admits the accuracy of this conclusion; but he argues that he is entitled to call to his aid the provisions of section 5 of the general Limitation Act of 1908. He argues that if he is able to satisfy the Commissioner that he had sufficient cause for not presenting his appeal within time, that then the Commissioner would under the general law of limitation be entitled to extend the period allowed for filing an appeal under the Act of 1859, so as to make the appeal presented by the plaintiff on the 22nd of December 1911 within time. This argument is erroneous; and, in my opinion, quite unsustainable. First of all if Mr. Manuk's argument be correct, no application was made to the Commissioner under section 5 to extend the time, even if section 5 of the Limitation Act can be considered to be applicable to the provisions of the special limitation contained in the Revenue Sales Act of 1859. The appeal was presented out of time, after it had become barred under the provisions of section 25 of that Act. However, in my opinion, it would not have been open to the Commissioner to entertain an application under section 5 of the Limitation Act so as to "affect or alter" the special provisions as to limitation prescribed by the Act of 1859 itself. Section 29 of the general Limitation Act excludes the applicability of the general Limitation Act to any special or local Act having a limitation of its own. There can be no doubt that the Revenue Sales Act of 1859 is a special Act which is applicable to the lower provinces of the Bengal Presidency, or to what is known as the permanently settled districts; and was primarily designed to facilitate the recovery and collection of

revenue due to Government. Lord Macnaghten, I think, in the case reported as *Gobind Lal Roy* v. *Ramjanam Misser* (20) gives very cogent reasons why the general provisions of the Limitation Act should not be held to apply to the special provisions of the Act of 1859. The title of the purchasers acquired under a revenue sale should not be exposed to the risk and danger of being challenged and defeated by any uncertainty of procedure under the Revenue Sales Act. Mr. Justice Brett sitting alone in a case reported as *Panchkouri Ghosh* v. *Pran Gopal Mukerjee* (19) so held, on the ground that the Revenue Sales Act was a complete Code in itself, quite independent of the general law of limitation. That decision has never been impeached notwithstanding the fact that there has been a great conflict of authority in India on this point. However, I entirely agree with the reasons given by their Lordships in the case reported as *Veeramma* v. *Abbiah* (18) in which all the authorities are considered; and applying the principle laid down by their Lordships in that case, and that laid down by Brett, J, in the case to which I have referred, I hold that in the present case the general provisions of the Limitation Act have no application whatsoever to the Revenue Sales Act of 1859. Secondly in my opinion, on the first branch of Mr. Manuk's argument the plaintiff's case must fail because he has not proved that substantial injury has been caused to him by reason of the irregularity complained of. However, it is unnecessary to further consider this aspect of the case having regard to the view I hold on the question of limitation.

The second argument put forward by Mr. Manuk on behalf of the plaintiff is that the sale which was effected by the Collector on the 15th of June 1911 was a nullity; or in the alternative that the plaintiff's property to the extent of eight annas share in *Mauza* Sao Khurd and five annas odd in *Mauza* Khurd did not pass to the defendant No 1 under the sale effected by the Collector. This is the real and vital question in this case; and it appears to me that this argument must be governed by the answer to the question as to what in fact, and in law, passed by the sale to the defendant on the 15th of June 1911? The answer to this question entirely depends upon the construction of the property described and offered for sale under the sale notification published under section 6. What, therefore, did the notification under section 6 offer for sale? It is contended that the term "*ijmal*" is a general denomination and description of a certain block or piece of land offered for sale and is quite capable of being ascertained definitely and with certainty, irrespective of the enumeration set out in the notification describing the property comprised within the "*ijmal*." In fact it is suggested that the *ijmali* share of a *mahal* is just as much a known factor as if one was to speak or refer to the known entity of the lands of Blackacre or Whiteacre. The law, I think, with regard to the description of property offered for sale, whether it is described in general terms or by means of a schedule, may be stated as follows:—Where the principal words of the description lack the certainty necessary for the rejection of the subordinate description as *falsa demonstratio*, and this subordinate description can be read as limiting the principal description, it should be treated accordingly. This was the law laid down by Lord Chelmsford in the case of *Slingsby* v. *Grainger* (21). And where the principal description is in form specific, yet if it lacks certainty it will be restricted by the general reference to the words of description: *In re Seal*, *Seal* v. *Taylor* (22). If the principal or general description of a property is followed by a schedule of the property comprised in that description, then only that which is comprised in the schedule will pass: *Barton* v. *Dawes* (23) and *Oort* v. *Sagar* (24). The *dictum* of Lord Westbury in *West* v. *Lawday* (6) is primarily applicable only to the construction of Wills. In *Brocket*, *In re*, *Dawes* v. *Miller* (7), Mr. Justice Joyce considered the principle enunciated by Lord Westbury and he says:—"Notwithstanding this, I think, I may say that there is certainly no rule that in a Will where there are two complete descriptions, the

(21) (1859) 7 H. L. C. 273; 28 L. J. Ch. 616; 5 Jur. (N. S.) 1111; 11 E. R. 109; 115 R. R. 146.

(22) (1894) 1 Ch. 316; 63 L. J. Ch. 275; 70 L. T. 329.

(23) (1850) 10 C. B. 261; 19 L. J. C. P. 302; 138 E. R. 106; 84 R. R. 562.

(24) (1858) 3 H. & N. 370; 27 L. J. Ex. 378; 117 R. R. 731; 157 E. R. 513.

former shall prevail over the latter; and I cannot think that Lord Westbury meant to lay down positively that in a Will where you have once got a complete description of the subject-matter in general and collective terms every or any subsequent enumeration of particulars must necessarily be rejected, if it do not include each and every item of the particulars which would be included in the first or general description standing by itself." In *West* v. *Lawday* (6), notwithstanding the fact that the Will contained a devise of property in general terms, yet there was a specific enumeration and description given of the property comprised within the terms of the general devise. And on the facts of that particular case Lord Westbury held that the subsequent description did control and limit the prior general denomination of the lands devised by the Will. However, it appears to me, on the authorities, that each case must depend, more or less, upon the construction of the particular document in question in each case, whether it be a deed, a Will, or a notification of sale. "*Ijmal*" is a general or generic term. It may be intended to apply to the residuary interest of the joint owners of the estate after individual co-sharers have opened separate accounts in respect of their separate shares. The *ijmali* interest may be an entity or denomination of land or an interest in land which may vary from day to day. It is quite uncertain in itself; and the Land Registration Act clearly shows that the *ijmali* interest may and can be defined, if right principles are observed by the Collector, with certainty with regard to each share in each *mauza* respectively comprised within the *ijmali* interest or share. I hold that in this case the term "*ijmal*" as used in the notification for sale prescribed by section 6 of Act XI of 1859 is restricted by the general description of the *ijmali* shares which the Collector offered for sale; so as to show that only the described parts of the *ijmali* share were offered for sale. This view is strongly supported by the decision of the Privy Council in a case reported as *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (1). I feel myself unable to distinguish the principle of that decision from the facts of the present case; and I think that so long as the decision of the Privy Council remains unaltered I am conclusively bound to follow the law laid down by their Lordships' Board. In that case the "*ijmali*" share was offered for sale with the following description: "the *ijmali* share cannot be particularised owing to separate accounts having been opened. The share to be sold forms a separate estate after excluding the share in respect of which separate accounts have been opened." The learned Subordinate Judge who tried that case held that the description so given in the notification of the sale was an irregularity which rendered the whole sale a nullity and void as being without jurisdiction. The learned Subordinate Judge based his judgment upon the fact that the shares in each *mauza* comprised in the "*ijmal*" had not been set out specifically in the notification for sale. The learned Judges of the Calcutta High Court disagreed entirely with the view of the Subordinate Judge, and held that the description of the property sold as stated was sufficient in law to enable any intending bidder to know what he was bidding for. However, their Lordships of the Privy Council reversed the decision of the Calcutta High Court and restored the decision of the learned Subordinate Judge. In the course of their Lordships' judgment they say as follows: "In view of this divergence of opinion their Lordships have examined the evidence for themselves and they have come to the conclusion that the view of the Trial Judge both as regards the value and the fact that the lowness of price was due to the defectiveness of the notice was well founded." I take that decision to mean that the word "*ijmal*" is not an adequate or sufficient description *per se* of the property offered for sale under section 6 of the Revenue Sales Act of 1859 and the Collector in effecting such a sale must define with particularity the property comprised in the "*ijmali*" share offered for sale. If this view be right, and I believe it is, then it follows of necessity that if it is incumbent upon the Collector to describe the property comprised within the *ijmali* share, then he must do so with accuracy and with particularity. In the present case there was an obvious and a patent irregularity in the description of the *ijmali* property offered for sale—that is conceded—one entire share in a village was completely omitted and a five-annas odd share in another village

was also omitted. There was thus not a complete enumeration of the several shares comprised within the *ijmali* interest of property offered for sale. If the construction that I put upon the notification be correct on the authorities which I have referred to, then there was a breaking up or dismemberment of the revenue unit which rendered the entire sale a nullity: because it is conceded that the Collector cannot sell part only of the revenue unit liable for arrears of revenue. He must sell the entire share and interest liable for the arrears, and he cannot break it up into parts. Their Lordships of the Privy Council have held that section 6 of Act XI of 1859 is protective of the interest of the proprietors of the properties to be sold; and the provisions of the Act must be strictly adhered to. Any departure from the terms and conditions of the Act renders any sale made under such conditions without jurisdiction; and such sale becomes a nullity in law. Acts similar to the Act of 1859 have always been strictly construed, because they involve the forfeiture of the interest of the proprietors of property merely for the non-payment of Government revenue. It is essential, therefore, that the governing authority, vested with statutory powers, should be coerced and obliged to act strictly within the statutory authority conferred on them by the Act. Therefore, I hold that when the Collector in the present case notified for sale only a part of the *ijmali* share in respect of which there was an arrear of revenue, he acted without jurisdiction and that consequently the sale was a nullity in point of law. The right of the subject is more sacred to me than the mere possibility of any inconvenience that may be caused to the Collector.

However, I think that on a further ground this sale is also void. In the case reported as *Raja Thakur Barmha* v. *Jiban Ram* (25), dealing with a sale under the Code of Civil Procedure, their Lordships of the Privy Council laid down that the property that passed by a sale in an execution proceeding under the Code of Civil Procedure was the property "attached" and nothing else. Applying the principle of that decision to the present case, the sale notification in the present case corresponds to the order of attachment in the case cited, and thus one is fortified in arriving at the conclusion that the sale was a nullity, applying the authority of the decision of Lord Moulton in the case referred to, where it is laid down that all that can be done is to effect a transfer of the property described in the order of attachment, which corresponds in this case to the notification. If the property offered for sale under the notification published under section 6 was of a clearly defined and limited character, the Collector could not, in my opinion, under the sale effected by him under section 14 of the Act of 1859, alter or vary or enlarge the property offered for sale, so as to make it inconsistent or at variance with the property notified for sale under section 6. He could only offer for sale the share of the property described in the sale notification; because the Collector's jurisdiction under section 14 follows as a natural sequence and consequence of the property offered for sale by the notification under section 6. Therefore, in my opinion, even though the Collector may in fact have, by the sale held by him on the 15th of June 1911, sold, and intended to sell, the entire *ijmali* interest in the *mahal* in question, nevertheless he exceeded his jurisdiction by offering for sale property or shares of property which were not offered for sale under section 6. And consequently the sale of the 15th of June 1911 under section 14 of the Act of 1859 must be held to be a nullity on the ground that it was inconsistent with the terms of the property notified for sale under section 6.

On both these grounds it appears to me that there has been an excess of jurisdiction, or absence of jurisdiction; and that consequently the sale is a nullity. Both these matters are quite independent of section 33; and the plaintiff is entitled to avail himself of the absence of jurisdiction in the Collector to effect the sale by challenging the entire proceeding. No doubt the pleadings are defective and cannot be said to raise the true issue for decision; but it is not denied that the plaintiff did urge before the Trial Judge that the sale was

(25) 21 Ind. Cas. 936; 18 C. W. N. 313; 12 A. L. J. 156; (1914) M. W. N. 118; 26 M. L. J. 89; 15 M. L. T. 137; 19 C. L. J. 161; 16 Bom. L. R. 156; 41 C. 590 (P. C.).

anullity by reason of the fact that his eight-annas share in Sao Khurd and five-annas odd share in *Mauza* Khurd had been omitted from the sale notification; and consequently did not pass at the sale effected by the Collector. Charged with the administration of the law founded on equity and good conscience, I consider that it would be unjust if we were to deprive the plaintiff, owing to any defect in the pleadings, from urging that the sale effected by the Collector was a nullity in point of law on the ground that there had been an excess of jurisdiction, particularly when that ground was urged before the Trial Judge and completely ignored by the lower Appellate Court. Accordingly I would hold that the plaintiff is entitled to the declaration he seeks and I would set aside the entire sale; and allow this appeal with costs.

*Appeal allowed.*

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ALLAHABAD HIGH COURT.
EXECUTION SECOND APPEAL No. 1689 OF 1915.
July 18, 1916.
*Present*:—Sir Henry Richards, KT., Chief Justice, and
Justice Sir P. C. Banerji, KT.
LAKHPAT SINGH—PLAINTIFF—APPELLANT
*versus*
BABU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of* 1908), *O. XX, r.* 14 *—Pre-emption—Decree, conditional upon payment into Court, compliance with—Mortgage of subject-matter of decree by decree-holder.*

Plaintiff obtained a decree for pre-emption conditional on payment into Court of the pre-emption money within a certain period. He raised the amount by a simple mortgage of the decreed property itself and paid it into Court:

*Held*, that it was a sufficient compliance with the terms of the decree.

Second appeal from a decree of the District Judge, Moradabad, dated the 17th August 1915, reversing that of the Additional Subordinate Judge, Moradabad, dated the 8th May 1915.

Mr. *G. W. Dillon*, for the Appellant.

Mr. *A. H. C. Hamilton* and Dr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff obtained a decree for pre-emption conditional upon his paying into Court within thirty-one days a certain sum mentioned in the decree. The sum mentioned was paid into Court. It is alleged that it was not paid within time. How much foundation there is for this allegation we are not in a position to say. If there is no foundation for it, it is unfortunate that the point should be raised, as it will only lead to loss by the parties. The money, if it be found to be sufficient, is lying idle in Court. The real question which we are called upon to decide is, whether or not the deposit of the money, assuming it to be within time, was in compliance with the terms of the decree. Lakhpat Singh, not having the money himself to deposit, borrowed the money by executing a simple mortgage of the property, the subject-matter of the suit for pre-emption. The mortgage was taken in the name of a minor, the money being provided by the father, one Birbal. Birbal signed the original tender for the deposit of money. The tender named the parties to the pre-emption suit. It named the purpose for which the money had been paid into Court, and in addition to the signature of Birbal, it contained the signature of the Pleader for the decree-holder. The money was accepted by the Court without any objection on the ground that it had been paid in by a person not authorized to do so. It seems to us absolutely clear that the money must be deemed under the circumstances to be a payment made for and on behalf of the decree-holder, and we are clearly of opinion (assuming that the money was not sufficient and paid in within the time mentioned in the decree) that the terms of the decree were complied with, and the property vested from that time in the decree-holder. We allow the appeal, set aside the orders of both the Courts below and remand the case to the Court of first instance with directions to re-admit on its original number and to proceed to deal with the same according to law. The appellant will have his costs in this Court and in the Court below to be paid by the respondents.

*Appeal allowed.*

SIKHAMANI PANDITHAR v. AMMANI AMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2331 OF 1914.

March 1, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SIKHAMANI PANDITHAR—DEFENDANT No. 2—APPELLANT

*versus*

AMMANI AMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3 TO 11—RESPONDENTS.

*Hindu Law—Partition—Declaration in writing of unilateral intention to become divided in status—Registration Act (XVI of 1908), ss. 17, 49—"Transaction," unilateral, whether amounts to intention to become divided in status—Registration.*

An unequivocal declaration by a member of an undivided family of his intention to be divided in status is sufficient to effect a partition, although division by metes and bounds may be deferred. [p. 36, col. 2: p. 37, col. 1.]

*Suraj Narain* v. *Iqbal Narain*, 18 Ind. Cas. 30; 35 A. 80; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C.); *Girja Bai* v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 15 (P. C.), followed.

Where such unilateral declaration is embodied in an instrument in writing prior to a division by metes and bounds, it does not amount to a "transaction" within the meaning of section 49 of the Registration Act and is admissible in evidence without registration. [p. 37, col. 1.]

Second appeal against the decree, dated 13th April 1914, of the District Court of North Arcot, in Appeal Suit No. 904 of 1913, preferred against that of the District Munsif, Arni, in Original Suit No. 835 of 1911.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *A. Krishnaswami Aiyar* and *M. Patanjali Sastri*, for the Respondents.

This second appeal coming on for hearing on the 28th and 29th September and the 4th October 1916, and having stood over for consideration till the 10th October 1916, the Court (Spencer and Phillips, JJ.) delivered the following

JUDGMENT.—The main question for consideration is whether Exhibit A is admissible in evidence for any purpose. The lower Courts have construed it as a partition deed, and although in the document the past tense is employed, that is, "as we have effected a division" and "for our having thus divided", it is undoubtedly an instrument of partition whereby the parties divide their property. If the partition was effected by this deed and not prior to the deed, the deed must be registered under section 17 of the Regisrtration Act and under section 49 of the Registration Act the document shall not affect any immoveable property comprised therein, nor be received as evidence of any transaction affecting such property. The lower Courts, while holding that the document is one that should be registered under section 17, have admitted it as evidence of the status of division. If, however, the division was not effected prior to execution of Exhibit A, by an unequivocal declaration, then we think that the document is altogether inadmissible in evidence, for the mere status of division in a Hindu family undoubtedly affects the family property, for on division the unascertained share of a divided member devolves in a different manner to the share of an undivided member. If, therefore, the deed be admitted as evidence of the status of division, it will at the same time be evidence of the transaction between the two brothers which brought about the division in status, as well as the partition by metes and bounds. This was the view taken by Sadasiva Aiyar, J., in *Pothi Naicken* v. *Nagama Naicker* (1) and although the other two Judges of the Bench express no opinion directly on this point, we are not inclined to take a different view. That view, however, applied to the circumstances of that case and in that case, there was no suggestion of any division in status other than that effected by the partition deed. In the present case, however, plaintiff alleges a division before Exhibit A. The lower Courts have both found that there was no such division before Exhibit A, but as we read the judgments, we think it is quite clear that they refer merely to a division by metes and bounds and have not considered the question of whether a status of division was not effected by the unequivocal declaration of one of the brothers. It has now been finally decided that an unequivocal declaration by one member of an undivided family

(1) 32 Ind. Cas. 486; 30 M. L. J. 62; 19 M. L. T. 50; 3 L. W. 115; (1916) 1 M. W. N. 79.

of his intention to be divided in status is sufficient to effect a partition, although division by metes and bounds may be deferred [*vide Suraj Narain* v. *Iqbal Narain* (2) and *Girja Bai* v. *Sadashiv Dhundiraj* (3)]. This view of the case has not been considered by the lower Courts, and although the District Munsif has believed the evidence that Parsa Nainar sought for partition, which was agreed to by his brother Jaya Rao, that some properties were set apart for Parsa's marriage expenses and that the brothers messed separately, he has not considered the effect of this evidence as evidence of a division in status as distinct from a division by metes and bounds and has not determined the question of whether there was a prior division in status. The District Judge merely agrees with the District Munsif's finding. As evidence of an unilateral declaration of division in status Exhibit A would be admissible, if such declaration had taken place prior to the division by metes and bounds, for it would be that unilateral declaration and not the division by metes and bounds which affected the property and altered its nature and it could not be called a "transaction", for to a transaction there must necessarily be at least two parties. We do not, therefore, think that Exhibit A would be inadmissible in evidence under section 49 of the Registration Act in so far as it goes to evidence a prior unilateral declaration of division. In this view, we remand the case for a revised finding on issues 1 and 1 (*a*) in the light of the above remarks.

The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

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In compliance with the order contained in the above judgment, the District Judge of North Arcot submitted the following

FINDING.—I am requested to submit a fresh finding upon issues (1) and 1 (*a*) which read as follows :—

(1) Whether the late Appavu Nainar and his brother were not divided and the partition was aot acted upon as alleged by defendant No. 1?

1 (*a*) Whether the division alleged is true?

* * * *

3. It is argued for the defendants that an intention to be divided in status must be proved by cogent and clear evidence, and it must be admitted that both sides have played false to a considerable extent. I consider, however, that there is sufficient ground for holding that Parsa Nainar had declared his intention prior to the execution of Exhibit A, and that he was, therefore, divided in status. This is my finding upon the issues referred to me.

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This second appeal coming on final hearing after the return of finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.

We accept the finding and dismiss the second appeal with costs.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 623 OF 1915.

December 9, 1916.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

LAKHPAT PANDEY AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

JANG BAHADUR PANDEY—PLAINTIFF—RESPONDENT.

*Limitation Act* (*IX of* 1908), *s.* 18, *Sch. I, Art.* 62—*Fraud, effect of—Limitation.*

The period of limitation for the recovery of money payable by the defendant to the plaintiff for money received for his use is three years from the date when the money was received. But if the knowledge of the plaintiff's right to institute the suit has been kept from him by the fraud of the defendant, under section 18 of the Limitation Act, the period of limitation runs from the date when the fraud first becomes known to the plaintiff. [p. 38, cols. 1 & 2.]

Second appeal against the decision of the Additional Judge, Gorakhpur, dated the 11th of February 1915.

(2) 18 Ind. Cas. 30; 35 A. 80; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 15 Bom. L. R 456; 16 O. C. 129; 40 I A. 40 (P. C.).

(3) 37 Ind. Cas. 321; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 15 (P. C.).

RAHAT ULLAH KHAN *v.* IBAD ULLAH KHAN.

The Hon'ble. Dr. *Sundar Lal*, for the Appellants.

Dr. *Surendro Nath Sen*, for the Respond-

JUDGMENT.—In the suit out of which this appeal arises the plaintiff alleged that he was entitled to one-third of the amount of certain bonds which stood in the name of the defendants or some of them. So far as this allegation is concerned it is correct, because the plaintiff had previously obtained a declaration to that effect from the Civil Court in a suit. He then alleged that the defendants had secretly realised the amounts of these bonds. The Court below has found that the defendants did recover on foot of the bonds. This being so, the plaintiff was clearly entitled to recover his share of the money realised or paid on foot of the bonds, provided he sued in time. The Court of first instance decided against the plaintiff upon the ground that he was bound to put forward his claim in the previous suit. The plaintiff appealed and the Court below has held that the view taken by the Court of first instance on this point was erroneous. In this we quite agree. The present appeal challenges the decree of the lower Appellate Court upon the ground that the suit was barred by limitation. We think that Article 62 of the Limitation Act is the Article applicable to a suit of this nature. The period of limitation prescribed is three years from the time when the money was received. In the present case the money was received more than three years before the institution of the suit. Therefore, the plaintiff's suit is barred unless he can call to his aid the provisions of section 18, which provides that if the knowledge of his right to institute the suit has been kept from him by the fraud of the defendant, then time shall run from the date when the fraud first became known. In this connection we may mention that the defendants even in the present suit denied that they had even then got the money. We have looked through the evidence and we find that the plaintiff did adduce evidence that he only obtained knowledge about two years before the institution of the suit. He expressly pleaded that the realisation of the money had been fraudulently concealed from him. The fraud of concealment seems to have been persevered in even up to the time the present suit was instituted. Under the circumstances we think that the plaintiff is entitled to the benefit of section 18, and the reason why the plea of limitation was not urged in the lower Appellate Court was that the defendants knew that it was impossible to deny that knowledge of the realisation of the money had been fraudulently kept from the plaintiff. We dismiss the appeal with costs, including in this Court fees on the higher scale.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 71 OF 1916.

February 22, 1917.

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

RAHAT ULLAH KHAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

IBAD ULLAH KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), Sch. II, paras. 17, 5, 19—Agreement, private, to refer to arbitration—Matters, some, covered by pending suits—Arbitrator refusing to act—Substitution of arbitrator—Court, power and duty of.*

Where, after the filing of an agreement under paragraph 17, Schedule II, Civil Procedure Code, one of the arbitrators refuses to act as such, the Court has power, under paragraph 19 read with paragraph 5, Schedule II, Civil Procedure Code, to substitute another arbitrator in place of the refusing arbitrator. [p. 39, col. 2.]

A private agreement to refer to arbitration certain matters, some of which form the subject of pending suits, is not interdicted; but, where an application is made under paragraph 17, Schedule II, Civil Procedure Code, with respect to the filing of such an agreement, the order of the Court directing the reference to arbitration must be confined to the matters not covered by the suits pending on the date of the agreement, unless those suits have meanwhile been withdrawn or stayed pending the reference. [p. 40, cols. 1 & 2.]

*Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1202 (P. C.), explained.

RAHAT ULLAH KHAN *v.* IBAD ULLAH KHAN.

Appeal against the order of the Officiating Subordinate Judge, Hardoi, dated the 14th November 1916.

Syed *Ali Mohammad*, for the Appellants.

Syed *Zahur Ahmad*, for the Respodents.

JUDGMENT.—By an agreement of the 25th March 1916 the parties to the present proceeding referred the matters in difference between them, which were specified in the agreement under ten heads, to the arbitration of three Pleaders of the Hardoi district, named Moulvi Nurul Hasan, Saiyid Amjad Ali and Babu Sheo Sahai. Some of the matters referred formed the subject-matter of three suits, then pending before the Munsif of Shahabad, and of two others pending before the Subordinate Judge of Hardoi. Instead of entering into separate agreements of reference in each case they entered into a private agreement for arbitration, which one of the parties filed in the Court of the Subordinate Judge of Hardoi under paragraph 17, Schedule II, of the Code of Civil Procedure, praying that the necessary directions might be issued to the arbitrators to decide the matters in dispute according to the agreement. The opposite parties contended that one of the arbitrators, Moulvi Nurul Hasan, had refused to arbitrate, that paragraph 17, Schedule II, of the Code of Civil Procedure did not authorize a reference to arbitration of such disputes as were pending in the Courts except through the Courts in which those disputes were pending, and that in one of the suits, the subject-matter of which was included in the agreement, the parties had by mutual consent set aside the reference and were proceeding with the case on the merits. They further stated that they were no longer willing to have the matters in difference between them decided by arbitration, as the position of the parties was altered by the partition of certain houses under a decree passed by the Munsif of Shahabad. The learned Subordinate Judge directed the award to be filed, holding that if one of the arbitrators had refused to act another could be appointed in his place and that if a part of the property which was the subject-matter of reference had ceased to exist, the reference could validly be made about the remaining property.

Ordinarily a reference under paragraph 17, Schedule II, of the Code of Civil Procedure can only be made to the arbitrators appointed in accordance with the provisions of the agreement. But when an arbitrator dies or refuses to act, and the parties agree to substitute another arbitrator in his place, a reference can be made to the remaining arbitrators and the substituted arbitrator jointly. Such a substitution is considered to be a new reference and is as valid as if the reference had been made to him and the other arbitrators originally. Where after the filing of an agreement, any of the contingencies provided in paragraph 5, Schedule II, of the Code arises, paragraph 19 authorizes the Court to take necessary steps, so far as they may be consistent with the agreement, to make the reference complete. It is admitted by the parties that since the order of the Court below, directing the defendants to nominate another arbitrator in place of Moulvi Nurul Hasan, which is the subject-matter of this appeal, the defendants have duly nominated another abitrator in his place, and a reference has been made to him and the remaining two arbitrators mentioned in the agreement jointly. In the circumstances the contention that the Court had no power to substitute another arbitrator in the place of the refusing arbitrator loses its force. In *Wali Muhammad* v. *Bahawal Baksh* (1), where an award sought to be filed was found defective, the parties were permitted to appoint other arbitrators to make a fresh reference.

It is urged, however, on behalf of the defendants that the reference should have been made through the various Courts in which some of the subject-matters of the reference were under litigation. The proceedings of those Courts are not before this Court, and it is difficult to say whether, simultaneously with the filing of this agreement in the Court below, steps were also taken in the Courts concerned to have formal reference made by them in regard to the matters comprised in the suits pending therein. In *Ghulam Khan* v. *Muhammad Hassan* (2) their

(1) 21 Ind. Cas. 925; 14 P. L. R. 1914; 28 P. R. 1914; 20 P. W. R. 1914.

(2) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

Lordships of the Privy Council classified the different methods in which references to arbitration can be made, but that classification does not necessarily interdict the making of a private reference to arbitration in regard to matters, some of which may form the subject of pending suits. The subject-matter cannot, however, be adjudicated both by the Courts where the suits may be pending and by arbitrators at the same time, for as pointed out in *Sheo Dat* v. *Sheo Shankar Singh* (3), where a matter has been referred to arbitration and the agreement of reference has either been filed in or brought to the notice of the Court, the Court should not deal with such matter in the same suit save in the manner and to the extent provided in Schedule II of the Code of Civil Procedure. Where a reference has been made out of Court, it may either stay proceedings and require the parties to file the award, or ask them to file the agreement and make a reference itself. In effect a private reference of a matter covered by a pending suit is not thus interdicted, but an adjudication of the same matter *pari passu* by two different tribunals of co-ordinate jurisdiction cannot be permitted In *Tincowry Dey* v. *Fakir Chand Dey* (4) and *Venkatachellam Reddi* v. *Rungiah Reddi* (5) it was accordingly held that it was open to the Court in which an agreement of reference to arbitration was sought to be enforced to refuse to file it, where the matter covered by the arbitration was one pending before another Court.

The agreement in the present case is not confined to the matters which were the subject-matter of decision in the other cases. In regard to the matters covered by the other suits, the parties can move, if they have not already done so, the Courts, in which those suits are pending, to make the reference unless those suits or any of them have been already decided.

The appeal is accordingly allowed, in so far that the order directing the reference to arbitration will be confined to the matters not covered by the suits pending on the date of the agreement, unless those suits have meanwhile been withdrawn or stayed pending this reference. No order is made as to the costs here.

*Appeal allowed.*

(3) 27 A. 53; 1 A. L. J. 398.
(4) 30 C. 218.
(5) 12 Ind. Cas. 372; 36 M. 353; 10 M. L. T. 248; (1911) 2 M. W. N. 249; 21 M. L. J. 990.

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 17 OF 1916.

July 24, 1916.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

*Raja* BRIJ NARAIN RAI AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

RAM DHARI RAI—PLAINTIFF—RESPONDENT.

*Pre-emption—Partial pre-emption*—**Wajib-ul-arz, entry in, construction of.**

A pre-emptor is not entitled to choose what part of the property sold he will exercise his right of pre-emption in respect of. He must, if at all, pre-empt the whole of the property which is the subject-matter of the sale. [p. 40, col 2; p. 41, col. 1.]

Where an entry in a *wajib-ul-arz* is in clear words the Court is not justified in giving it a strained meaning. [p. 41, col. 1.]

First appeal from an order of the Subordinate Judge, Ghazipur, dated the 13th of September 1915.

Dr. *S. M. Sulaiman*, for the Appellants.

The Hon'ble Munshi *Gokul Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The sale was a sale of property comprised in two *mahals*. The *mahals* each consists of a number of villages. There also appears to have been a number of sub-divisions, called *thoks*. The plaintiff only sought to pre-empt the property comprised in one of the two *mahals*. Even in respect of this property he originally claimed that the vendor's title to a portion was bad. This, however, has been decided against him. The defendant-vendee pleaded that the plaintiff was entitled to pre-empt the property comprised in each of the *mahals*, and that not having done so, his suit must fail. It must be conceded that if the plaintiff was entitled to pre-empt all the property, the subject-matter of the sale, and he omitted a part, his suit must fail. A pre-emptor is not entitled to choose what part of the

property sold, he will exercise his right of pre-emption in respect of. The plaintiff in support of his case and to prove the existence of the custom gave in evidence an extract from the *wajib-ul-arz*. This document records that the first right is with a co-sharer who was a near relation. The second right was to a near co-sharer in the *thok*. The third right was to the co-sharer of another *thok* "*minbad hissadaran digar thok*;" after that the property might be sold to a stranger. Admittedly the plaintiff is a co-sharer in the *mahal* in which that part of the property is situate which was included in the sale-deed but excluded from the claim for pre-emption. *Prima facie*, therefore, as a co-sharer in another *thok* in the same *mahal*, the plaintiff would have a right as against a stranger. It is contended on behalf of the plaintiff that if this part of the *wajib-ul-arz* is read as giving a right to co-sharers in a different *thok* in the same *mahal*, then the meaning of the preceding portion of the entry is obscure because it refers to a "near" co-sharer in the same *thok*. The plaintiff would, therefore, ask the Court to read the expression "*hissadaran digar thok*" as meaning the other co-sharers in the *thok*. We think there would be no justification in putting such a strained meaning on the clear words, particularly when we bear in mind that almost invariably where the entries in the *wajib-ul-arz* give the details of the right of pre-emption, all the different classes of co-sharers are exhausted before a sale can be made to a stranger. We must also in this connection remember that the entries in the *wajib-ul-arz* is the evidence which the plaintiff himself relies upon as proving the existence of the custom. There is no other evidence. We allow the appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

*Appeal allowed.*

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 449 OF 1915-16 OF GONDA DISTRICT.

November 24, 1916.

*Present*:—Mr. Holms, S. M.

PARMESHAR DAT AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

BISHESHAR AND OTHERS - PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Lease—Lessee, holding over, whether bound by conditions of lease*—Thekadar, *position of—Ejectment without landlord's consent, whether permissible—Tenant, knowledge of.*

A lessee holding over after the expiration of the lease is bound by the conditions of the lease. [p. 42, col. 1.]

A *thekadar* cannot issue a notice of ejectment without his landlord's permission, if his powers are in that respect restricted under the terms of the *theka*, irrespective of the fact whether or not such restriction is known to the tenants. [p. 42, cols. 1 & 2.]

*Lal* v. *Raja Udey Partap Udya Dutt Singh*, Selected Decision No. 9 of 1892, distinguished.

Appeal from the decree of the Commissioner, Fyzabad, dated the 1st July 1916, reversing the order of the Honorary Assistant Collector, Gonda, dated the 7th April 1916.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

Mr. *Muhammad Wasim*, for the Respondents.

JUDGMENT.—I deal first with the first point in the Officiating Commissioner's judgment. He held that the status of the present respondents was more than that of an ordinary tenant. What he meant by this is clear from his judgment and is that they were holding under a settlement decree. It seems to me that the decision of the Civil Courts referred to by him makes it *res judicata* that they were not so holding, and moreover the fact that decrees for arrears of rent have been obtained by the appellants against the respondents further supports this view. I consider then that they are not holding under the settlement decree the land in suit, though of course at some future time if they obtain the lease they would be so holding. The respondents wish to raise the point that they are under-proprietors, but this was not raised

in the appeal to the Commissioner and cannot be raised now. As regards the claim to have rights of occupancy, the respondents can point to no evidence on the record to show that they satisfied all the conditions required by section 5.

There remains the second point in the Commissioner's judgment. The appellants argue that because they are the persons to whom the respondents as tenants are liable to pay rent that, therefore, they are entitled to issue a notice of ejectment. They are holding over after the expiration of the lease granted to them by the *talukdar*, the conditions of which they agreed to, and under the decision of *Khuda Bakhsh* v. *Abid Husain* (1), they are still bound by these conditions which they agreed to with their eyes open. One of the conditions of the lease was a very ordinary condition that they as *thekadars* were not authorised to issue notices of ejectment without the consent of the *talukdar*. The appellants argue that they are entitled to repudiate this condition, because it is not one expressly mentioned in the settlement decree which refers to the landlord's power to fix rent only, but when they agreed of their own accord to an ordinary condition of this sort I do not think that they are entitled to repudiate it, and it certainly seems to me to be in no way contrary to the terms of the settlement decree. There is nothing in the Act to prevent a *zemindar* and *thekadar* agreeing to certain restrictions in the power of the *thekadar* during the *theka*. It was certainly laid down in *Lal* v. *Raja Udey Partap Udya Dutt Singh* (2) that any such restrictions should not obtain to the detriment of the tenant unless they were known to the tenants. But the present case is different. The question is whether a *thekadar* can repudiate in a suit with a tenant such restriction when the restriction is to the tenants' benefit.

I cannot accept the argument of the appellants that despite a definite restriction on his power to eject, every *thekadar* has against a tenant a power to issue a notice of ejectment. I consider then that as the *talukdar* has not agreed to the issue of the notice of ejectment in this case the *thekadar* was not entitled to issue it. For this reason I dismiss the appeal with costs.

*Appeal dismissed.*

(1) 3 Ind. Cas. 873; 12 O. C. 279.
(2) Selected Decision No. 9 of 1892.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 420 OF 1915.

January 24, 1917.

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C

*Babu* CHARU CHANDRA BISWAS AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

LALLAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Construction of document—Mortgage, usufructuary, construction of*—Malguzari, *meaning of*—*Mortgagee, enhanced land revenue paid by, position of*—*Redemption.*

The fact that a bargain becomes unconscionable if a particular meaning is attached to the words used in the instrument evidencing that bargain, affords no reason for holding that the intention of the parties to the bargain was otherwise if the terms are clear. But where a word used is capable of more than one interpretation, a Court is justified in adopting the interpretation which is consistent with the existence of a contract such as persons of ordinary intelligence would make and rejecting the interpretation which involves the acceptance of a contract such as no sensible person would be likely to agree to. [p. 44, col. 2.]

The word '*malguzari*', although usually meaning an amount paid to the Crown, is susceptible of meaning the amount due from under-proprietors to the superior proprietor. [p. 44, cols. 1 & 2.]

By an usufructuary mortgage the mortgagee was to retain profits arising out of the mortgaged property after paying the land revenue assessed on it, in lieu of interest on the principal money. The mortgage was to be redeemed on receipt of the principal money only:

*Held*, that the mortgagee was entitled, on redemption, to claim the difference between the original land revenue and the subsequently enhanced land revenue, but was not entitled to it if the amount of the profits was not shown to have been reduced owing to the enhancement of the land revenue. [p. 45, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 11th August 1915, confirming that of the Subordinate Judge, Partabgarh, dated the 29th April 1915.

The Hon'ble Syed *Wazir Hasan* and Babu *Bisheshwar Nath Srivastava*, for the Appellants.

CHARU CHANDRA BISWAS *v.* LALLAN SINGH.

The Hon'ble Mirza *Sami Ullah Beg* and Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—The decision of this second civil appeal has been referred to a Bench as the subject-matter is over Rs. 10,000. The facts are as follows:—

Ajudhia Bakhsh Singh obtained an adjudication from the British Indian Association on 8th July 1869 against Babu Balbhaddar Singh and Bikramajit Singh awarding him under-proprietary rights in the village of Pachhamgaon and three other villages on the following terms:—He was to pay the land revenue *plus* 25 per cent. to the superior proprietor. In the next generation his successor was to pay an increase of one-fourth. In the third generation the payment was to be increased by one-fourth again. In the fourth generation it was to be increased by one-fourth again, and after four generations the under-proprietors were to obtain occupancy rights. Ajudhia Bakhsh Singh was allowed no rights of transfer. This adjudication was confirmed by the Financial Commissioner of Oudh by an order dated the 20th July 1869. Ajudhia Bakhsh Singh died, and was succeeded by Ranjit Singh. Ranjit Singh was succeeded by three sons Satrajit Singh, Lallan Singh and Narendra Bahadur Singh. On 26th July 1878 Satrajit Singh, Lallan Singh and Narendra Bahadur Singh executed a deed of usufructuary mortgage of the village of Pachhamgaon in favour of Manmatha Nath for Rs. 2,100. On 25th May 1914 Lallan Singh and the three sons of Narendra Bahadur Singh (Satrajit Singh having died without issue), plaintiffs Nos. 1 to 4, executed a lease for ten years in favour of plaintiffs Nos. 5 to 12 and authorised them to redeem the property. The suit for redemption was filed on 7th September 1914 in the Court of the Subordinate Judge of Partabgarh. Redemption was decreed on payment of Rs. 2,100. An appeal was filed against this decision to the District Judge. He dismissed the appeal. The mortgagees come here in second appeal.

The learned Counsel for the appellants has not argued the appeal on the first, second and sixth grounds. We have to decide the third, fourth and fifth grounds only. We are concerned solely with the interpretation of some of the conditions of the deed of 26th July 1878. The first condition postpones redemption for 36 years. In no circumstances were the mortgagors entitled to redeem during the first 36 years of the existence of the usufructuary mortgage. They were permitted to redeem under the terms of the deed during the next 14 years. The first condition continues that the mortgagee after paying certain charges (the nature of which will be considered later) is to retain the profits of the property mortgaged in lieu of interest at 12 per cent. per annum on the principal sum, that is to say, in lieu of Rs. 252 a year. When the period for redemption arose the mortgagors were to pay off the entire principal (mortgage-money). The condition concludes with the statement that at the time of redemption the mortgagors shall not have any claim over the mortgagee in respect of mesne profits of any sort and the mortgagee shall not claim anything by way of interest from the mortgagors.

The second condition is to the effect that, if the mortgagee should consider at any period that the transaction has become injurious to him, he may in lieu of the privileges afforded by the deed of usufructuary mortgage bring a suit for the recovery of his principal and interest at 12 per cent., after deducting the profits during his period of possession. This condition clearly means that if the profits amount to less than interest at 12 per cent. on the principal, that is to say Rs. 252 a year, the mortgagee has a right to take a remedy against the mortgagors for the recovery of the principal and the balance of interest. The third condition is to the effect that, whatever profits the mortgagee may make over and above Rs. 252, he shall be permitted to retain. So far the conditions of the mortgage present no difficulty. The mortgagee is entitled to profits amounting to Rs. 252 and anything more that he may be able to make. If the profits are less than Rs. 252 he can sue for his principal and the balance due to him by way of interest. The fourth condition, however, introduces a variation quite inconsistent with the previous arrangement. It states that, if the mortgagee has to pay

anything on account of boundary disputes, *et cetera*, or in case the Government revenue is enhanced at a subsequent settlement, or if the mortgagee is put to expenses owing to the claim of third parties, the amount of the loss which he may sustain should be added to the principal amount payable at the time of redemption. The first condition states very clearly that the amount payable for redemption is Rs. 2,100. Here we find a subsequent condition stating that in certain circumstances the amount payable for redemption may be more than Rs. 2,100. The fifth condition refers to the management of the mortgaged property by the mortgagee. The sixth condition states that, if the mortgage be not redeemed between the 37th and 50th year by the payment of the mortgage money, *i. e.*, the principal amount, the property shall be foreclosed.

We are not concerned with the validity of the transfer or the validity of all these conditions. We are concerned only with the contention of the learned Counsel for the appellants who has confined his argument to two points. He claims in the first instance that the plaintiffs shall pay, before they can redeem the mortgaged property, the amounts which were due to the superior proprietor over and above the actual land revenue and cesses paid to Government during the years that the mortgagee had been in possession, and that they must further pay before they can redeem the difference between the land revenue originally fixed and the land revenue as enhanced at a subsequent settlement during the same period.

The decision of the first point turns on the interpretation of the word "*malguzari*" in certain places in the deed. In other places the word clearly refers to Government land revenue. The learned Counsel for the appellants argues that in the places where the plaintiffs do not admit that it refers to land revenue, it also refers to land revenue. The learned Counsel for the respondents argues that in the places where he does not admit that it does refer to the land revenue the word means the amount which was due from the under-proprietors to the superior proprietor. Now it is to be noted that the under-proprietors do not pay land revenue direct to the Crown. They pay a sum equivalent to the land revenue *plus* an additional sum to the superior proprietor. The superior proprietor pays out of this sum what is due to the Crown on account of land revenue and retains the remainder for his own use. The word "*malguzari*" (although it usually means an amount paid to the Crown) is susceptible of the meaning which the learned Counsel for the respondents desires that we should place upon it, and we are of opinion that the view taken by the lower Courts upon this point, which is supported by the learned Counsel for the respondents, is correct. If the other view be taken the transaction would be unconscionable to a degree. The mortgagors would have been surrendering the profits of the village, should they amount to Rs. 252 or more, and in addition were agreeing to pay, according to the statement of the learned Counsel for the appellants, a sum of some Rs. 691 more out of their own pocket to the superior proprietor. If the profits of the village were less than Rs. 252 the mortgagors had to make up the amount. They were thus giving up all the profits and in addition were saddling themselves with a liability to pay Rs. 691 a year and were getting in exchange the use of Rs. 2,100. On our calculations they would, if this view were adopted, have been paying something like 45 per cent. or more for the use of the money if they kept those conditions, and were to continue to pay this amount for 36 years before they could redeem. The fact that the bargain is unconscionable would afford no reason for holding that it was not intended by the parties if the terms are clear. But, where a word is used capable of more than one interpretation, a Court is justified in adopting the interpretation which is consistent with the existence of a contract such as persons of ordinary intelligence would make and rejecting the interpretation which involves the acceptance of a contract such as no sensible person would be likely to agree to. We hold, therefore, that the word "*malguzari*" in the passages in question means the amount payable to the superior proprietor, and it follows as a necessary consequence that the mortgagee

under the terms of the deed was liable to pay this amount.

The next point for decisiou is with regard to the enhanced Government revenue. We should have found ourselves confronted with a difficulty, had it been established that the increase in Government revenue had reduced the profits of the mortgaged property to less than Rs. 252, for, had such been the case, we should have had to decide whether to give effect to the first and sixth conditions of the deed, which explicitly state that redemption can take place for Rs. 2,100, or to the fourth condition which suggests that in certain circumstances redemption could only be obtained by the payment of a larger sum. The two positions are contradictory and it is impossible in our opinion to reconcile them. But we are relieved from the necessity of deciding what should be done in such an eventuality, for no eventuality has arisen which would justify us in increasing the amount, even if we were ready to accept the fourth condition as binding. We interpret the fourth condition to mean that, if owing to an enhancement of Government revenue the profits of the mortgaged property becomes less than Rs. 252, the mortgagors must make good the deficiency in profits at the time of redemption. The learned Counsel for the appellants does not, however, suggest that the profits have ever been less than Rs. 252. He recognises the fact that there is no evidence to show that there has been any deficiency, and frankly admits that, as far as he knows, the profits have always been more than Rs. 252. The contention for which he argues is that, even though the profits have not been less than Rs. 252 in any year, his clients are entitled to recover the difference between the old land revenue and the new. We do not interpret the condition as he would have us interpret it. We consider that this condition lays down that, if the profits be less than Rs. 252 through an enhancement of revenue or other causes, the mortgagors must make up the deficiency at the time of redemption and as the profits have never been less than Rs. 252 this clause can clearly have no effect.

These are the only points that have been argued. We dismiss this appeal. The appellants will pay their own costs and those of the respondents.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 411 OF 1915.

August 15, 1916.

*Present*:—Mr Lindsay, J. C.

MAHESH CHARAN AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Nawab Mirza* MUHAMMAD BAQAR ALI—DEFENDANT—RESPONDENT.

*Decree, settlement, construction of*—Dhara *dues*—Talukdar, *liability of.*

At the time of the first Regular Settlement the ex-proprietors of a village which had been included in a *taluka* got a decree against the *talukdar* for their right to receive *dhara* dues in the village:

*Held*, that the *talukdar* was liable under the settlement decree to render the said dues to the ex-proprietors, whether he chose to collect them or not. [p. 46, col. 2.]

Appeal from the decree of the District Judge, Sitapur, dated the 27th July 1911, reversing that of the Munsif, Sitapur, dated the 30th April 1915.

Mr. *Muhammad Wasim*, for the Appellants.

Seyad *Nabi Ullah*, for the Respondent.

JUDGMENT.—The decision of this case turns upon the interpretation of a decree which was passed at the time of the first Regular Settlement in a suit brought by the predecessors-in-interest of the present plaintiffs-appellants. It appears from the documents on the record, Exhibits 1, 3 and 4, that at the time of the first Regular Settlement two persons Rai Rudra Prasad and Lachhmi Narain brought a suit against the *talukdar*, claiming to have their right to certain manorial dues established with respect to a village called Rampur Bhawana. Exhibit 1 is a copy of the plaint which was filed in that suit and from this document it is made to appear that Rai Rudra Prasad and his co-plaintiff represented that they had been the old proprietors of this village. It was stated that some years prior to annexation the village had become in-

cluded in the defendant's *taluka*, but it was at the same time asserted that notwithstanding this inclusion in the *taluka* these plaintiffs had been receiving various dues and also a cash *nankar* allowance from the *talukdar*. The suit was tried out and a decree was given in favour of these plaintiffs on a confession of judgment made by the agent of the *talukdar* who was examined on oath. A copy of his statement is Exhibit No. 3. Exhibit No. 4 is a copy of the decree which was passed. Among the items of dues specified in the plaint and also mentioned in the decree was one which is described by the name of *dhara*. It appears that this *dhara* consists of the right to receive half a seer out of every maund of grain produced in the village. Various other items were decreed, such for example as the right of fishery and the right to receive bundles of grass and to gather wild rice, etc. The decree was passed against the *talukdar* alone. The present suit has been brought by the plaintiffs appellants who represent ¾ths of the interest which accrued to Rai Rudra Prasad and Lachhmi Narain under the settlement decree. The suit was framed as a suit for recovery of money, the sum demanded by the plaintiffs being Rs. 139-12-0. They alleged that they had not received their *dhara* dues from the defendant during the years 1318 to 1321 *Faslis*. It was stated in the plaint that up till the year 1309 *Fasli* this village of Rampur Bhawana had been a grain-rented village, that in the year in question the grain rent had been commuted into cash rent and it was for this reason that the appellants laid their suit as a suit for money, their case being that they were entitled to a certain percentage of the rent equivalent to the ratio between half a seer and one maund.

The Court of First Instance decreed the claim. The Lower Appellate Court has dismissed the claim, being of opinion that the *talukdar* was not liable to pay anything to these plaintiffs on account of *dhara* dues. The view taken by the learned District Judge appears to have been that although the plaintiffs' predecessors-in-interest acquired a right to these dues, they could only enforce that right against the tenants in the village and not against the *talukdar*. The learned Judge said that the *talukdar* was not the agent of these plaintiffs for the purpose of collecting these dues and accounting for them to the plaintiffs. He seems, therefore, to have thought that the only remedy for the plaintiffs in order to recover these dues was to proceed against the tenants. This view is clearly wrong, when it is remembered that the tenants were no parties to the settlement decree. That decree was obtained against the *talukdar* only and he is undoubtedly bound by its terms. The defendant-respondent contested the case on every imaginable ground and one of the pleas was that these dues had not been collected in the village for some time. The learned District Judge seems to have come to the conclusion that this part of the defendant's story was true; but at any rate it is clear from copies of the village papers which are on the record that the taking of these dues in this village is recognised, and it further appears that the tenants are liable to pay these *dhara* dues in addition to the regular rents they pay to the proprietor. The whole question is whether or not the plaintiffs are entitled under the terms of the settlement decree to enforce their demand against the *talukdar* in respect of these dues and whether the *talukdar* can avoid the liability by pleading or proving that he has not himself collected them. In my opinion the decision of the first Court is right and I think the *talukdar* is clearly liable under the terms of this decree to render these dues to the plaintiffs every year. If he chooses to collect the dues, well and good; if he does not choose to collect them he is still responsible to the plaintiffs for their payment. The situation seems to me to be perfectly clear. The decree of the Settlement Court is, of course, not drawn up in a very artistic form but the intention of the Court which passed the decree is easily ascertainable. There seems to be no doubt that the predecessors-in-interest of these plaintiffs were the ancient proprietors of this village. They managed to establish their proprietary rights at the time of the First Settlement; but inasmuch as the village had been included in the *sanad* granted to the *talukdar* it was not possible to restore them to proprietary possession. The decree which was passed in favour of these ex-proprietors and upon which the case of the

present plaintiffs is based, was obviously intended to secure to these ex-proprietors some compensation for their exclusion from the settlement and I look upon the terms of the decree in the same light as if the decree declared a rent charge in favour of these plaintiffs against the *talukdar*. The learned District Judge lays stress upon certain words contained in the decree, indicating that the then plaintiffs were to be entitled to exercise their rights without any interference on the part of the *talukdar*. If we look at the nature of the various items which were claimed in that suit, it is obvious what the extent of the application of these words "*bila muzahmat*" is. They would properly apply for example to the exercise of the plaintiffs' right of fishery or of some cognate right; but the learned Judge was not I think entitled to fasten on these words and to deduce therefrom the conclusion that the plaintiffs themselves were given a right to go and collect these *dhara* dues from the tenants, subject only to the condition that the *talukdar* was not to interfere with them. As I have already mentioned, the decree could not bind any of the tenants in the village as they were no parties to the proceedings. I am satisfied, therefore, that the plaintiffs are entitled to recover these dues from the defendant, whether the defendant chooses to collect them or not. As regards the amount which is payable it seems to be admitted now that the village has been cash-rented since the year 1309 *Fasli*. The plaintiffs represent, as I have said, $\frac{3}{4}$ths of the interest which was acquired by Rai Rudra Prasad and Lachhmi Narain under the settlement decree and taking into account the figures relating to the gross annual profits as found by the learned District Judge, I find that the plaintiffs are entitled for the years in suit to Rs. 125-2-3.

The result, therefore, is that the appeal is allowed to this extent. The plaintiffs' claim is decreed accordingly and they will have proportionate costs in all three Courts.

*Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 416 OF 1915.

April 23, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

BHARATH INDU AND OTHERS—DECREE-HOLDERS—APPELLANTS

*versus*

*Musammat* TILOK KUNWAR—RESPONDENT.

*Execution—Amendment of decree—Person not judgment-debtor made judgment-debtor—Decree, whether can be executed against such person.*

A suit for sale on a mortgage against *G.* and *J.* was decreed against *G.* alone. The mortgaged property proved insufficient to satisfy the decree and an application was made for a personal decree under section 90 of the Transfer of Property Act as against *G.* alone and the decree was passed. On the attachment of certain property as the property of *G.*, *T.* the widow of *J.* objected and got the property released. The decree-holder applied for the amendment of the decree to the effect that the name of *T.* might be added as judgment-debtor and got an *ex parte* order in his favour. He then applied for execution of the decree as against *T.* *T.* objected. The application was, however, dismissed as barred by time. On the decree-holder's appeal:

*Held*, that apart from the question of limitation the Court below would have been fully justified in refusing to put the decree into execution on the simple ground that the name of *T.* was fraudulently added to the decree without any decree having been passed against her. [p. 48, col. 2.]

Execution first appeal against the decision of the Subordinate Judge, Mainpuri, dated the 16th of August 1915.

FACTS appear from the judgment.

Dr. *Surendra Nath Sen*, for the Appellants.

—The point involved in this appeal is that an Executing Court cannot go behind the decree. The respondent's name appears in the decree and she cannot now question the execution of the decree against her. Her name was added to the decree as the judgment-debtor on the 25th of March 1914. Notice was issued to her but returned unserved. Later on the notice was published in the *Leader* and on her failure to appear on the date fixed her name was entered as judgment-debtor. She cannot now come and object to the application for execution as she was made a party to the application for amendment.

Mr. *Gokul Prasad*, for the Respondent, was not called upon.

JUDGMENT.—The facts out of which this appeal has arisen are as follows:—In the year

SHANKAR KHAN DAT PURI *v.* SHEO SINGH.

1891 a suit for sale on a mortgage was brought against two persons, Gobind Singh and Jagmohan Singh, the minor son of Raghubir Singh. Of these two persons Jagmohan Singh pleaded that he was no longer a member of the family as he had been adopted into another family and had no interest in the mortgaged property. On the 18th of May 1892 the case was decided and an *ex parte* decree was granted against Gobind Singh who alone was held liable, and the suit as against Jagmohan Singh failed. In the decree it was set forth that if the mortgaged property was insufficient to satisfy the debt, the balance should be recoverable out of the other properties of the judgment-debtor who was the brother of Raghubir Singh. This decree was subsequently set aside, the suit was re-heard and on the 13th of June 1896 it was decreed as against Gobind Singh alone. On the 12th of June 1899 the decree was confirmed. On appeal on the 17th of July 1899 an order absolute was made, the mortgaged property was sold on the 22nd of March 1900 and the sale was confirmed on the 20th of July 1900. An application was made for a personal decree under section 90 of the Transfer of Property Act as against Gobind Singh alone. Either on the 22nd or 30th of September a decree was passed as against Gobind Singh alone and in execution of that decree certain property was attached.

*Musammat* Tilok Kunwar, the widow of Jagmohan Singh, raised objection to the attachment on the ground that the property was hers and was not liable to sale in execution of the decree. Her objection was allowed on the 4th of March 1911. No suit was brought by the decree-holder within the period of one year allowed by law and that order became final. On the 18th of September 1911 the decree-holder made an application, ostensibly for amendment of the decree which he had obtained in September 1900 against Gobind Singh. The application was to the effect that the name of *Musammat* Tilok Kunwar, the widow of Jagmohan Singh *alias* Man Kunwar, might be added in the decree as judgment-debtor. Notice was apparently issued but not served personally on the lady. A notification was then put in a local newspaper, the *Leader*, and an *ex parte* order was passed on the 25th of June 1913 under which her name was added to the decree. On the 2nd of March 1914 an application for execution was made as against Tilok Kunwar. She objected. The lower Court disallowed the application on the ground that it was barred by time. The decree-holder appeals. There is no explanation of the order of the 25th June 19 3, nor can it be understood on what ground it was made. There was a decree as against Gobind Singh alone and that application could in no way be treated as an application for amendment of the decree. It is quite clear that *Musammat* Tilok Kunwar had no information of the application and the whole step appears to be a pure fraud. There is not in fact, and there has not at any time been, a decree against Tilok Kunwar which can be put into execution against her. In our judgment she was fully justified in coming into Court and objecting to the matter, she having been made a party to the application. Apart from the question of limitation the Court below would have been fully justified in refusing to put the decree into execution on the simple ground that the name of *Musammat* Tilok Kunwar was fraudulently added to the decree without any decree having been passed against her. The appeal fails and is dismissed with costs, including fees on the higher scale.

*Appeal dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 66 OF 1915-16 OF BARA BANKI DISTRICT.

November 23, 1916.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

SHANKAR KHAN DAT PURI—APPLICANT—APPELLANT

*versus*

SHEO SINGH AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

*Landlord and tenant—Occupancy tenant, whether can relinquish rights without relinquishing land.*

SHANKAR KHAN DAT PURI *v.* SHEO SINGH.

An occupancy tenant cannot, without relinquishing the land, relinquish his rights as occupancy tenant in the land and still remain a tenant under some other tenure.

Appeal against the order of the Commissioner, Fyzabad, dated the 8th August 1916, reversing that of the Deputy Commissioner, Bara Banki, dated the 8th May 1916, upholding that of the Assistant Collector, Bara Banki, dated 5th January 1916.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

Babu *Basdeo Lal*, for the Respondents.

JUDGMENT.

HOLMS, S. M. (*November* 20, 1916).—This is an interesting case in which I am unable to accept the view of the law taken by the Commissioner. The facts may be stated briefly:—

At settlement one Bhawani Puri got a decree that he was entitled to hold certain land at a rent of revenue *plus* 5 per cent. His successor and *chela*, Sheo Dat Puri, had some litigation with the *lambardar* and his title as an occupancy tenant was established. The respondents say that Sheo Dat Puri died in 1902. Apparently there was a dispute as to succession between two rival *chelas*, and one of these, Har Dat Puri, obtained an order for the entry of his name as occupancy tenant in succession to Sheo Dat. To this litigation it is admitted that the *zemindar* was not a party. It seems, however, that Har Dat Puri had been assisted by the *zemindar* in the contest and on the 13th November 1902 he entered into an agreement relating to certain property described as groves, offerings (*charhawa*) and *sankalp*, the plots in dispute being included in the *sankalp* In the agreement he said that he admits the *zemindars* had a right to possession of all this property and that at the death of his *guru* they had possession of it and had given it to him and that they had a right to take it from him at any time. Har Dat Puri died on the 29th January 1914, and two months later the present appellant applied for his name to be entered in the papers as his *chela* and successor to the occupancy rights. In the short interval of two months the *zemindar* had possession of the plots in suit other than the groves. As regards the groves, the result of the Commissioner's order apparently was that the groves should be recorded in the name of the present appellant as occupancy tenant, which is somewhat inconsistent with the rest of his order. The Commissioner's decision also mentions a house, but both sides admit that the house is not one of the plots in dispute. In the twelve years between the execution of the agreement and Har Dat Puri's death the *zemindar* took no steps to turn out Har Dat Puri and the *zemindar* took no steps to have the entry in the *khetauni* corrected whereby Har Dat Puri was recorded as occupancy tenant. I have questioned the respondent and he says that between Sheo Dat Puri's death and Har Dat Puri coming in he did not obtain possession of the land in dispute. So the statement in the agreement that the *zemindar* had obtained possession of the property does not seem based on fact. There was no relinquishment of the land under section 20 of the Oudh Rent Act, and one of the questions which arises is—Can an occupancy tenant without relinquishing the land relinquish his rights as occupancy tenant in the land and still remain as a tenant under some other tenure? I should be loath to accept this contention, for it would undoubtedly open the door to fraud. The nature of the tenure created by the agreement, were it to hold good, is by no means clear, and it is argued that even under it Har Dat Puri remained an occupancy tenant though he agreed that the *zemindars* could take the land from him at any time. If this is the effect of the agreement it is certainly waste paper once he died and could not affect the right of his successor. It might be urged that as section 4 does not apply to the case of an occupancy tenant, he is at full liberty to contract himself out of the Act. Even so I am by no means sure that the agreement had the effect of putting an end to Har Dat Puri's occupancy tenure, and the fact of the *zemindar's* long acquiescence in the record of his name as occupancy tenant seems to support this view.

I would set aside the order of the Commissioner and restore that of the Assistant

Collector, respondents paying costs throughout and Rs. 40 Pleader's fees.

CAMPBELL, J. M.—I agree.

*Appeal allowed.*

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MADRAS HIGH COURT.
APPEAL No. 13 OF 1916.
August 31, 1916.
*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Srinivasa Aiyangar.
A. S. S. SUBBAIYA PANDARAM—
PLAINTIFF—APPELLANT
*versus*
MAHAMAD MUSTAPHA MARACAYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Trust—Purchase of trust properties in Court sale—Purchaser, whether can assign for value—Limitation Act (IX of* 1908), *s.* 10—"*Assign for valueable consideration*"—*Receiver, possession of, nature of—Adverse possession—Trespassers in succession—Title to properties, by whom acquired.*

One S. acquired large properties in the salt trade. In 1894 by an instrument of deed of trust he endowed certain charities with some properties and directed that a sum of Rs. 144 should be spent every year on account of the charity and directed the members of his family to act as trustees. In 1895 he died and *A.*, one of his sons, succeeded as trustee. In execution of a decree obtained against *A.* for debts due from his father the charity properties were attached and brought to sale. The first defendant became the purchaser and was in possession ever since 1898. In 1913, *A.* was removed from his trusteeship and *B.* was appointed in his place. In a suit by *B.* to recover possession of the properties on behalf of the charities:

*Held*, (1) that the suit was barred by limitation; [p. 55, col. 1.]

(2) that the power to apply Rs. 144 every year towards the charity properties was not a proprietary interest in the property alienated which could pass to an alienee but was only a power which the trustee had to exercise from time to time. [p. 52, col. 2.]

A purchaser in Court auction is an "assign for valuable consideration" within the meaning of section 10 of the Limitation Act, although he knows he is purchasing trust properties in which his alienor has only a limited interest. [p. 52, col. 2; p. 54, col. 1.]

The omission of the words 'good faith' from section 10 of the Limitation Acts of 1877 and 1908 is a clear indication that an "assign for valuable consideration" under that section need not have acted in "good faith"; it is enough if he pays valuable consideration. That intention is also clear from Article 134 of Schedule I of the Limitation Act. That Article does not apply to the case of a purchaser in Court auction. [p. 52, col. 2; p 54, col. 1.]

So long as the legal title is transferred to the purchaser and possession given to him, whether such title is transferred by virtue of the legal estate vesting in the trustee or mortgagee or by virtue of a special power, the transferee can take advantage of Article 134. So far as alienation of trust property is concerned there is no distinction between a private trust and a charity. [p. 54, col. 1.]

The possession of a Receiver must be regarded as possession on behalf of the party entitled to the property as finally settled in the suit and where the suit is against a defendant who was in possession and is dismissed, the possession of the Receiver must be regarded as on behalf of the defendant and it does not suspend the operation of adverse possession. [p. 54, col. 2.]

Where there are successive independent trespassers who have been continuously in possession for the statutory period, the first trespasser gets the title and not the last who is in possession at the time when the title of the real owner is extinguished. [p. 55, col. 1.]

**Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 61 of 1914.**

**FACTS appear from the judgment.**

Messrs. *T. R. Ramachandra Aiyar* and *G. S. Ramachandra Aiyar*, for the Appellant.—There is no limitation as against a fraudulent trustee. In case of fraud section 18 of the Limitation Act applies: *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (1).

Where a trustee having no power transfers, what is transferred is only the trustee's interest: *Radhanath Doss* v. *Gisborne & Co.* (2); *Ram Churn Tewary* v. *Protap Chandra Dutt Jha* (3); *Iswar Shyam Chand Jiu* v. *Ram Kanai Ghose* (4); *Narasaya Udpa* v. *Venkataramana*

(1) 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).
(2) 14 M. I. A. 1 at p. 15; 15 W. R. 24 (P. C.); 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687.
(3) 2 C. L. J. 448.
(4) 10 Ind. Cas. 683; 38 C. 526; 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 281; 21 M. L. J. 1145 (P. C.).

*Bhatta* (5); *Mahomed* v. *Ganapati* (6); *Kamalathammal* v. *Krishna Pillai* (7); *Singaram Chettiar* v. *Kalyanasundaram Pillai* (8), *Tholasinga Mudali* v. *Nagalinga Chetty* (9); *Velayuthan Pillai* v. *Subbaroya Pillai* (10).

In section 10 of the Limitation Act assign for value" does not include a fraudulent transferee, one who knew he was purchasing only a limited interest.

The suit is based on promissory title. I had a promissory title for three years and I had been disturbed by the Receiver and I was a minor. It was a cause of action against a minor. Receivership is not alleged in the plaint. Possession of a Receiver is for the person rightly entitled. *Sarala Sundar Dasi* v. *Sarada Prosad Sur* (11).

The Hon'ble Mr. *T. Rangachariar*, Messrs. *N. M. Malim Saheb* and *A. V. Viswanadha Sastri*, for the Respondents.

[SRINIVASA AIYANGAR, J.—What we want you to say is that when your client knew it was trust property and purchased it in that belief, what is its effect?]

The argument on the other side is that nobody is a purchaser for value, if he is not a *bona fide* purchaser for value. Section 10 says that he must not be an assign for valuable consideration. Section 18 uses the words "other than in good faith and for valuable consideration". Section 14 says "prosecuting in good faith." Wherever the Legislature wants "good faith" it expressly says so. Act IX of 1871 uses the words "in good faith" in connection with a purchaser. Act IX of 1871 Article 134, the words are "in good faith." The omission is deliberate, having regard to the substantive law on the subject. See section 64 of Act II of 1882; *Prasanna Venkatachella* v. *Collector of Trichinopoly* (12). The case of *Radhanath Doss* v. *Gisborne & Co.* (2) turned upon the construction of section 5 of Act XIV of 1859. See also *Damodar Das* v. *Lakhan Das* (13); *Madhu Sudan Mandal* v. *Radhika Prosad Das* (14); *Thiagaraja* v. *Rathnasabapathi Pillai* (15).

Mr. *G. S. Ramachandra Aiyar*, for the Appellant, in reply.

JUDGMENT.—This is an appeal by the plaintiff from the decree of the Subordinate Judge of Tanjore, dismissing the suit on the preliminary ground that it was barred by limitation.

The case has not been fully tried and except where the facts are admitted we have to take the statements in the plaint as true for the present purpose. The facts which raise the question in dispute may be shortly stated.

One Subbaiya Pandaram acquired large properties in a salt trade and settled certain of his properties in trust for charity by two instruments, dated 21st February 1890 and 13th December 1894 and marked as Exhibits B and B-1 in the case. He had an only son Arunachela, the 3rd defendant, and the plaintiff is his son. Subbaiya Pandaram constituted himself the Ist trustee and after his death his descendants according to seniority were to be trustees hereditarily. The trustee for the time being had the power, if he was so inclined, to take Rs. 144 a year for his own use out of the income of the charity properties and this power he had to exercise within three months after the close of the year. These are the only material terms of the trust-deeds for the present purpose. Subbaiya Pandaram died in 1895 and after his death a decree was obtained against Arunachela for a large sum said to be due from his father Subbaiya, and in execution

(5) 16 Ind. Cas. 53; 23 M. L. J. 260; 12 M. L. T. 218; (1912) M. W. N. 870.
(6) 13 M. 277; 4 Ind. Dec. (N. S.) 905.
(7) 8 Ind. Cas. 998; 20 M. L. J. 781; 9 M. L. T. 73.
(8) 26 Ind. Cas. 1; 1 L. W. 687; (1914) M. W. N. 735.
(9) 32 Ind. Cas. 265; (1916) 1 M. W. N. 28; 3 L. W. 19.
(10) 31 Ind. Cas. 398; 2 L. W. 989; 18 M. L. T. 424; (1915) M. W. N. 873; 39 M. 879.
(11) 2 C. L. J. 602.
(12) 33 Ind. Cas. 45; 38 M. 1064.
(13) 7 Ind. Cas. 240; 37 C. 885; 37 I. A. 147 14 C. W. N. 889; 12 C. L. J. 110; 20 M. L. J. 624; (1910) M. W. N. 303; 8 M. L. T. 145; 7 A. L. J. 791; 12 Bom. L. R. 632 (P. C.).
(14) 16 Ind. Cas. 927, 16 C. L. J. 349; 17 C. W. N. 873.
(15) 6 Ind. Cas. 992; 34 M. 284; 20 M. L. J. 421; 8 M. L. T. 134; (1910) M. W. N. 425.

of that decree the charity properties covered by both Exhibits B and B-1 were attached as the personal property of Subbaiya. The plaintiff objected to the attachment in the execution proceedings and on his objection being rejected instituted a regular suit to establish the right of the charity. While that suit was pending, the properties were sold in execution sale and purchased by the 1st defendant who obtained possession in March 1898, and he is in possession down to this date. Arunachela was removed from the trusteeship in July 1913 and the plaintiff is now the trustee under the deeds of endowment. The plaintiff now sues as trustee of the charity to recover possession of the charity properties, on the ground that their sale for the payment of the personal debts of Subbaiya was void and that the 1st defendant acquired no title by his purchase. He also charges the 1st defendant with knowledge that the properties which he purchased were charity properties. He says he was a minor till within three years before the action was brought. In these circumstances the 1st defendant having admittedly been in possession for over twelve years at the time when the action was brought and the charity represented by the then lawful trustee, the 3rd defendant who was under no disability, having been out of possession for over twelve years, the question is whether the suit of the plaintiff is not barred by the Statute of Limitations. The plaintiff says no, and his case is put by his learned Pleader in four different ways.

First he contends that the trustee for the time being is entitled to a beneficial interest to the extent of Rs. 144 a year out of the charity properties which can legally pass to an alienee and that the execution sale did, therefore, pass an interest to the 1st defendant which came to an end only on the removal of the 3rd defendant from the trusteeship and that, therefore, on the principle of the decision of the Privy Council in *Abhiram Goswami's* case (1), as explained in *Narasaya Udpa* v. *Venaktaramana Bhatta* (5) and followed in *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (16), he was entitled to bring his action within twelve years after he became trustee and that the possession of the 1st defendant did not become adverse to him or to the charity till the beneficial interest of the 3rd defendant, of which the 1st defendant was transferee, ceased. This contention is, we think, untenable. The Rs. 144 which the trustee at his option is entitled to take, is not an interest in the charity properties which can pass to an alienee and by virtue of which the alienee has a right to hold possession of the charity properties during the period when the alienor remains a trustee. It is really in the nature of a power which the trustee has to exercise from time to time and the trustee for the time being has no proprietary interest in the trust properties. This is the view which the plaintiff himself took, for in paragraph 4 of his plaint he says, "neither Subbaiya Pandaram nor his heirs have any proprietary right therein," that is, in the charity properties.

Next he contends that there was no limit of time for the institution of this suit and that section 10 of the Act applied. The argument, if we understood right, was that the 1st defendant was not an assign for valuable consideration, because though he is an assign and though he gave valuable consideration, he was not an 'assign for valuable consideration' within the meaning of the section as he had knowledge at the time of his purchase of the true nature of the property and that it could not be sold for the payment of the private debt of the trustee; in fact, unless he acted with good faith an assign for consideration is not an assign for consideration within the meaning of the section. There is no warrant for the introduction of additional words to qualify the plain meaning of the section and when we remember that the very words 'in good faith' which were found in the Limitation Acts of 1871 and 1859 were deliberately omitted in the Act of 1877, this introduction becomes still less permissible. The only authority cited is a case reported as *Ram Churn Tewary* v. *Protap Chandra Dutt Jha* (3). That decision was adversely criticised in a case reported as *Ram Kanai Ghosh* v. *Raja Sri Sri Sri Hari Narayan Singh Deo*

(16) 19 Ind. Cas. 694; 25 M. L. J. 393; 13 M. L. T. 498; (1913) M. W. N. 581; 38 M. 356.

(17) 2 C. L. J. 546.

*Bahadur* (17), where Mookerjee, J., examines the provisions of section 10 and the cognate Article 134. We entirely agree, if we may say so with respect, with that exposition. It is true that in a case reported as *Singaram Chettiar* v. *Kalyanasundaram Pillai* (8), the learned Chief Justice and Mr. Justice Hannay said they were unable to follow this ruling of Mookerjee, J., as they thought that it appeared to be at variance with the decision of the Privy Council in *Radhanath Doss* v. *Gisborne & Co.* (2) decided under the Act of 1859 and other decisions which followed it even after the words 'in good faith' were omitted in the Acts of 1877 and 1908. This observation is merely *obiter* and a careful perusal of the judgment of Mookerjee, J., shows that it is in no way inconsistent with the decision of the Privy Council or the other decisions which followed it, as we shall shew presently. Mr. Ramachandra Aiyar relied on this and certain other decisions of this Court as to the meaning of the word 'purchaser' occurring in Article 134 of the Act as throwing light on the meaning of the words 'assign for value' in section 10; see *Singaram Chettiar* v. *Kalyanasundaram Pillai* (8), *Tholasinga Mudali* v. *Nagalinga Chetty* (9). In these cases the meaning of the words 'puschaser' as applied to a purchaser from a mortgagee was discussed. It is clear that an assignee merely of the mortgagee's interest is not a purchaser within the meaning of the Article. It obviously means a person who purported to obtain an absolute title which the mortgagee purported to convey. Except in an English mortgage or a mortgage by conditional sale, the absolute title or the legal estate is not vested in the mortgagee; and except in a very limited class of mortgages the mortgagee has no power to sell the mortgaged property. (See section 69 of the Transfer of Property Act.) If, therefore, the assignee from a mortgagee knows that his assignor is only a mortgagee and that he could under no conceivable circumstances dispose of the absolute title, as for instance, in the case of an ordinary usufructuary mortgagee of properties outside the towns specified in section 69 of the Transfer of Property Act, that assignee may not be a purchaser within the meaning of the Article. That is the utmost extent to which the cases take us. Lord Cairns delivering the judgment of the Privy Council in *Radhanath Doss* v. *Gisborne & Co.* (2) said that a purchaser must mean 'some person who purchases that which *de facto* is a mortgage upon a representation and in the full belief that it is not a mortgage but an absolute title'. It is to be observed that 'good faith' is not said to be an element in the definition of 'purchaser.' That was another requisite required by the Act of 1859 to entitle a purchaser to take advantage of the shorter period of limitation prescribed by section 5 of the Act; the 'full belief' need not be a *bona fide* belief. This is made quite clear at pages 17 and 19 of the report. At page 17 His Lordship says: "In pleading a purchase for valuable consideration in this country, the very first averment in the plea is, that the person selling either was seized, or alleged that he was seized, for an absolute title, and then the plea goes on to say that being so seized, or alleging that he was so seized, he contracted to sell, and did sell and convey that absolute title, asserting it to be such, to the purchaser, who paid his money for that which was thus sold," and at page 19 after considering the terms of the deed of transfer by the mortgagee to the purchaser, in that case, he says: "Their Lordships can find in this deed no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property of the Maheeanwan Estate was a property which the vendor claimed to hold by what we should call in this country a fee-simple title." It will be seen that their Lordships nowhere say that if a transferee from a trustee or mortgagee knew that his vendor was a trustee or mortgagee he cannot be a 'purchaser' within the meaning of section 5 of the Act of 1859 corresponding to Article 134. They merely use that fact as an element to be taken into consideration in determining the question whether in fact the transferee purported to purchase anything more than the mortgagee's interest. It must be remembered that a mortgagee as such has a transferable beneficial interest in the mortgaged property while a trustee as such has no such interest, though a trustee may also be a beneficiary under the trust. Both in the case of a trustee and mortgagee the purchaser may have knowledge that his vendor is only a trustee

or mortgagee; but they may purport to transfer the absolute title in the exercise of a power of sale and the vendee may purchase it, knowing or having reason to believe that the trustee or the mortgagee was exercising that power mischievously or even fraudulently; at the same time he may bargain for and get a transfer of the absolute title. There can be no doubt that the purchaser in such a case obtains the sale in the full belief that what he is getting is a transfer of the absolute title, though at the same time he may know that if proceedings are taken against him he may not be able to retain his purchase; Article 134 in fact assumes that the purchaser in possession could not resist a suit for recovery and that his title by purchase is not good. If good faith were required, the purchaser except in a very small number of cases (as for example where the transfer is made in the exercise of a power *boda fide* assumed to exist by both parties though in fact there is no such power) would get a good title without the assistance of any law of limitation. So long as the legal title is transferred to the purchaser and possession given to him, whether such title is transferred by virtue of the legal estate vesting in the trustee or mortgagee or by virtue of a special power, the transferee can take advantage of Article 134. So far at any rate as alienation of trust property is concerned, there is no distinction between a private trust and a charity in this matter. The decision of the Privy Council in *Damodar Das* v. *Lakhan Das* (13) appears to be conclusive. There the two disciples of a deceased Mahant divided the properties of the *mutt*, which were trust properties to their knowledge, the junior *chela* obtaining a portion. It was held that the possession of the junior *chela* was adverse to the senior *chela* and the trust which he represented and the title of the charity was barred after twelve years of such possession. We must, therefore, disallow this contention.

The next contention is that the possession of the 1st defendant was not continuous for twelve years. It was said that in a previous suit between the parties (to which we shall have to refer hereafter on another point) the 1st defendant was appointed Receiver by the Court and that during the period when the 1st defendant was in possession as Receiver, his possession could not be said to have been adverse to the trust. In the first place there is no allegation in the plaint that the 1st defendant ever lost his possession after he got it in March 1898. Whether this so-called interruption was before the 1st defendant perfected his title by twelve years' possession or after, we do not know. As to the terms and conditions on which the 1st defendant was appointed, there is no statement. Mr. Ramachandrier says that his client will supply all these omissions at the trial, but the question is not one of proof, but of pleading. Assuming, however, that the 1st defendant was in possession as Receiver for some time during the pendency of the former suit, that suit having been admittedly dismissed, the 1st defendant now, who was also the defendant in that suit, could not be said to have lost his possession during his Receivership. It is not contended that the 1st defendant quitted possession or lost possession and that nobody was in possession during that period so as to revive the possession of the trust as in the case of *Trustees and Agency Company* v. *Short* (18). The possession of the Court through the Receiver can only be on behalf of the party entitled as finally settled in that suit and as the suit was dismissed, the possession must be deemed to have been on behalf of the 1st defendant himself, he being the successful party.

These are the points taken in respect of the claim of the plaintiff as the lawful trustee of the charity in succession to Arunachela, his father, who had been removed from the trusteeship in 1913. Article 134 of the Limitation Act has been held by this Court to be inapplicable to a purchaser in Court auction, *Ahamed Kutti* v. *Raman Nambudri* (19). We have held that section 10 does not apply. The only other Articles applicable are Article 142 or 144. Whichever Article applies, the 1st defendant having been in possession without any title whatsoever (for the case of the plaintiff is that the execution sale was absolutely void and conveyed no title

(18) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(19) 25 M. 99; 11 M. L. J. 323.

whatever to the 1st defendant) the title of the trustee Arunachela and of the charity which he represented was extinguished [*Damodar Das* v. *Lakhan Das* (13)]. The plaintiff as a successor has no fresh cause of action. The plaintiff's suit then as the successor of Arunachela in the trusteeship fails and must be dismissed.

But the plaintiff contends—that is the fourth point argued by Mr. Ramachandrier—that he has put forward an alternative claim to the possession of the lands on the ground of his prior possession, even when Arunachela was the trustee, and that the 1st defendant in fact dispossessed him when he (the 1st defendant) obtained delivery in March 1898 and inasmuch as he, the plaintiff, was a minor at the time of the dispossession and within three years of the institution of the suit, his claim to recover possession, treating his prior possession as the root of his title, is not barred. This raises an interesting question as to the rights of successive independent trespassers who have been continuously in possession, if and when the title of the real owner is extinguished. The weight of authority is in favour of the view that in such a case the first trespasser gets the title and not the last who was in possession at the time when the title of the real owner became extinguished. It is now well settled that a person in possession without a title has the right to maintain his possession against all the world except the rightful owner; that he can sue in ejectment and recover possession – not merely in trespass—from any person who subsequently dispossesses him, unless the latter is the real owner or claims under him or justifies under his authority; proof by the defendant that the real title was outstanding in a third party would be no defence. In fact the prior possession is itself a root of title and the prior possessor has all the rights of a true owner except, of course, against the owner himself: see *Asher* v. *Whitlock* (20), where *Doe* v. *Barnard* (21) is explained; *Perry* v. *Clissold* (22), *Sundar* v. *Parbati* (23), *Narayana Row* v. *Dharmachar* (24). It is equally well settled that the effect of the extinction of the title of the real owner is not to transfer that title to the person in possession at the time of such extinction, though it is sometimes said that the adverse possessor for the requisite period obtains a title by statutory transfer. Section 28 of the Limitation Act like section 34 of 3 and 4 Will. IV, Ch. 27, merely extinguishes the title of the real owner, and the person in possession who had a right to retain that possession against all but the real owner in consequence of the extinction of the title of the real owner cannot be ousted thereafter even by the real owner and in that sense acquires a title by Statute; but it is not an involuntary transfer by Statute of the estate of the rightful owner, though the title acquired by the trespasser may have the same legal character as that lost by the rightful owner (See Dart's Vendors and Purchasers, Volume I, page 473) *cf.* *Tichborne* v. *Weir* (25) with *In re Nisbet and Potts' Contract* (26). From this it follows that if a prior possessor had a right to eject a subsequent trespasser so long as the title of the rightful owner was outstanding, that right could not cease to exist because that title becomes extinct by lapse of time. If then the prior possessor can eject the subsequent trespasser the title must be in the first trespasser unless, of course, the subsequent trespasser had obtained a title by adverse possession against the previous trespasser. This is the view taken by Sir F. Pollock (see page 95 of his Essay on Possession), by Dart (Vendors and Purchasers, page 474), by Mr. F. H. Carson (Real Property Statutes, page 80) and by Mr. Lightwood, (Possession of Land, page 275). The case of *Asher* v. *Whitlock* (20) appears to decide this very point as will be seen from the various dates given in the report. The title of the real owner appears to have become extinguished by the lapse of twenty years when the widow of the original possessor

(20) (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26.
(21) (1849) 13 Q. B. 945; 18 L. J. Q. B. 306; 13 Jur. 915; 116 E. R. 1524; 78 R. R. 564.
(22) (1907) A. C. 73; 76 L. J. P. C. 19; 95 L. T. 90; 23 T. L. R. 232.
(23) 12 A. 51; 16 I. A. 186; 5 Sar. P. C. J. 448; 6 Ind. Dec. (N. S.) 782 (P. C.).
(24) 26 M. 514.
(25) (1893) 67 L. T. 735; 4 R. 26.
(26) (1906) 1 Ch. 386; 75 L. J. Ch. 238; 54 W. R. 286; 94 L. T. 297; 22 T. L. R. 234.

(who had married again) and her second husband were in possession; at that time she had no title to remain or retain possession as her interest ceased by her second marriage and her daughter was the person entitled. The daughter's heirs succeeded in ejecting the second husband of the widow, which they could not have done if the title vested in the widow or her second husband, who were the subsequent trespassers in possession at the time when the title of the real owner was extinguished. The passage from Pollock on Possession was cited with approval by Lindley, L. J. (as he then was) in *Dalton* v. *Fitzgerald* (27). The only authority against this view are some observations of Lord Romilly in *Dixon* v. *Gayfere* (28), from which it appears His Lordship was of opinion that in law the person last in possession would acquire the legal title. The actual decision in the case does not touch the present question. These observations were dissented from in *Asher* v. *Whitlock* (20) where Cockburn, C. J., said, "The Master of the Rolls may be right in equity, but I doubt his being right in law." It appears that when the Limitation Bill of 1877 was drafted, it was proposed to add a section dealing with this matter but it was dropped (see Mitra, Volume I, page 445). On principle and on the authorities we think the plaintiff had a right to recover possession on his title based on his prior possession, and that right is not barred if the facts are as alleged by him. Mr. Rangachariar, however, contended that though this may be so in a case where the plaintiff claims the property beneficially, in this case as he sues to recover the property for the charity and inasmuch as the charity is barred by reason of the twelve years' adverse possession suffered by the lawful trustee, the plaintiff's suit is barred. We think this is not correct. For the purpose of limitation the plaintiff must be taken to be suing for a personal right, though no doubt if he recovers possession of the properties he may have to hold them for the charity. The charity is barred and can be barred only when its trustee or the manager is barred, as the charity can sue only through a natural person [see *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (29)]. Mr. Rangachariar did not contend that, as the 1st defendant obtained possession claiming under a sale in execution of a decree against the then trustee, (which sale must on the allegations in the plaint be taken to be a nullity) the 1st defendant could have resisted any suit for possession by the plaintiff by virtue of his prior possession.

This conclusion of ours would necessitate a remand of the suit for a trial of this claim. But Mr. Rangachariar contends that as this very claim based on prior possession was put forward as a ground of claim in a previous suit, Original Suit No. 16 of 1907, between the same parties, where also the present plaintiff asked for the same reliefs as he asks now and as that suit was dismissed, the present claim is barred by the former adjudication. Although this question was not dealt with by the lower Court, in order to avoid delay we decided to hear parties on this point in appeal and dispose of it here as the question is one of pure law. It depends entirely on the effect of the former judgment, Exhibit G. The plaint in the suit has also been read to us by the appellant and we find the material portions correctly set out in the judgment G. In paragraph 12 of the plaint in that suit the present plaintiff in setting out his various titles for the reliefs claimed there set up this very title of prior possession. The only relief asked for was possession of the properties sued for from the present defendants Nos. 1 and 2, who were also defendants Nos. 1 and 2 in that suit. The father Arunachela was made a party but no relief was asked against him and no relief by way of recovery of possession could possibly be asked as admittedly he was not in possession. The Subordinate Judge of Negapatam in whose Court that suit was filed, the same Court in which the present suit also was instituted, held that the prior possession of the plaintiff, even if true, gave him no cause of action to recover possession

(27) (1897) 2 Ch. 86 at p. 90; 66 L. J. Ch 604; 76 L. T. 700; 45 W R. 685.

(28) (1853) 17 Beav. 421; 23 L. J. Ch. 60; 51 E R. 1097; 99 R. R. 218.

(29) 32 C. 129; 31 I. A. 203; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698.

of the properties till that prior possession was perfected under the Statute of Limitation against the real owner, and disallowed the claim. Whether he was right or wrong in so holding, the decree dismissing the plaintiff's suit based *inter alia* on that claim is *res judicata*, and obviously prevents the plaintiff from again putting forward the same claim. The appellant agrees that this may be so, but as in this case, Arunachela who was the lawful trustee was a party to that suit, that decision cannot be *res judicata*; the argument is that as the plaintiff cannot recover against the lawful owner by virtue of prior possession and he having been a party to that suit, that decision was perfectly right and that that decision really held that the prior possession was not good as a root of title against a trespasser in the presence of the lawful owner. We are unable to accept this contention. It will be seen from the pleadings and the judgment in the previous suit, that though Arunachela was a party to that suit, he was only a nominal party; not even a declaration of title against him was asked—not that this would make any difference for the application of the principle of *res judicata*. The cause of action on the claim of prior possession was against the parties in possession and against them alone and it is against them that the suit was dismissed. We, therefore, think that this claim was not available to the plaintiff in the present suit.

Mr. Ramachandrier also contended that the respondent is not entitled to take this point now as he did not raise it in his written statement and if he had raised it then, the appellant might have avoided the plea by pleading fraud, negligence or other ground of avoidance of the previous judgment. There is no basis for this contention. For the defendants have pleaded this very judgment as *res judicata* in paragraph 17 of their written statement and an issue (issue No. 10) has been raised on this. The plaintiff never pleaded that the previous judgment was not binding on him. We must, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

V. R. P.

## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION No. 185 OF 1916.

June 20, 1916.

*Present*:—Mr. Stuart, J. C.

KASHMIRI BANK, LTD., FYZABAD—APPLICANT

*versus*

*Rai* GOKUL CHAND *Bahadur* AND OTHERS—OPPOSITE PARTY.

*Companies Act* (*VII of* 1913), *s.* 153—*Creditors and share-holders, meeting of—Arrangement—Acceptance by creditors not present at meeting, effect of—Majority.*

In a meeting held under the provisions of section 153 of the Companies Act, the written acceptance of the arrangement by those share-holders and creditors who are not present, either in person or by proxy, cannot be taken into consideration to make up the majority in number representing three-fourths in value of the share-holders and creditors. [p. 58, col. 1.]

Application under section 153, Act VII of 1913 (Indian Companies Act), instituted on the 12th April 1916.

Mr. *S. N. Sinha*, for the Applicant.

Babus *Ishwari Prasad, Girja Saran Lal* and *Lachhman Prasad Varma*, for the Opposite Party.

JUDGMENT.—An application was made by certain Directors of the Kashmiri Bank, Limited, a registered Company which had its registered office at Fyzabad, on 31st January 1916 to Mr. Lindsay, Judicial Commissioner, Oudh, under the provisions of section 153 (1) of the Indian Companies Act of 1913, requesting that the Court might order a meeting of creditors and share-holders of the Bank to consider an arrangement for private liquidation. The Judicial Commissioner passed an order on 2nd February 1916 directing that such a meeting should be held on 3rd April 1916. That meeting has since been held and this Court is now asked to sanction the arrangement at which that meeting arrived. Certain objections have been taken.

I find that there was unfortunately a fatal flaw in procedure which has vitiated the proceedings of that meeting. Section 153 (2) of the Indian Companies Act of 1913 lays down that before a Court can sanction such an arrangement, it must be approved by a majority in number representing three-fourths in value of the creditors or class of creditors, or members, or class of

members, as the case may be, present either in person or by proxy at the meeting. On looking at the facts I find that there were present six share-holders, five in person and one by proxy, who represented 320 shares out of 5,000 shares and there were further present eleven persons who stated that they held fixed deposits to the value, as far as I can ascertain, of Rs. 16,218-7-5 out of a total amount of fixed deposits to the value of Rs. 97,231-7-6. I cannot trace two of the persons so present as holding any fixed deposits at all. This may possibly be due to misdescription of their names, but in any circumstances it may be taken that at the outside the persons holding fixed deposits who were present at the meeting did not represent more than Rs. 20,000 out of the total sum of Rs. 97,231-7-6. There are further holders of Savings Bank deposits aggregating Rs. 2,950-14-6. None of these persons were present. There were thus in all eleven alleged holders of fixed deposits present in person. No holders of fixed deposits were present by proxy. It is clear that the majority representing three-fourths in value of creditors present either in person or by proxy was not obtained. The learned Counsel in support of the petition has urged that many other creditors who were not present in person or by proxy wrote to say that they were ready to accept the arrangement, and that if the amount of the holdings of these creditors be added to the amount of the holdings of those present, the requisite majority will be obtained. But unfortunately the provisions of the section do not provide for the inclusion of holdings where the holders have neither been present in person or by proxy and the acceptance of the arrangement by such persons is of no effect.

For the above reasons, I reject this application. It will, of course, be open to the Directors to come up again under section 153 (1) asking for permission to hold another meeting at which the same proposals can be put up, and then endeavour to ensure that the arrangement shall be accepted in such a manner as will enable the Court, if it considers desirable, to sanction the same.

The Bank will pay its own costs and those of the objectors.

*Application rejected.*

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 198 OF 1916.

March 27, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KALLU—DEFENDANT - APPELLANT

*versus*

BHAGIRATH LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Accounts, suit for—Acknowledgment, suit on basis of, whether maintainable—Civil Procedure Code (Act V of 1908), O. XLI rr. 23, 25—Remand—Preliminary point—Decision on some issues—Order, proper.*

A suit for a sum of money due upon accounts, stated between the parties and for money lent, can lie on the basis of a mere acknowledgment. [p. 59, col. 2.]

*Bhola Nath* v. *Net Ram*, 3 A. J. L. 800, A. W. N. (1906) 185, followed.

Under Order XLI, rule 23, of the Civil Procedure Code, 1908, it is only when the Appellate Court reverses the order of the Court of First Instance on a preliminary point that the suit should be remanded [p. 59, col. 2.]

Therefore, where an Appellate Court decides some of the issues in a case and leaves the other issues to be decided by the Trial Court, the case should be remanded under Order XLI, rule 25, and not under Order XLI, rule 23. [p. 59, col. 2.]

First appeal from an order of the Additional District Judge, Meerut, dated the 12th September 1916.

FACTS.—The plaintiffs brought a suit on the basis of *bahi khatas*. They alleged that defendant No. 1 as head of a joint Hindu family carried on a money-lending business with him; that in a certain year defendants Nos. 1 and 2 having admitted and accepted Rs. 585 as due by them on account of a debt under a bond executed by defendant No. 2 struck a balance on the account book of the plaintiffs and having affixed a stamp label, put their thumb impression to it; that subsequently defendant No. 1 used to borrow money, as parol debts; that on a subsequent date, defendant No. 1 after understanding the account and having found Rs. 1,611-8-0 as due by him affixed his thumb impression on the stamp label; that finally on the 1st of August 1914 defendant No. 1 having accepted Rs. 1,711-8-0 as due by him affixed a stamp label and put his thumb impression to the account book of the plaintiffs; and that after this date the defendant No. 1 borrowed Rs. 142-12-0 on different dates, and the sums were entered in the plaintiffs' account books. The plaintiffs, therefore, claimed Rs. 2,420-2-0. The defence was that

the suit was not legally maintainable; that the finger impressions had been obtained fictitiously and without payment of consideration; that the claim was barred by limitation and that defendants Nos. 2 to 7 were not liable.

The Court of Frst Instance dismissed the suit on the ground that a mere acknowledgment could not form the basis of a suit. On appeal the lower Appellate Court held that the suit was maintainable. It further held that the thumb impressions had not been proved to have been obtained in the manner alleged by the defendants. The case was remanded under Order XLI, rule 23, Civil Procedure Code, for the decision of the third issue only.

The defendants appealed to the High Court.

Mr. *Lakshmi Narayan*, for the Appellant.—No suit can be maintained on the basis of a mere acknowledgment, unless such acknowledgment amounts to a new contract. The learned Judge is in error in assuming that the suit is based on the whole accounts. I rely on *Ganga Prasad* v. *Ram Dayal* (1). The facts of this case are very similar to the present case. The case of *Bhola Nath* v. *Net Ram* (2) is distinguishable. So far as the sum of Rs. 585 is concerned, it is clearly only an acknowledgment of the debt due from defendant No. 2.

Moreover, the order of remand is defective. The Court of Frst Instance decided the case on a preliminary point. The lower Appellate Court has remanded the case for the trial of *one* issue only. No doubt it decided the other issues incidentally, but the defendants have been greatly prejudiced thereby. The case ought to have been remanded for the trial of the issues left undecided by the first Court.

Dr. *Surendra Nath Sen*, for Mr. *N. Upadhya*, for the Respondents, was not called upon.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed a sum of money as being due upon accounts stated between them and the defendants and for money lent. The Court of First Instance dismissed the suit apparently upon the sole ground that the suit could not be maintained on the entries in the *bahi khata*. It had framed three issues, namely (1) "Is the amount claimed due to the plaintiffs on accounts and did the plaintiffs obtain defendant Kallu's finger impression on account 1968-1971 *Sambat* by way of *farzi* and without payment of consideration? (2) Is the whole claim or any part of the same barred by time? (3). Are the defendants Nos. 2 to 7 entitled to be exempted or are they liable for the amount claimed?" Witnesses had been called by both parties and it is quite clear that the learned Additional District Judge on appeal was against the defendants on all the issues except the third. The main contention was as to whether or not the plaintiff's suit lay as alleged in the plaint. The Court of First Instance on the authority of *Ganga Prasad* v. *Ram Dayal* (1) had dismissed the claim. The lower Appellate Court overruled the objection and referred to the later case of *Bhola Nath* v. *Net Ram* (2). We think the lower Appellate Court was correct in the view it has taken of the law, and we also agree with the reasons and think that the later authority is the one which should be followed in the present case. The present appeal complains that the Court ought not to have remanded merely the third issue but ought, after deciding the preliminary point, to have remanded the entire case. There is some force in this contention. Under Order XLI, rule 23, it is only when the Appellate Court reverses the Court of First Instance on a preliminary point that the suit should be remanded. If the lower Appellate Court had decided itself, on the materials it had, all the issues except the third issue and if it was not prepared to decide this issue, what it should have done was to have referred the third issue to the Court of First Instance under Order XLI, rule 25, and not remanded the case under Order XLI, rule 23. We think that the Court did decide the first two issues and the only issue left undecided was the third issue. We accordingly allow the appeal to this extent, that we send back the case to the lower Appellate Court with directions that it must either decide the third issue itself (if there are materials on the record to enable it to do so), or refer an issue to the Court of First Instance, and on the return made to that issue finally dispose of the

(1) 23 A. 502; A. W. N. (1901) 150.
(2) 3 A. L. J. 800; A. W. N. (1906) 185.

appeal. Costs here and hitherto will be at the discretion of the Court disposing of the case.

*Appeal partly allowed.*

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 57 OF 1915-16 OF SITAPUR DISTRICT.

November 24, 1916.

*Present:*—Mr. Holms, S. M., and Mr. Campbell, J. M.

*Musammat* LIHAZUNNISSA KHANAM AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

DADHICH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Oudh Rent Act (XXII of 1886), s. 107 G, H—Rent free grant, sale of—Purchaser, position of.*

The purchaser of a rent-free grant cannot, under any circumstances, acquire a title superior to that of his vendor. [p 60, col. 2; p. 61, col. 2.]

*Ghulam Sarvar* v. *Muhammad Ambar Ali Khan*, 25 Ind. Cas. 594; 1 O. L. J. 325, dissented from.

Appeal from the decree of the Commissioner, Lucknow, dated the 27th August 1915, upholding the order of the Deputy Commissioner, Sitapur, dated the 12th May 1915, upholding the order of the Assistant Collector, Sitapur, dated the 19th October 1914.

The Hon'ble Pandit *Gokaran Nath Misra*, Babu *Bisheshwar Nath Srivastava* and *Lachhman Prasad Varma* and Pandit *Bansi Dhar Misra*, for the Appellants.

Mr. *St. George Jackson* and Babu *Ishwari Prasad*, for the Respondents.

JUDGMENT.

CAMPBELL, J. M.—(*April* 20, 1916).—I am unable to agree with the Commissioner's finding in this case. He has himself decided in Appeal No. 88, *Lihazunnisa* v. *Syed Nadir Mirza*, on November 25th, 1915 that the rent-free grant in favour of Akbari Begum (from whom the present respondents derive their title) was not proved to be fifty years old and that, therefore, her descendants should be assessed to rent as ordinary tenants under section 107 G, and not as under-proprietors under section 107H. The present respondents are purchasers from Akbari Begum's descendants and because they are found to have acquired their position for valuable consideration, it is held that they have under-proprietary rights under section 107H while their vendors have only ordinary tenants' rights under section 107G. In other words the vendee has a better status than his vendor. This is the absurd situation arrived at by accepting the findings in Appeal No. 28 of 1912-13 [*Ghulam Sarvar* v. *Muhammad Ambar Ali Khan* (1)], as a sound exposition of the existing law. I have repeatedly disagreed with it myself, and think that my colleague holds similar views. I am of opinion that the purchaser of a rent-free grant cannot under any circumstances acquire a title superior to that of his vendor.

I would, therefore, set aside the orders of all the lower Courts and, finding that the present respondents have no title superior to that of ordinary tenants, would direct that the land held by them be assessed to rent under section 107G. The Assistant Collector and Deputy Commissioner both held that the respondents had entirely failed to establish any title to proprietary rights. This finding was not appealed against to the Commissioner, and the Deputy Commissioner's order is now final. It is now argued for respondents that because the Commissioner summarily dismissed plaintiffs-appellants' appeal, they were prevented from putting in a cross-objection raising this question of proprietary title and that, therefore, the case should be remanded to the Commissioner to enable it to be raised. I never heard such a preposterous argument and decline to entertain it. In any case I entirely agree with the Assistant Collector and Deputy Commissioner's views on the subject. I would give the appellant his costs in all Courts and Rs. 50 Pleader's fees.

HOLMS, S. M.—When my colleague's judgment came before me I fixed a date to hear Counsel of both sides, as my colleague wishes to dissent from a previous decision of the Board, though not a selected decision, namely that of Sir Duncan Baillie and Mr. Tweedy in *Ghulam Sarvar* v. *Muhammad Ambar Ali Khan* (1), dated 12th Decem-

(1) 25 Ind. Cas. 594; 1 O. L. J. 325.

ber 1913. Before going into that question I will deal first with a further contention of the respondent that he has a proprietary title in the land in suit. The Assistant Collector decided that he had no such title and the Deputy Commissioner upheld this order. The present respondent did not appeal to the Commissioner against the decisions of the lower Courts and ordinarily could not raise this point now. It is urged that had the Commissioner fixed a date for the hearing of parties in the appeal before him he could have raised this point by a cross-objection, but the Commissioner heard the appeal summarily without sending for parties. As he did not appeal to the Commissioner against the decision of the two lower Courts that he had no proprietary title, I agree with my colleague that the question cannot be raised now.

The interpretation of the words in question of section 107H is not an easy matter. The wording of section 158 of the Agra Tenancy Act in this respect is almost precisely the same as that of the section of the Oudh Act. Sir Duncan Baillie in his judgment writes that a similar question has frequently arisen under section 151 (*b*) of the Agra Act and has been decided. To begin with the wording of section 151 (*b*) of the Agra Act, is not precisely the same as that of section 158. Search has been made for the decisions to which Sir Duncan Baillie refers, either of the Board or of the High Court, but they cannot be found, and the Counsel in the present case are unable to trace them. Sir Duncan Baillie writes:—"I think it reasonable to consider that the law intended to protect all persons who in good faith paid good money for the acquisition of a right which they regarded as valuable and transferable, and which would have been valuable and transferable except for the operation of the special law as to rent-free tenures." I rather take the view of Mr. Tweedy who wrote:—"It may be doubted whether the Legislature intended the protection contemplated by the Senior Member, for the doctrine of *caveat emptor* applies and the purchaser is bound to make sure of the title before he makes the bargain."

Apart from these arguments the only reason for the decision of my predecessors was that the words "acquired for valuable consideration" are plain and to hold as my colleague now wishes to hold would be to read before these words the word "originally."

The appellant on the other hand urges that the words of the section should be so interpreted as not to violate the well-known rule of law that a vendee cannot have a better title than his vendor, and argues that, reading the whole clause together, which begins by referring to the acquisition in consideration of the loss of right previously vested in the grantee and goes on to refer to acquisition by a written instrument for a valuable consideration, the meaning obviously is that the second acquisition must also be by the grantee. For this point of view there is a good deal to be said. It has been argued that the word "acquire" necessarily implies that the vendor must have had a transferable interest which is capable of passing to a purchaser, and that a rent-free interest which can at once be put a stop to by action of the original grantor cannot be said to be such an interest. This argument does not seem to be altogether conclusive.

On the whole, however, I agree with the view taken by my colleague which is the view I took as Commissioner of Fyzabad when the decision in *Ghulam Sarvar's* case (1) was not known to me.

I concur in the proposed order.

*Appeal allowed.*

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## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1031 OF 1915.

June 22, 1916.

*Present*:—Mr. Justice Shadi Lal.

GIANI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

*Musammat* MARI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Succession—Alienation by widow—Widow's estate, nature of—Proprietary body, rights of*—Riwaj-i-am, *entry in, construction of—Succession—Sister and sister's son.*

A widow's estate is only limited for the benefit of reversioners and where there are none she is, to all intents and purposes, an absolute owner; and the

onus is upon the proprietors of the *patti* to establish their right to contest an alienation by such a widow.

*Allah Ditta* v. *Gauhra*, 23 Ind. Cas. 127; 3 P. R. 1914; 129 P. L. R. 1914, followed.

A *riwaj-i-am* contained an entry to the effect that if a man dies intestate leaving no relations, his immoveable property devolves on all the landowners of the *thula* or *panna* in which the land of the deceased is situate:

*Held*, that the entry was not intended to be an absolute provision excluding a sister or a sister's son from succession and it was not contemplated that they should yield to the proprietary body of a heterogeneous character.

First appeal from the decree of the District Judge, Hissar, dated the 31st July 1914.

Mr. *Sundar Das*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Chajju, a *Jat* of *Mauza* Kheri Gangan, Tahsil Hansi, District Hissar, who was the last male proprietor of the land in dispute, died leaving a widow *Musammat* Mari. It appears that she adopted one Hira, her husband's sister's son, and got the estate mutated in his favour on the 27th February 1908. The plaintiffs, who are *Jats* of another *got* and proprietors in the *thula*, claimed a declaration that the adoption and the mutation consequent thereupon should not affect their rights in the estate on the death of *Musammat* Mari.

The point for determination is whether the proprietors in the *thula* have any *locus standi* to contest the widow's power to adopt a son to her husband. Now it has been laid down in *Allah Ditta* v. *Gauhra* (1) that the onus is upon the proprietors of the *patti* to establish their right to contest an alienation by a widow and that a widow's estate is only limited for the benefit of reversioners, and where there are none, she is, to all intents and purposes, an absolute owner. Upon the present record there is not an iota of evidence to discharge this onus. It is true that in answer to question 71 the proprietors stated that "if a man dies intestate leaving no relations, his immoveable property devolves on all the land-owners of the *thula* or *panna* in which the land of the deceased is situate." It must, however, be remembered that in the present case the proprietors of the *thula* are not a compact body, but are of miscellaneous tribes, and I do not think that this provision of the *riwaj-i-am* was intended to apply to the case of a *thula*, in which the proprietors have no community of interest.

Further, I am not prepared to hold that, even in the absence of the adoption, the proprietors would be entitled to succeed to the land in preference to the deceased's sister's son. The entry in the *riwaj-i-am* excluding a sister or a sister's son from succession was not intended to be an absolute provision, and it was hardly contemplated that they should yield to the proprietary body of a heterogeneous character. No instance of the succession of the proprietors of a *thula* as against a sister or sister's son is forthcoming, and the *riwaj-i-am* does not, therefore, create a presumption in favour of the plaintiffs, *vide. inter alia*, *Devi Singh* v. *Premi* (2). In fact, in at least two judgments of this Court *Bishen Singh* v. *Bhagwan Singh* (3) (*Jats* of Ambala District) and *Ballu* v. *Gur Dyal* (4) (*Girths* of Kangra District) it has been held that a sister's son excludes the village proprietary body.

Upon both the grounds set out above the plaintiffs' claim must be dismissed. I accordingly confirm the decree of the lower Court and dismiss the appeal with costs.

*Appeal dismissed.*

(1) 23 Ind. Cas. 127; 3 P. R. 1914; 129 P. L. R. 1914.

(2) 9 Ind. Cas. 683; 11 P. R. 1911; 83 P. L. R. 1911; 57 P. W. R. 1911.

(3) 28 P. R. 1904; 64 P. L. R. 1904.

(4) 95 P. R. 1905; 47 P. L. R. 1906.

SUKHPAL SINGH *v.* BRIJ KISHORE.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 127 OF 1915-16 OF RAE BARELI DISTRICT.

July 27, 1916.

*Present*:—Mr. Holms, S. M., and Mr. Lovett, J. M.

SUKHPAL SINGH—DEFENDANT—APPELLANT

*versus*

*Lala* BRIJ KISHORE—PLAINTIFF—RESPONDENT.

*Oudh Rent Act* (*XXII of* 1886), *s.* 33—*U. P. Land Revenue Act* (*III of* 1901), *s.* 79—*Enhancement of rent—Tenant with heritable non-transferable rights—Settlement Court, order by—Judicial decision—Occupancy tenant.*

The decision by the Settlement Court holding a tenant to have heritable and non-transferable rights is a judicial decision as contemplated by section 79 of the U. P. Land Revenue Act; and the rent of a tenant holding under such a decision cannot be enhanced under section 33 of the Oudh Rent Act, although he be recorded as an occupancy tenant in the village papers.

**Appeal from the decree of the Commissioner, Lucknow, dated the 6th March 1916.**

JUDGMENT.

HOLMS, S. M.—(*July* 22, 1916).—The appellant bases his objection to the suit for enhancement of rent as a tenant with a right of occupancy under section 33 of the Oudh Rent Act, on the ground that he is a holder of a heritable non-transferable lease held under a judicial decision and that, therefore, under section 79 of the Land Revenue Act his rent can only be enhanced at the revision of Settlement. Nothing in section 79 applies to rent payable by a tenant with a right of occupancy under the provisions of the Oudh Rent Act. Now, the appellant's predecessors were held to have a heritable and non-transferable right in the Settlement Court on 17th December 1870 at the time of the first Regular Settlement, and this is a judicial decision. It is clear from a perusal of the judgment that they are not held to have the rights of occupancy which were conferred by the section of the Rent Act of the time (XIX of 1868), which were equivalent to those in section 5 of the present Act. The respondent urges his objection to this view that the judicial decision contemplated in section 79 was a judicial decision prior to any Oudh Rent Act at all; but I can find no authority for this contention. The application of section 79 of the Land Revenue Act to the present appeal does not seem to have been considered by the learned Commissioner.

I would, therefore, set aside the order of the Commissioner and restore that of the Assistant Collector, parties bearing their own costs in this and the Commissioner's Court, as the present appellant's failure to have his name recorded otherwise than as an occupancy tenant is largely responsible for the litigation.

LOVETT, J. M.—I concur.

*Appeal allowed.*

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RAJINDRH SINGH *v.* ABDUL GHANI.

## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1093 OF 1913.

January 2, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

RAJINDRA SINGH—DEFENDANT—APPELLANT

*versus*

ABDUL GHANI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENT.

*Custom—Alienation by widow—Mortgage, prior—Necessity—Limitation Act (IX of* 1908), *Sch. I, Art.* 125—*Mortgage forming consideration for sale, suit in respect of.*

A widow mortgaged certain lands of her husband by way of conditional sale in 1891. In 1901 she sold the land to the mortgagee in consideration of the mortgage money. More than twelve years after 1891 plaintiffs, as reversioners of the last male holder, sued for a declaration that the sale shall not affect their reversionary rights:

*Held*, (1) that the suit as regards the validity of the mortgage was barred under Article 125 of the Limitation Act, having been brought more than twelve years after the execution of the mortgage; [p. 64, col. 1.]

*Khiali Ram* v. *Gulab Khan*, 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911, relied upon.

(2) that the mortgagee having failed to take proceedings under Regulation XVII of 1806, there was no necessity for the widow to convert the mortgage into a sale. [p. 64, col. 1.]

**Second appeal from the decree of the Divisional Judge, Ambala, dated the 5th March 1913.**

Mr. *Nanak Chand*, for the Appellant.

Mr. *Abdul Rashid*, for the Respondents.

MEHDI HASAN KHAN *v.* BRIJ BHUSHAN MISRA.

JUDGMENT.—This is a second appeal from the order of the lower Appellate Court, confirming the decree of the first Court declaring that a sale executed by *Musammat* Lakhan on 25th April 1901 for a consideration of Rs. 1,500, shall not affect the plaintiff's reversionary rights.

Prior to the sale the land was mortgaged to the present vendee for the same sum of Rs. 1,500 with possession by deed of 9th July 1891. It has been held by the lower Appellate Court that there was consideration for the sale and mortgage.

It is contended by Counsel for appellant that if the sale had not taken place plaintiff would not have been in time to contest the mortgage under Article 125 of the 1st Schedule of the Limitation Act. The argument is correct and having regard to the principle enunciated in *Khiali Ram* v. *Gulab Khan* (1) plaintiff cannot now contest the necessity for the mortgage.

There was, however, no necessity for the sale; *Musammat* Lakhan did not receive any consideration for converting the mortgage into a sale. Mr. Nanak Chand points out that the mortgage was by way of conditional sale and that *Musammat* Lakhan was merely doing what might have been forced on her had the morgagee instituted proceedigs under Regulation XVII of 1806. He did not, however, institute any such proceedings and *Musammat* Lakhan was under no necessity to convert the mortgage into a sale.

We, therefore, accept the appeal and modifying the order of the Courts below set aside the sale of the land, but declare that it shall be considered as mortgaged for Rs. 1,500 under the deed of 9th July 1891. Parties will bear their own costs in all the Courts.

*Appeal accepted.*

(1) 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 244 OF 1916.

February 23, 1917.

*Present*:—Mr. Stuart, A. J. C.

MEHDI HASAN KHAN—DEFENDANT—APPELLANT

*versus*

BRIJ BHUSHAN MISRA—PLAINTIFF—RESPONDENT.

*Oudh Rent Act (XXII of 1886), s. 155—'Stranger', meaning of—Pre-emption.*

The word "stranger" in section 155 of the Oudh Rent Act means a stranger with regard to the whole village, in other words, some body outside the village, not only some body outside the *patti* or *mahal* in which the land is situate. [p. 65, col. 1.]

Appeal from the decree of the District Judge, Gonda, dated the 1st May 1916, confirming that of the Munsif, Gonda, dated the 14th March 1916.

Mr. *Muhammad Wasim*, for the Appellant.

Mr. *H. K. Ghosh*, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises are as follows:—

The village Rajwapur consists of two *pattis*, one is a twelve-annas *patti* known as *patti* Muhammad Hasan and the other a four-annas *patti* known as *patti* Mehdi Hasan Khan. Muhammad Hasan owned eight annas out of the twelve annas in *patti* Muhammad Hasan. Ramrup had interests in the twelve-annas *patti*. The four annas *patti* is owned by Mehdi Hasan Khan. Ramrup obtained a decree from the Rent Court against Muhammad Hasan. In execution of this decree he attached and brought to sale the eight-annas share of Muhammad Hasan. The sale took place on 21st December 1914. Mehdi Hasan Khan purchased the share. Brij Bhushan son of Ramrup claimed under the provisions of section 155, Act XXII of 1886, to purchase the share at the sum at which it had been knocked down. The sale officer rejected his claim. Brij Bhushan then instituted a suit in the Civil Courts for a declaration that he was entitled to take advantage of the provisions of section 155. If his suit were successful, the effect would be that the eight-annas share would pass into his possession. The Munsif passed a decree in his favour which has been

upheld on appeal by the learned District Judge. Mehdi Hasan Khan comes here in second appeal

The right claimed by Brij Bhushan is under the provisions of section 155. The provisions of Chapter II of Act XVIII of 1876 have no bearing upon this case. Section 155 is as follows:—

"When land is sold in execution of a decree under this Act, and the land or any lot thereof has been knocked down to a stranger, any co-sharer, other than the judgment-debtor, may, before sunset on the day of sale, claim to take the land or lot, as the case may be, at the sum at which it was so knocked down."

It is necessary for Brij Bhushan to establish in order to succeed that the purchaser Mehdi Hasan Khan is a stranger within the meaning of the section. Mehdi Hasan Khan as has already been stated owns one of the two *pattis* into which the village is divided. He has no interest in the *patti* in which the share sold is situated but he owns the other *patti*. Can it be said that he is a stranger? The learned Counsel for the respondent has argued that the word "stranger" means a stranger in respect of the land sold. Such an interpretation would, in my opinion, narrow the meaning of the word unjustifiably. The word "stranger" in this section means, according to the interpretation that I take, a stranger with regard to the village, in other words some body outside the village, not only some body outside the *patti* or *mahal* in which the land is situated. Section 14 of Act XXIII of 1861 (since repealed) read as follows:—

"When the land sold in execution of a decree is a share of a *pattidari* estate paying revenue to Government as defined in section 11, Act I of 1841,.....if the lot shall have been knocked down to a stranger, any co-sharer other than the judgment-debtor, or any other member of the co-parcenary, may claim to take the share sold at the sum at which the lot was knocked down."

A Bench of the Allahabad High Court decided in *Farzand Ali* v. *Alimullah* (1), that a share-holder in one *patti* of a *pattidari* estate is not a "stranger" with reference to a share-holder in another *patti* of the estate within the meaning of that term in that section, and this decision supports the view at which I arrive with regard to the meaning of the word "stranger" in section 155, Act XXII of 1886. As Mehdi Hasan Khan was not a stranger no right under the provisions of section 155 accrued to anybody. The suit brought by Brij Bhushan must, therefore, fail. I allow the appeal and direct that the suit stand dismissed. Brij Bhushan will pay his own costs and those of the appellant Mehdi Hasan Khan in all Courts.

*Appeal allowed.*

(1) 1 A. 272; 1 Ind. Dec. (N. S.) 225.



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PUNJAB CHIEF COURT.

CIVIL REVISION NO. 21 OF 1916.

January 3, 1917.

*Present*:—Mr. Justice Broadway.

IMDAD ALI SHAH—PLAINTIFF—PETITIONER

*versus*

SAYED ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of* 1908*), O. VI, r.* 17, *s.* 115—*Plaint, amendment of—Revision—Interlocutory order—High Court, power of, to interfere.*

The Chief Court has power to interfere in revision with interlocutory orders, but such power is exercised only in very exceptional cases, *e. g.*, where the order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision. [p. 66, cols. 1 & 2.]

Plaintiff brought a suit claiming certain shares in the property in dispute. Before issues were settled he filed an application under Order VI, rule 17, Civil Procedure Code, praying for leave to amend the plaint so as to increase the number of shares claimed. The lower Court rejected the application:

*Held*, (1) that the plaintiff should have been given leave to amend the plaint; [p. 66, col. 2.]

(2) that the Chief Court could interfere in revision with the order refusing leave to amend. [p. 66, cols. 1 & 2.]

SHESHMAN PRASAD *v.* BINDESHURI MISIR.

Civil revision from the order of the Munsif, 1st Class, Jullundur, dated the 22nd December 1915.

Mr. *Azim-ullah*, for the Petitioner.

Mr. *D. C. Khanna*, for the Respondents.

JUDGMENT.—The plaintiff-petitioner in this case brought a suit in which he claimed certain shares in the property in dispute.

Before issues were settled he filed an application under Order VI, rule 17, Civil Procedure Code, praying for leave to amend his plaint so as to increase the number of shares claimed, *i. e.*, from 1/16th to 2/16ths or $\frac{1}{8}$th.

This application was opposed by the defendants-respondents and was refused on the 30th November 1915. An application for review of the order of refusal was made on the 18th December 1915, but was rejected on the 22nd December 19 5.

The plaintiff has come up to this Court under section 44 of Act III of 1914 praying for a revision of the order of refusal. Mr. Khanna, for the respondents, urged that the order being an interlocutory one was not open to revision.

Mr. Azim-ullah, for the petitioner, has referred me to *Gurdas* v. *Bhag* (1) and *Sevugan Chetty* v. *Krishna Aiyangar* (2), as authorities for holding that an interlocutory order can be dealt with on the revision side.

These rulings certainly support the contention advanced but it is only in exceptional cases that the Court will interfere. In *Saadat Sultan Begam* v. *Muhammad Munir Khan* (3) and *Nihala Mall* v. *Bogu Ram* (4) it was held that interference on the revision side is permissible only when an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision.

It would thus seem that this Court has the power to interfere with interlocutory orders, but will exercise that power only in very exceptional cases. [See also *Khirode Chandra Ghoshal* v. *Saroda Prosad Mitra* (5).] Is the present such a case? The plaint shows that the claim made is for less than what the plaintiff now says he is entitled to. A subsequent suit for the balance would be barred by limitation and also probably by Order II, rule 2, Civil Procedure Code. The application for leave to amend was made before the issues had been settled and there seems to be no good reason why the learned Munsif should have declined to allow the amendment at that stage. In the circumstances I think the order refusing to allow the amendment was unsound and causes irreparable loss to the petitioner.

I accordingly accept this revision and set aside the order of the learned Munsif. I direct that the application be again heard and if *at the date it was made* the claim was within time, the amendment must be allowed. Parties will bear their own costs in this Court.

*Revision accepted.*

(1) 11 Ind. Cas. 231; 143 P. W. R. 1911; 216 P. L. R. 1911; 96 P. R. 1911.

(2) 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

(3) 11 Ind. Cas. 831; 149 P. W. R. 1911; 249 P. L. R. 1911.

(4) 11 Ind. Cas. 880; 164 P. W. R. 1911; 243 P. L. R. 1911.

(5) 7 Ind. Cas. 436 at p. 442; 12 C. L. J. 525.

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 50 OF 1915-16 OF SULTANPUR DISTRICT.

August 17, 1916.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

SHESHMAN PRASAD—OPPOSITE PARTY—APPELLANT

*versus*

BINDESHURI MISIR—APPLICANT—RESPONDENT.

*U. P. Land Revenue Act (III of 1901), s. 36—Ex-proprietary rights, claim as to—Limitation.*

A vendor's application under section 36 of the U. P. Land Revenue Act, filed within one year from the date of the application for mutation made by the vendee, but beyond one year from the date of the sale, is barred by limitation. [p. 67, col. 1.]

*Nawab Sultan Husain Khan* v. *Sewak Singh*, 27 Ind. Cas. 586; Selected Decision No. 12 of 1914; 2 O. L. J. 11, followed.

Appeal against the order of the Commissioner, Fyzabad, dated the 25th March 1916.

JUDGMENT.

HOLMS, S. M.—(*August* 7, 1917).—The respondent made an application which was really one under section 36 of the Land Revenue Act for specification of land in which he had ex-proprietary rights and fixation of rent thereon. The facts appear to be these. The appeal is as regards two plots only, Nos. 92 and 132. These plots among others were transferred by the sale-deed of the 9th June 1910. The respondent instead of applying within a year under section 36 of the Land Revenue Act instituted a suit under section 108 (10) of the Oudh Rent Act on the 24th April 1911 for recovery of possession of certain land in which he said he was an ex-proprietary tenant and from which he had been illegally ejected. The Assistant Collector held that the vendees, the present *zemindars*, had remained in possession of this land of which they were the former mortgagees even after the sale and that as no ex-proprietary rights had been settled under section 36 the then plaintiff had not been illegally ejected. Mutation proceedings followed and the present application under section 36 was not made until 19th November 1914. On the face of it, the 9th June 1910 must be taken as the date of the transfer unless good reason is shown to the contrary. I am unable to agree with the Commissioner who holds that the possession of the appellant as vendee did not begin till the 6th March 1914 when he applied for mutation. The mutation was simply a record of the transfer and not the transfer itself.

I hold then that the ex-proprietary rights were not claimed within a year from the time when they were created and that, therefore, having regard to *Sultan Husain Khan* v. *Sewak Singh* (1) the present application as regards the two plots under appeal is barred by limitation. I would, therefore, modify the orders of the lower Courts to this extent that the application so far as it concerns plots Nos. 92 and 132 is dismissed.

In the circumstances parties will bear their own costs in this appeal.

CAMPBELL, J. M.—I agree.

*Appeal partly allowed.*

(1) 27 Ind. Cas. 586; Selected Decision No. 12 of 1914; 2 O. L. J. 11.

## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 139 OF 1916.

January 3, 1917.

*Present*:—Mr. Lindsay, J. C.

RAMESHWAR—DEFENDANT—APPLICANT

*versus*

GAURI—PLAINTIFF—OPPOSITE PARTY.

*Provincial Small Cause Courts Act* (*IX of* 1887), *Sch. II, Art.* 35 (g)—*Suit to recover money advanced as loan on condition of marriage—Jurisdiction.*

A suit to recover money advanced by way of loan, on condition that the debtor would marry his daughter to the creditor's nephew and on failure to do so would pay back the money, falls under Article 35 (*g*), Schedule II, of the Provincial Small Cause Courts Act and is, therefore, cognizable on the regular side. [p. 68, col. 1.]

Civil revision against the order of the District Judge, Gonda, dated the 30th August 1916, reversing that of the Munsif, Gonda, dated the 10th August 1916.

Babu *Lachhman Das*, for the Applicant.

Babu *Gopal Sahai*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed by the learned District Judge of Gonda in appeal. The principal point involved is whether or not the suit which was brought by the plaintiff, opposite party, was exclusively cognizable by a Court of Small Causes. The suit was filed in the Court of the Subordinate Judge of Gonda as Judge of a Small Cause Court. He was of opinion that the suit was one to which the terms of Article 35, clause (*g*), of the second Schedule to the Provincial Small Cause Courts Act applied. He, therefore, returned the plaint to the plaintiff and ordered him to present it to the Court of the Munsif in order that the case might be tried by the Munsif as a regular suit. The Munsif took a different view of the facts and being of opinion that the suit was exclusively cognizable by a Small Cause Court returned the plaint for presentation in the Small Cause Court presided over by the Subordinate Judge. This order was appealed to the District Judge. The learned District Judge held that the order of the Small Cause Court Judge was correct and he has, therefore, directed the Munsif to entertain the plaint and to proceed with the suit on the regular side. It is argued here in revision that the decision of the lower Appellate Court is wrong,

IMAM IBRAHIM *v.* BHAU APPAJI JADHAV.

that on the statements contained in the plaint it should be held that the money which the plaintiff was seeking to recover was money advanced by way of loan and that, therefore, the suit was cognizable only by a Court of Small Causes. The learned Counsel for the applicant maintains that Article 35, clause (*g*) of the second Schedule to the Provincial Small Cause Courts Act has no application to the case. The learned Judge has referred in his judgment to several authorities. One case which is cited by him [*Nura* v. *Aladitta* (1)] is clearly against the applicant. There in a suit brought by the plaintiff to recover a sum of Rs. 150 in circumstances exactly similar to those of the present case it was held, on a reference made to the learned Judges of the Punjab Chief Court, that the case was one under Article 35, clause (*g*), of the second Schedule to the Provincial Small Cause Courts Act. I am not prepared to differ with the opinion of the learned District Judge in this case. It seems to me that it was open to him to treat this suit as a suit for compensation for a breach of the promise of marriage.

It is true that in the first paragraph of the plaint the plaintiff used the word "*qarza*" which literally interpreted might be taken to mean a loan, but having regard to the whole text of the first paragraph* it seems to me that the learned Judge was entitled to take up the position that there was a dealing between the parties which amounted to an agreement by which the amount of compensation for the breach of promise of marriage was fixed at the sum claimed by the plaintiff in the present suit. I am unable, therefore, to entertain the contention advanced on behalf of the applicant that the suit was exclusively cognizable by the Court of Small Causes. I refuse, therefore, to disturb the order of the learned District Judge and dismiss this application with costs.

*Revision rejected.*

(1) 132 P. R. 1889.

*The first paragraph ran as follows:—

"That on *Sawan Badi* 2nd 1323 *Fasli* the defendant took Rs, 125 from the plaintiff as loan, on condition that in the month of *Baisakh* the former would marry his daughter to the latter's nephew, and on failure to do so, would pay back the money." – *Ed.*

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 830 OF 1915.

February 9, 1917.

*Present*:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

IMAM IBRAHIM AND ANOTHER—DEFENDANTS—APPELLANT

*versus*

BHAU APPAJI JADHAV AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Registration Act* (*XVI of* 1908), *s.* 16 – Rajinamas *and* kabuliyats, *whether require registration—Occupancy rights, transfer of.*

*Rajinamas* and *kabuliyats*, that is, transactions with regard to the *khata*, are the general accompaniment of transfers of ownership of occupancy rights. The transfer, however, of the beneficial ownership is a transaction not between the *khatedar* and his superior holder, but the *khatedar* and the incoming occupant. [p. 70, col. 1.]

A *rajinama* and *kabuliyat* are documents between the occupant and his superior holder and not documents between the transferor and the transferee. They recite the transfer which has taken place, but they themselves do not purport to operate as transferring any interest to another. [p. 69, col. 2.]

Even if they can be said to fall within section 17 of the Registration Act as operating to extinguish an interest in immoveable property, they are not required to be registered unless it is shown that the interest extinguished is of the value of Rs. 100 or upwards. [p. 69, col. 2.]

Per *Beaman, J.*—The conjoint effect of a *rajinama* and a *kabuliyat*, between a mortgagor and a mortgagee, or between a mortgagor and a third party, is to indicate that in the first case the equity of redemption has been extinguished and that in the second case it has been transferred. [p. 70, col. 2.]

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 251 of 1914, reversing the decree passed by the 2nd class Subordinate Judge, Athni, in Civil Suit No. 331 of 1913.

Mr. *Coyaji* (with him Mr. *P. B. Shingne*), for the Appellants.

Mr. *Jayakar* (with him Mr. *A. G. Desai*), for the Respondents.

JUDGMENT.

SCOTT, C. J.—We see no reason to differ from the conclusion by the learned Assistant Judge on the questions of *res judicata* and limitation.

The only other point arising on the appeal is whether the plaintiffs had an equity of redemption remaining in them, and that depends upon whether the *rajinama* or the series of *rajinamas* upon which the defendants rely required registration. The learned Assistant Judge observes:

"It is perfectly clear that the transactions

with regard to the *khata* of the land which took place between 1875 and 1878 were intended to transfer ownership. Mutation of names was a well recognised means of transfer. Unfortunately for the defendants, *rajinamas* and *kabuliyats* in alienated villages had no legal standing at the time these transactions took place. Act I of 1865 did not apply to such villages. The *rajinama* by which Anandrao transferred his interest to the *mamlatdar* was, therefore, a document which required registration, and so it cannot be proved in Court. The result is no doubt unfortunate. The defendants who have all along supposed themselves to have an indefeasible title, now find themselves liable to be redeemed by the plaintiffs the conduct of whose predecessor-in-title appears to have been all along thoroughly dishonest. (See remarks by the District Judge in the judgment in the previous suit)."

The *rajinamas* upon which the defendants relied were three in number. *First*, there was a *rajinama* in 1875 by which the mortgagor Anandrao addressing the *inamdar* of the *inam* village stated that he gave notice that he had that day transferred his *khata* together with all the rights appertaining to the same to Jyoti *bin* Appaji Chavan residing at the place aforesaid. The *rajinama* was duly given in writing.

On the same day Jyoti Appaji addressed the *inamdar* stating that "the *vahivat* of the plot of land of the Government *khata* is entered in my name. I agree to that from this day's date. You will be pleased to enter my name in the Government record as the *vahivatdar* of this plot of land bearing the above-mentioned survey number in the place of Anandrao *bin* Mansingrao Jadhav. I hereby agree to pay all the arrears due to Government in respect of this survey number."

The *inamdar* was apparently the grantee of the assessment of the village which primarily was due to Government and was assigned by it to the *inamdar*, and although Act I of 1865 did not apply to alienated villages, it is evident from these documents that the *khatas* in which mutation of names was effected were kept in the alienated villages in the same way as in villages where there had been no alienation. If upon a transfer of the occupancy rights, the registered occupant did not provide for the mutation of names, he would be liable for the arrears of assessment, and all assessments falling due in future. By the *kabuliyat* the transferee of the occupancy right agrees to pay those arrears and to be liable in the future. The *rajinama* and the *kabuliyat* both in the case of Jyoti, and presumably in the subsequent documents of the same nature upon which the defendants relied, until the *khata* came to be registered in their name, are documents between the occupant and his superior holder, and not documents between the transferor and the transferee. They recite the transfer which has taken place presumably for consideration, but they themselves do not purport to operate as transferring any interest to another. If they fall within the terms of section 17 of the Indian Registration Act, it is because in some way they operate to extinguish an interest in immoveable property, either the interest of the occupant to remain on the *khata* upon the terms of paying the assessment, or the interest of the *inamdar* to receive the assessment from the particular *khatedar*. Assuming that by reason of such extinguishment they are documents of the nature aimed at by section 17 of the Indian Registration Act, registration is not necessary unless it is shown that the interest extinguished was of the value of Rs. 100 or upwards. Now the assessment to which the *inamdar* was entitled was an assessment of Rs. 18 a year, and there is no evidence as to the amount of any arrears of assessment which Jyoti undertook to discharge. There is nothing to show that the occupant could not relinquish his *khata* at any time, provided some other occupant was found to take over the liability of assessment. Therefore there is no reason to capitalize the assessment of Rs. 18 by any number of years' purchase, and this being so, it is impossible to hold that it is proved that the interest, if any, extinguished by the *rajinama*, is of the value of Rs. 100 or upwards. It is, therefore, not shown that the document is compulsorily registrable.

The learned Assistant Judge observes that "the transactions with regard to the *khata* of the land which took place between 1875 and 1878 were intended to transfer ownership." That is, I think, an inaccurate statement but in this inaccuracy the learned Judge does not stand alone, because similar inaccuracies of state-

ment are to be found in judgments of the High Court over a series of years with reference to *rajinamas* and *kahuliyats*. It would, I think, be more accurate to say that *rajinamas* and *kabuliyats*, that is, transactions with regard to the *khata*, are the general accompaniment of transfers of ownership of occupancy rights. The transfer, however, of the beneficial ownership is a transaction not between the *khatedar* and his superior holder but the *khatedar* and the incoming occupant. At the time these transactions took place from 1875 to 1878, it was not necessary according to the law that there should be any document evidencing the transfer. Payment of price and delivery of possession completed the transaction. In the case of the owner of the equity of redemption, in property mortgaged with possession to the mortgagee, the only remaining outward symbol of ownership, as the learned Subordinate Judge has well put it, is the *khata*, and when the equity of redemption is transferred, arrangements are made for mutation of names, so that the *khata* or the outward symbol of ownership, would be in the transferee of the equity of redemption. That is the explanation the *rajinamas* and *kabuliyats* which resulted in the claim of the defendants to hold the equity of redemption as well as the rights of the mortgagee. The *rajinamas* and *kabuliyats* are good evidence of the transfers having taken place as the defendants claim, since they contain the admission of the transferors and as it is not shown that they required registration, we are able to decide in accordance with what the Assistant Judge was convinced was the justice of the case. We hold that the defendants are shown to be the owners of the equity of redemption, and therefore, the plaintiffs' suit to redeem must fail. We set aside the decree of the lower Appellate Court and dismiss the suit with costs throughout.

BEAMAN, J.—I concur.

I take this, the earliest opportunity, of correcting a recent judgment I delivered in the case of *Vinayak Hari Paranjpe* v. *Navaji Parsu Kapse*, unreported S. A. No. 87 of 1915. In the light of the fuller argument we have had in this case, and the many difficulties it has revealed, I realize that in one passage I used much too loose and general language. I should have said that the conjoint effect of a *rajinama* and a *kabuliyat*, between a mortgagor and a mortgagee or between a mortgagor and a third party, was to indicate that in the first case the equity of redemption had been extinguished, that in the second case, it had been transferred. The fact would, I believe, always be found to be so, though since the actual extinction or transfer must *ex hypothesi* have been effected either orally or by another writing, it is by no means so clear that the fact could always be proved. In the present case I see no reason in law to prevent it. I do not wish to add an unnecessary word to the full explanatory analysis of the true content, and the legal limits to be put upon the scope and effect of such papers, and the statement of the resultant law governing this, and all like cases, in the judgment of the Chief Justice. I am satisfied that it is accurate and must supersede much confusion of thought or expression or both to be found in earlier judgments. It makes this point, which is of capital importance in deciding the case before us, quite clear, that *rajinamas* and *kabuliyats* can never be in themselves documents of transfer between the parties, respectively giving them to the Government or other over-lord.

*Decree set aside.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2609 OF 1914.

December 20, 1916.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumaraswami Sastri.

KOTTAYAT GOPALA MENON AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

KOLAT NARAYANA KURUP AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mortgage—Suit by mortgagee to recover mortgage-debt—Mortgagee unable to restore possession of mortgaged property—Procedure—Transfer of Property Act (IV of 1882), s. 76—Mortgage accounts.*

There is no authority for the broad proposition that if the mortgagee cannot for any reason put the mortgagor in possession of the whole of the mortgaged property, he cannot recover the mortgage-debt. [p. 71, col. 1.]

NANDI *v.* SARUP LAL.

If owing to the fact that there have been acquisitions of the mortgaged property under the Land Acquisition Act, or other causes, there is some difficulty in identifying the mortgaged property, or if after identification the mortgagee is unable to give possession of the whole of the mortgaged property owing to some default on his part, the proper course is to debit the mortgagee with the value of the land in taking the mortgage accounts under section 76 of the Transfer of Property Act.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Calicut, in Appeal Suit No. 625 of 1913, preferred against that of the Court of the Principal District Munsif, Calicut, in Original Suit No. 181 of 1912.

Mr. *K. P. M. Menon*, for the Appellant.

Messrs. *C. V. Anantha Krishna Aiyar* and *P. V. Parameswara Aiyar*, for the Respondents.

JUDGMENT.—It is contended for the appellants that if the mortgagee is not in a position to put the mortgagor in possession of the whole of the mortgaged property, he cannot recover the mortgage debt. In England, if the mortgagee after foreclosure seeks to enforce the personal covenant, he thereby re-opens the mortgage and gives the mortgagor a right to redeem, that is to say, to recover the mortgaged property on payment of what is due. If after foreclosure the mortgagee has alienated the property, so as to put it out of his power to put the mortgagor in possession on redemption, the Courts do not allow the mortgagee to enforce the personal covenant, as he cannot restore the property to the mortgagor. *Lockhart* v. *Hardy* (1) and *Palmer* v. *Hendrie* (2). We do not think these cases are authority for the broad proposition that if the mortgagee cannot for any reason put the mortgagor in possession of the whole of the mortgaged property, he cannot recover the mortgage debt. In the present case, owing possibly to the fact that there have been acquisitions under the Land Acquisition Act or other causes, it appears there has been some difficulty in identifying the item of property in question, in this suit. Even so, we think the proper course is to debit the mortgagee with the value of the land in taking the mortgage accounts under section 76 of the Transfer of Property Act, if it is found that the property cannot be identified. We also think the same course should be adopted if after identification the mortgagee is unable to give possession owing to some default on his part. We think, however, that the Subordinate Judge was wrong in leaving that matter to be dealt with in execution and we must set aside his decree and remand the case for disposal according to law. Fresh evidence may be taken by the Subordinate Judge. There will be no order as to costs of this appeal or the memorandum of objections. Other costs are to be dealt with by the Subordinate Judge.

*Decree set aside; Case remanded.*

V. R. P.

(1) (1846) 9 Beav. 349; 10 Jur. 532; 15 L. J. Ch 247; 50 E. R. 378; 73 R. R. 379.

(2) (1859) 27 Beav. 349; 54 E. R. 136; 122 R. R. 426.

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 162 OF 1916.

March 27, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C Banerji, KT.

*Musammat* NANDI—PLAINTIFF—APPELLANT

*versus*

SARUP LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Co-widows—Sale of house by one co-widow—Improvements by vendee—Death of vendor—House reverting to other co-widow—Vendee, right of, to compensation.*

Where a transferee of a house from a co-widow chooses to spend a large sum of money upon the house, he does so at his peril and is not entitled to the amount so spent on the house reverting to the other co-widow on the death of the vendor co-widow. [p. 72, col. 2.]

First appeal from the order of District Judge, Meerut, dated the 13th September 1916.

Dr. *S. N. Sen*, for Mr. *N. Upadhya*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of a house. It appears

that the house originally belonged to Tara Chand who died leaving two widows and no male issue. The name of one of the widows was *Musammat* Bakhti. The name of the other widow was *Musammat* Nandi, the plaintiff. These two ladies made a partition of Tara Chand's property as between themselves. The house in question fell to the lot of Bakhti. Bakhti executed a sale-deed of the house to the defendant on the 29th of April 1898. Bakhti has now died and the plaintiff has brought this suit to recover possession of the house. The case has come right up to this Court on a previous occasion but finally the Court of first instance found that there was no legal necessity for the sale made by *Musammat* Bakhti. It appears that after the sale a considerable amount of money was spent in improvements on the house. In the Court of first instance there was an issue as to who had spent the money, and the Court found that it had been expended out of the money which belonged to *Musammat* Bakhti. The Court decreed the plaintiff's suit. On appeal the lower Appellate Court held in agreement with the Court of first instance that there was no legal necessity for the sale but came to the conclusion that the defendant had improved the house out of his own money, and for some reason or other remanded the case to the Court of first instance. The present appeal has been preferred on behalf of the plaintiff who contends that even on the finding that the house had been improved out of moneys belonging to the defendant, the plaintiff's suit should have been decreed and there was no necessity for a remand. We must, of course, accept the finding of the lower Appellate Court as to where the money came from which went to improve the house. At the same time we feel some doubt as to whether the Court of first instance did not arrive at the right conclusion even on this issue of fact. It is somewhat improbable that the defendant spent out of his own money this large sum of money upon the house, his title to which he must have known was most infirm and could only last for the period of *Musammat* Bakhti's life. Furthermore, *Musammat* Bakhti undoubtedly had some money which might have been expended upon the house. Eventually what has become of this money we do not know. accepting, however, as we are bound to do, the finding of the lower Appellate Court that the defendant expended the money out of his own pocket, in our opinion it affords no answer to the present suit. If the defendant chose to spend money on the house he did at his peril. It is quite clear that the partition between the two ladies operated merely during their life and upon the death of *Musammat* Bakhti the property became the property of the surviving widow for the period of her life. We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs in all Courts.

*Appeal allowed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1241 OF 1913.

April 1, 1916.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

ATA AHMAD—PLAINTIFF—APPELLANT

*versus*

NIAZ ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Succession—Gift to daughter—Right of her descendants to succeed—Collaterals of donor, reversion to.*

Where a gift of ancestral property is made to a daughter, the property after the death of the donee does not revert to the collaterals of the donor, but is inherited by the descendants of the donee. [p. 73, col. 1.]

*Shahanchi Khan* v. *Begam Jan*, 20 Ind. Cas. 451; 13 P. R. 1914; 286 P. L. R. 1913; 191 P. W. R. 1913, followed.

*Jannat* v. *Abdulla*, 32 Ind. Cas. 817; 4 P. R. 1916; 25 P. W. R. 1916, distinguished.

Second appeal from the decree of the Divisional Judge, Jullundhur, dated the 1st March 1913, affirming that of the Subordinate Judge, 2nd Class, Jullundhur, dated the 31st October 1912, dismissing the suit.

Pandit *Rambhaj Datta* for the Appellant.

Mr. *Kanwar Narain*, for Rai Bahadur Pandit *Sheo Narain* and Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The point of custom certified by the Divisional Judge is whether on the death of a daughter of a donee, her property (out of the gift) should revert to the donor's collaterals rather than be inherited by other descendants of the donee.

The Divisional Judge did not decide whether the property was ancestral as to the plaintiff, but proceeded on the assumption that it was so.

Of course, if it is not, the plaintiff has no right to it in the presence of nearer relatives of the donee.

In appeal before us the main contention is that the gift to *Musammat* Jijo merely accelerated the succession for in this family daughters succeed to their father and *Musammat* Jijo would in the ordinary course of things have succeeded the donor, her father.

If daughters, however, succeed their father, they either act as conduits to the next male descendant in which case Niaz Ali has a better claim than the plaintiff or they hold absolutely.

Now *Musammat* Jijo treated the property as her own absolute property, for in 1876 she died having bequeathed her property to three daughters and a grand-daughter who have accordingly enjoyed the property, since that date.

Niaz Ali is a lineal descendant of the donee and there are several authorities for the view that no reversion of the gifted property to donor's line takes place until the donee's line is extinguished.

The decisions of this Court on the point have not always been consistent; the first rulings held gifts to daughters to be absolute, the pandulum then swung back and they were held to be for the benefit of the daughters' male issue, but the property gifted remained ancestral *qua* the donor's collaterals subsequently the course of decision has been that the presence of even females of the donee's line would bar a reversion to the donor's branch so that in fact the donor's branch comes in only just before the Government or any other body to which the estate would otherwise escheat.

The whole matter was reviewed in *Shahanchi Khan* v. *Begam Jan* (1) and though, of course, the position is illogical, we see no reason for refusing to follow that decision. The appellant urges that in *Jannat* v. *Abdulla* (2) it was held that the female descendant of the donee must be an heir of the last male holder and it is not sufficient that she should be merely a descendant of the donee.

That case, however, was not decided on that point, which does not appear to have been very fully argued.

In this particular case, moreover, *Musammat* Jijo and her descendants appear to have treated the donated property as their own absolute property and to have enjoyed it not as heirs but as donees.

In our opinion the dismissal of plaintiff's suit by the lower Courts was correct and we dismiss this appeal likewise with costs.

*Appeal dismissed.*

(1) 20 Ind. Cas. 451; 13 P. R. 1914; 286 P. L. R. 1913; 191 P. W. R. 1913.
(2) 32 Ind. Cas. 817; 4 P. R. 1916; 25 P. W. R 1916.

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ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 792 OF 1916.
April 21, 19.7.
*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
MAHABALI - PLAINTIFF—APPELLANT
*versus*
SAHDEO AND ANOTHER —DEFENDANTS — RESPONDENTS.

*Pre-emption—Custom*—Wajib-ul-arz, *interpretation of.*

A *wajib-ul-arz* of 1840 recorded a right of pre-emption in the case of mortgages to *lambardars* and to co-sharers while the entry in the *wajib-ul-arz* of 1882 was of a totally different nature. There was no reference to mortgages and the *lambardars* were dropped out altogether and the right was given to an own brother (irrespective of whether he was a co-sharer or not), then to near relations, then to co-sharers in the same *lambardari* and then to other co-sharers:

*Held*, that under the circumstances no custom of pre-emption was established by the *wajib-ul-araiz.* [p. 74, col. 1.]

Second appeal against the decision of the Subordinate Judge, Mirzapur, dated the 18th February 1916.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought to be put into possession of certain property which had been usufructuarily mortgaged to the respondents. It was necessary for the plaintiff to prove the existence of some

custom. He had to prove a custom which gave him a right to be substituted for the mortgagee. The lower Appellate Court has found that he has not established the existence of such a custom. We find that there was an entry in respect of pre-emption the *wajib-ul-arz* of 1840. This recorded a right in the case of mortgage to *lambardars* and to co-sharers. The entry in the *wajib-ul-arz* of 1882 is of a totally different nature. In the first place it does not refer to mortgages at all. *Lambardars* are dropped out altogether and the right is given to an own brother (apparently irrespective of whether he is a co-sharer or not) and then to near relations, then to co-sharers in the same *lambardari*, and then to other co-sharers. We think that the Court below was justified under these circumstances in holding that the plaintiff had not established the existence of the custom which it was necessary for him to prove. So far as the finding is a finding of fact it is binding upon us in second appeal. We dismiss the appeal with costs including in this Court fees on the higher scale.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 273 OF 1914.

January 10, 1917.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

SURAJ MAL KHARAD—DEFENDANT—APPELLANT

*versus*

AKSHOY KUMAR ROY CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 91, scope of—Calcutta Municipal Act (III B. C. of 1899), s. 336, whether controls s. 91, Civil Procedure Code—Public highway, dedication of.*

Section 336 of the Calcutta Municipal Act does not impose any limitation on section 91, Civil Procedure Code, so as to exclude from its scope cases in which a local authority, such as a Municipal Committee or a District Board, might be regarded as competent to safeguard the interests of the public against acts of public nuisance created by the obstruction of a public highway. [p. 75, col. 1.]

No formal act of adoption by any person or authority is required for the acceptance of a highway dedicated to the public use, such acceptance can be inferred from the public user of the way. [p. 75, col. 1.]

Appeal against the decree of the Additional District Judge, 24-Perganahs, dated the 24th November 1913, modifying that of the Subordinate Judge, second Court of that District, dated the 29th April 1913.

Sir *Rash Behari Ghose* and Babu *Jogendra Nath Mukherjee*, for the Appellant.

Babus *Provash Chandra Mitter*, *Jnanendra Nath Sarkar* and *Bhupendra Nath Basu*, for the Respondents.

JUDGMENT.

WALMSLEY, J.—The suit from which this appeal arises was instituted by two Hindu gentlemen with the permission of the Advocate-General in regard to a piece of land which they described as a public highway, and the relief for which they asked is in the terms of form No. 31 in Appendix A of the Civil Procedure Code. The defendant, now appellant, is a Marwari who has built a temple on land immediately adjoining the strip which the plaintiffs say is a public highway.

The learned Subordinate Judge in the first Court found that the plaintiffs had proved their case, and granted them a decree, and this decision was confirmed by the learned District Judge in appeal.

The first argument pressed in support of the appeal is that the plaintiffs could not sue under section 91, Civil Procedure Code, because the land lies within the area of the Calcutta Municipality and reference is made to section 336 of the Calcutta Municipal Act which declares that: "All public streets * * * including the soil * * * shall rest in and belong to the Corporation."

The defendant has no authority to quote in support of this argument and we have to read the two sections together, and consider whether section 336 of Act III of 1899 imposes any limitation on section 91, Civil Procedure Code. For my part I cannot see anything to suggest such a limitation. Section 91 of the Civil Procedure Code is extremely broad in its terms, and if it had been intended to exclude from its scope cases in which a local authority, such as a Municipal Committee or a District Board, might be regarded as competent to safeguard the interests of the public it would have been very easy to

insert words to that effect. As the section stands it does not matter where the alleged public nuisance is situated. Any two persons, provided they obtain the Advocate-General's consent in writing, may sue for its removal. Again the other section, section 326 of the Calcutta Municipal Act, merely vests the proprietary right in the soil of highways in the Corporation: but it does not add that in case of obstruction the Corporation alone shall have the right to sue for the removal of the obstruction. In my opinion, therefore, there is no weight in this first argument.

Next it is urged that the dedication to the public use on which the plaintiffs rely is invalid, and this argument has several branches. It is said that the Courts below have not found when the dedication did take place, that the dedication cannot have been earlier than July 27th 1893 when a letter, Exhibit 6, was addressed to the Secretary of the Corporation by Buddh Singh, Bishan Chand and Budree Das, that in 1893 the signatories to that letter were incompetent to make the dedication because they had previously entered into an oral contract with the defendant's father respecting the land, and that in any case such dedication was invalid because there was no acceptance by the Corporation.

Lastly it was urged that the lower Courts were wrong in holding that the oral agreement set up by defendant was inoperative because it was not reduced to writing.

One of these points may be disposed of at once, that is the objection that acceptance by the Corporation was necessary to make the dedication operative. The learned Vakil can refer us to no authority for this proposition, while on the other hand, there is the statement in paragraph 43 of the Article on Highways in Lord Halsbury's Laws of England, Volume 16, that: "Acceptance by the public requires no formal act of adoption by any persons or authority but is to be inferred from public user of the way." It may be added here that although there was no formal acceptance the lower Courts have found that the lighting, repairing, watering and scavenging of the alleged highway was carried out by the Corporation.

Now let us turn to the time and fact of dedication. In this Court it is conceded that a letter in the terms of Exhibit 6 was written in July 1893 to the Secretary to the Corporation. That letter speaks of the road as having been used by the public for about six years. The learned Subordinate Judge does not record an exact finding as to the year in which the public began to use the strip of land, but he points out that one of the two highways which it connects was constructed in 1886. The lower Appellate Court, however, records very clear findings on this point: and says more than once that the public began to use the land as a passage in about 1887. Paragraphs 51 and 52 of the Article already mentioned deal with user as evidence of dedication. On the definite finding of user since 1887, I do not think that the dedication must be regarded as made in July 1893 when the letter Exhibit 6 was written. Without that letter the evidence of user since 1887 is enough to justify the inference of a dedication in 1887, and the letter with its reference to six years' user corroborates that evidence. It must be remembered that the defendant offers no evidence to rebut the inference, but contents himself with pleading that certainly before 1893 possibly before 1887, the signatories had parted with their rights in the land.

The remaining question, therefore, relates to this alleged agreement of 1887 or thereabouts. The evidence of this alleged agreement is to be found in Exhibit D, a deed of gift executed in 1911 by Budh Singh and the son of Bishan Chand in favour of the defendant. Regarding this document and its allegation of a previous agreement, the learned District Judge holds that Exhibit C is not operative because the signatures of the executants have not been properly attested, that the alleged gift could not be made except by a registered document, and that by the very words of Exhibit C, the ownership of the land remained with the executants up to 1911. The first of these objections is fatal: one executant signed the document at Calcutta and the other at Azimganj and one witness only attested each signature. The third objection is equally fatal to the defendant's assertion that the dedicators were not competent to dedicate, for they say in the document that they are in possession and this is borne out, as the lower Court's remark, by their possession of the title-deeds. In regard to the second objection the learned Vakil has

urged that there was a sort of exchange between the parties in 1887 and that no document was necessary. But this attitude is inconsistent with Exhibit D for the executants convey the property by way of free gift. If the appellant received the property by way of free gift in 1911, it is clear that there can have been no operative agreement concluded in 1887.

In my opinion none of the arguments put forward on behalf of the appellant has any substance and I think that the appeal should be dismissed with costs.

D. CHATTERJEE, J.—I agree.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 369 OF 1915.

April 16, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

*Rai Bahadur* KRISHNA SAH, C. I. E.—OPPOSITE PARTY—APPELLANT

*versus*

THE COLLECTOR OF BAREILLY—PETITIONER—RESPONDENT.

*Land Acquisition Act (I of 1894), s. 9, cl. (3)—"To the same effect", meaning of—Notice—Time, whether allowable.*

The words "to the same effect" in clause (3) of section 9 of the Land Acquisition Act mean that the second notice should have the same matters mentioned in it including the time, as are mentioned in the first notice. [p. 76, col. 2.]

Therefore, in the second notice under clause (3) of section 9 of the Land Acquisition Act to the occupier of the land 15 days should also be allowed to enable the occupier to make his objections. [p. 76, col. 2.]

First appeal against the decision of the District Judge, Bareilly, dated the 3rd September, 1915.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings under the Land Acquisition Act. The learned District Judge has affirmed the award of the Collector on the sole ground that the appellant did not state "the nature of his interest in the land and the particulars of his claim to compensation for such interest" by way of objection under section 9, clause (2), of the Land Acquisition Act. He appears to have considered that such objection not having been put forward he was justified, (if not bound), under section 25 to affirm the award of the Collector. Section 9 of the Land Acquisition Act provides that the Collector must cause public notice to be given at convenient places at or near the land to be taken stating that the Government intends to take possession of the land and claims to compensation for all interest in such land may be made to him. Clause 2 prescribes what the notice shall state and amongst other things that the notice shall require all persons interested in the land to appear before the Collector *at a time* mentioned in the notice. It has expressly provided that the *time shall not be earlier than* 15 *days after the publication of the notice.* In the present case the publication of the notice was on the 18th of July and the date required for appearance before the Collector was the 24th of July—clearly a much shorter period than that prescribed by the section. Clause (3) provides for a second notice which is to be served on the occupier of the land and which is *to the same effect* as the notice prescribed by clause (2). In the present case this personal notice was served on the 16th of July. This also is less than 15 days. The learned Judge seems to have thought that because the personal notice was served, the first notice was unnecessary, and as no *time* was prescribed in the second notice the appellant is not entitled to complain that the notice served on him gave him less than 15 days to make his objection. We think that the learned Judge was wrong in the view he took. In the first place the Act requires that two notices are to be served, and accordingly the service of the first notice containing what is prescribed by the section was absolutely necessary. We think also that the 15 days ought to be allowed by the second notice. There is no reason why the occupier should not have some time allowed him within which to make his objection as other persons. We think that the words "*to the same effect*" in clause (3) really mean that the second notice should have the same matters mentioned in it including the time as is in the first notice. The learned District Judge

should, therefore, have tried the case and considered the evidence, and the appellant ought to be considered as having had sufficient reason for not filing his objections before the Collector. We allow the appeal, set aside the order of the learned District Judge and remand the case to him with directions to re-admit the case on its original number on the file and proceed to hear and determine the same on the merits having regard to what we have said above. The respondent must pay the costs of this appeal including fees on the higher scale.

*Appeal allowed; Case remanded.*

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CALCUTTA HIGH COURT.
RULE *Nisi* No. 769 OF 1916.
March 28, 1917.
*Present*:—Mr. Justice Fletcher and
Mr. Justice Smither.
BASUDEB NARAYAN SINHA—
DEFENDANT—PETITIONER
*versus*
*Srimati* KADAMBINI DASSI—PLAINTIFF
—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1, s. 115—Leave to withdraw with liberty to bring fresh suit—Insufficient grounds—Revision—High Court, interference by.*

The mere fact that the Primary Court granted leave to a plaintiff, to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on insufficient grounds is no ground for the High Court's interference in revision under section 115, Civil Procedure Code, unless the lower Court in granting leave acted without jurisdiction or with material irregularity in the exercise of its jurisdiction.

Rule issued against the order of the Munsif, First Court, Kandi, in Mortgage Suit No. 1008 of 1915.

FACTS of the case appear from the judgment.

Babu *Bemal Chandra Deb*, for the Petitioner.—The plaintiff brought a mortgage suit against the defendant admittedly twelve years after the execution of the mortgage, but in order to save limitation she alleged payment of interest within twelve years. But the whole evidence of the plaintiff did not disclose any payment of interest. After the evidence for the plaintiff was finished the Munsif called upon the defendant-petitioner to adduce evidence in support of his case. She did not do so but asked the Court to dismiss the plaintiff's suit as being *prima facie* barred by limitation. Thereafter the plaintiff seeing the defect in his case filed an application for withdrawing the suit with liberty to institute a fresh suit and the Munsif allowed his application. I submit that the Munsif improperly exercised his jurisdiction in allowing the plaintiff to withdraw his suit under Order XXIII, rule 1, Civil Procedure Code, without assigning any reason whatsoever and your Lordships should set aside that order in revision. He should have dismissed the suit as being *prima facie* barred by limitation under section 3 of the Limitation Act. The plaintiff should not have been allowed to withdraw from the suit simply because he failed to prove his case. See Order XXIII, rule 1, Civil Procedure Code. The Munsif exercised in this case a jurisdiction not vested in him by law.

Babu *Sajani Kanta Sinha*, for the Opposite Party, was not called upon in reply.

JUDGMENT.

FLETCHER, J.—This is a Rule calling on the opposite party to show cause why the order complained of should not be set aside. The plaintiff opposite party brought a suit to enforce a mortgage. A question was raised as to whether the plaintiff could be successful and the plaintiff applied to the learned Judge for permission to withdraw from the suit with liberty to bring another suit on the same cause of action which the learned Judge granted. The learned Judge under the terms of the rule clearly had power to grant the plaintiff permission to withdraw from the suit with liberty to bring a fresh suit at any stage of the proceeding. The mere fact that the learned Judge granted that leave on a ground that may or may not appear to us to be sufficient is no ground for interfering under the terms of section 115, Code of Civil Procedure. This is not a case of want of jurisdiction nor did the learned Judge act with material irregularity. The Rule is discharged with costs—one gold *mohur*.

SMITHER, J.—I agree.

*Rule discharged.*

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 238 OF 1915.

June 19, 1916.

*Present*:—Mr. Justice Batchelor and Mr. Justice Shah.

JAYA MADHAV KALAVANT—APPELLANT

*versus*

MANJUNATH TAI CHANDU—RESPONDENT.

*Hindu Law--Succession*—Naikins—*Daughters and sons.*

In the case of a *naikin* or prostitute dancing girl, daughters are preferential heirs over sons.

*Kamakshi* v. *Nagarathnam*, 5 M. H. C. R. 161, relied upon.

Second appeal from the decision of the District Judge, Canara, in Appeal No. 208 of 1913, reversing the decree passed by the Additional Subordinate Judge, Karwar, in Civil Suit No. 152 of 1912.

Mr. *G. S. Mulgaokar*, for the Appellant.

Mr. *S. V. Palekar*, for the Respondent.

JUDGMENT.—The question here is as to the inheritance to the property of a *naikin* or prostitute dancing girl. The competition is between the daughter and the son, and the learned District Judge has held that the daughter is the sole heir.

Mr. Mulgaokar, who appears for the son, has referred us to numerous decisions of the High Courts. But the only decision which is strictly in point is that of *Kamakshi* v. *Nagarathnam* (1) and there the learned Judges in a similar case held that the daughters are preferential heirs over the sons. The books have been searched on both sides, but neither learned Pleader is able to point to any decision of any High Court in which the ruling in *Kamakshi's* case (1) has been differed from or questioned. This ruling is in accordance with the observation in Steele's Laws and Customs of Hindu Castes, at page 181, where we read: "Children of dancing girls are of their mother's caste... Daughters inherit the mother's property in preference to sons." We are the more ready to give effect to this opinion in the present case because it comes from the district of Canara, and at page 89, section 361, of Strange's Manual of Hindu Law as prevailing in the Presidency of Madras, it is stated that "the property of a dancing girl will pass to her female issue first, and then to her male, as in the case of other females." Now at the time Strange's Manual was published, what is now the Bombay District of Canara formed part of the Madras Presidency, and there is no reason to doubt that the customs incident to *naikins* in the Canara District are indistinguishable from those observed by similar classes further south.

On the whole, therefore, the present state of the law is in favour of the view taken by the learned District Judge whose decree must be confirmed with costs, this appeal being dismissed.

*Appeal dismissed.*

(1) 5 M. H. C. R. 161.

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## CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 576 OF 1915.

December 1, 1916.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

KERAMAT ALI PATWARI—JUDGMENT-DEBTOR—APPELLANT

*versus*

NAGENDRA (NABENDRA IN *Vakalatnama*) KISHORE ROY—DECREE-HOLDER—RESPONDENT.

*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 182—*Execution—Decree*, ex parte, *satisfaction of, against one judgment-debtor—Decree set aside as against that judgment-debtor—Application for execution—Limitation.*

When an *ex parte* decree which has been execute against one of the judgment-debtors is set aside in suit by that judgment-debtor and the money realised in execution is ordered to be refunded, a further application of the decree-holder, on the date on which the *ex parte* decree is set aside, to execute the decree against the other judgment-debtor must be treated as a continuation of the original application for execution which was made within time. [p. 79, col. 1.]

Appeal against the order of the District Judge, Noakhali, dated the 4th June, 1915, reversing that of the Munsif, Second Court, Lakhipur, dated the 1st August 1914.

Babus *Sitaram Banerji* and *Sarat Chandra Mukherjee*, for the Appellant.

Babus *Akshoy Kumar Banerjee* and *Ramesh Chandra Sen*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the learned District Judge of Noakhali, dated the 4th June, 1915, revers-

ing the order of the Munsif of Lakhipur. The proceedings arise out of an application for execution of a decree. The decree was obtained as long ago as the 17th June 1910. It was an *ex parte* decree obtained against the present appellant and another person named Sangsar-ud-Din, his co-defendant. The decree-holder, respondent before us then applied for execution against Sangsar-ud-Din and brought to sale in execution the moveables of Sangsar-ud-Din on the 15th April 1913 and the whole decree was satisfied from the proceeds of such sale. On the 16th June 1913, Sangsar-ud-Din sued to set aside the *ex parte* decree and that suit was decreed on the 26th June 1914. On the same date on which that suit was decreed, the decree-holder applied for execution against the appellant, the other judgment-debtor, and the application having been refused by the Munsif, on appeal to the District Judge, the order was reversed and execution was directed to issue. The only point is whether that application was made within time. The matter seems to be one of first impression. The view that the learned Judge of the lower Appellate Court appears to have taken was that the order directing refund by the decree-holder to Sangsar-ud-Din in effect re-opened the execution proceedings and that the present application must be treated as a continuation of the original application for execution which was brought within time. We think, on the whole, that the view taken by the learned Judge was correct and we ought to affirm his order. The present appeal, therefore, fails and must be dismissed with costs. We assess the hearing fee as two gold *mohurs*.

*Appeal dismissed.*

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PATNA HIGH COURT.
CIVIL REVIEW No. 14 OF 1916.
May 11, 1917.
*Present*:—Mr. Justice Atkinson and
Mr. Justice Jwala Prasad.
*Musammat* BHAGELA KUER AND OTHERS
—APPELLANTS
*versus*
ABDUL RAHMAN AND OTHERS—
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (c)—Review—Document not produced at trial—Negligence.*

Where a document which was not produced before judgment through gross negligence is subsequently produced and shows that an injustice has been done, the interests of justice demand that the party to whom the injustice has been done should be granted a review notwithstanding his negligence. [p. 80, col. 2.]

*In the matter of the petition of Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah*, 2 C. 131; 3 I. A. 221; 26 W. R. 50; 1 Ind. Dec. (N. S.) 380 (P. C.), followed.

Civil review in Appeal No. 406 of 1913 against the judgment of the Sub-Judge of Shahabad.

Messrs. *Hasan Imam*, and *Naresh Ch. Sinha*, for the Appellants.

Mr. *Pugh*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This suit came before my learned colleague and myself in June of last year; and we dismissed this action on the ground of defective joinder of parties. It was argued and contended before us that the suit was not properly constituted inasmuch as two persons named Kazi Akbar Ali and Kazi Amjad Ali who were brothers of the second wife of the original mortgagee had not been made parties to the suit.

Having regard to the frame of the suit and to paragraph 4 of the written statement we held that the plaintiff ought to have joined these two persons as parties.

This application is now made to us to review our judgment on two grounds.

*First*, it is contended that the two persons named in paragraph 4 of the written statement are not necessary parties inasmuch as, by a document, dated the 3rd October 1912, they relinquished any right which they might have had in the property of Shaikh Elahi Buksh, the mortgagee, through his second wife, and that if they had any right through her they assigned their right to the plaintiff No. 1, who is the son of the original mortgagee.

*Secondly*, it is urged that these parties, even if necessary parties could have been joined inasmuch as there was an acknowledgment within the meaning of section 19 of the Limitation Act which would have saved limitation; and that thus if we considered that these two persons were necessary parties the joinder could have been made within limitation.

BHAGELA KUER *v.* ABDUL RAHMAN.

In support of the ground of limitation reference is made to an application filed by defendant No. 1 for a certificate of guardianship, schedule B of which shows the debts due by her husband's estate—the husband being the original mortgagor.

In this schedule appears, as item No. 5, the debt due to the mortgagees in this case. It is contended that this is an acknowledgment within the meaning of the Indian Limitation Act and that it saves limitation and it is urged that if these two persons ought properly to have been joined as parties they could have been joined inasmuch as there was an acknowledgment in the application of the defendant No. 1 of the debt due to the plaintiff which satisfies the requirements of the Limitation Act. The date of the application was the 6th September 1910; and it is, therefore, urged that the plaintiffs could even now have added these parties as plainitffs within time. We agree in thinking that this argument is well founded and correct.

However, the more material ground is the argument that the plaintiff was misled owing to the form in which the learned Judge in the lower Court had decided the question as to whether the two persons named in paragraph 4 of the written statement were the heirs of the deceased.

No doubt these persons are not heirs, legally entitled to share with the others, as heirs of the deceased; but we think that there was material to lead the plaintiff to believe that it had been decided that these persons were not heirs of the deceased mortgagee and consequently that they need not have been joined as parties.

It now transpires that after the institution of the suit on the 3rd October 1910 the plaintiff procured a deed from these two persons relinquishing and assigning to him all their interest in these properties and the plaintiff now seeks to roly upon this deed for the purpose of showing that these persons are not necessary parties; and that consequently the suit should not have been dismissed on the ground of defective joinder of parties.

Mr. Pugh contends very strongly that the plaintiff's application cannot come within the purview of Order XLVII, rule 1, inasmuch as they have not shown that the document they now rely on could not have been produced at the trial or before us after the exercise of due diligence since the deed of the 3rd of October 1912 was in their possession; and the plaintiffs must be deemed to have withheld this document deliberately in the face of the pleadings in the suit.

Undoubtedly there was gross neglect on the part of the plaintiff in this case in not producing the document they now rely on, but we think that where the document which is subsequently produced shows (as it does in this case) that an injustice has been done, the interest of justice demands that the party to whom the injustice has been done should be granted a review. This well settled principle of law and practice was laid down by their Lordships of the Privy Council in a case reported as *In the matter of the petition of Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah* (1), their Lordships say: "Looking to the extreme generality of the terms used in these sections, particularly to these terms 'other good and sufficient reason' and 'necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice,' they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing."

This was a registered document registered on the very day it was executed and it has in no way been impugned as false or fraudulent. It was not produced earlier owing to the negligence or oversight on the part of the plaintiff himself who was misled by the decision of the Subordinate Judge and who failed to inform his legal advisers of its existence.—If produced the suit would not have been dismissed.

We think that the plaintiff has shown a sufficient reason for granting this application and we accordingly grant it.

It will be necessary to remand the case to the lower Court with a direction to accept evidence of the due execution of this docu-

(1) 2 C. 131; 3 I. A. 221; 26 W. R. 50; 1 Ind. Dec. (N. S.) 380 (P. C.).

ment of the 3rd of October 1912, and to receive same in evidence when it will be admitted on the record.

At the original hearing my learned colleague and I held different views upon the question as to the necessity for adducing evidence of the proof of the debt; but Mr. Justice Jwala Prasad agrees that as the case must go back to the lower Court upon the question of proof and admission of the deed of 3rd October 1912, it should also be referred to the Judge to ascertain by legal proof what amount is now due and owing to the plaintiffs by the defendant on foot of the mortgage bond in suit.

We will accordingly direct the learned Subordinate Judge to ascertain the sum due and owing to the plaintiffs on foot of the mortgage bond, dated the 4th of September 1897. In doing so the learned Subordinate Judge should have regard to the well established principle of law that strict proof is necessary in the case of a creditor seeking to establish a debt against the estate of a deceased person.

We regret to have to observe that the generous offer for settlement made on behalf of the plaintiff by Mr. Hassan Imam on Saturday last has been so unworthily declined.

Inasmuch as the plaintiffs are responsible for this review and the appeal proving abortive before us, we feel that it is right and proper that they should pay the costs of the defendants in this Court as well as the costs before the Subordinate Judge and also a fee of three gold *mohurs* as the costs of this application.

*Application accepted.*

## SIND JUDICIAL COMMISSIONER'S COURT.

JUDICIAL MISCELLANEOUS APPLICATION No. 29 OF 1916.

November 22, 1916.

*Present*:—Mr. Pratt, J. C.

MESSRS. FLEMING SHAW AND CO.—APPLICANTS

*versus*

HAJI YUSIF ELLIAS—OPPONENT.

*Arbitration Act (IX of 1899), s. 19—'Step in the proceedings', what amounts to.*

Any application whatsoever to the Court, even though it be merely an application for time, is a 'step in the proceedings', within the meaning of section 19 of the Arbitration Act, irrespective of the intention with which the application is made. [p. 82, col. 1.]

Even a mere acquiescence in a proceeding initiated by the other party and in an order made on his separate application amounts to a 'step in the proceedings'. [p. 82, col. 1.]

Mr. *T. G. Elphinston*, for the Applicants.

Mr. *Nadirshah Noaroji*, for the Opponent.

JUDGMENT.—This is an application under section 19 of the Arbitration Act to stay a suit which was filed against the applicant on the 16th August last on the ground that the agreement between the parties, on which the suit was filed, provided that any dispute whatsoever in connection with it should be referred to arbitration.

The suit was filed on the 16th of August, and summons was ordered to issue for the framing of issues on the 6th of September. On the 6th of September, the applicants appeared before the Small Cause Court by their Pleader Mr. Pamanmal, who admits that he applied for a postponement on the ground that the documents relating to the suit had to be discovered and the time allowed had been too short to permit of this being done. On Mr. Pamanmal's application and with the consent of the opponent the Court adjourned the hearing until the 25th of September. On referring to the documents the applicants say that they noticed the arbitration clause in the indent and then made this application on the 22nd of September, three days before the date to which the Small Cause Court suit had been adjourned.

Mr. Nadirshah contends, and I think rightly, that the present application is barred by the reason of application

made to the Small Cause Court on the 6th of September for an adjournment.

The application for time seems to me to be clearly a step in the proceedings and it is pointed out in the case of *Sarat Kumar Roy* v. *Corporation of Calcutta* (1) that this is so, irrespective of the intention with which the application was made. Whether the applicant wished to have further time to file a written statement or wished to have further time to raise as a bar to the suit the agreement to refer to arbitration, in either event the application was an application to invite the Court to do something which would enable the applicant to establish his defence.

Mr. Elphinston relies on a passage in the judgment of Denman, J., in the case of *Chappell* v. *North* (2) to the effect that a mere consent to what may afterwards lead to a step is not of itself a "step" in the proceedings. But it is pointed out in the case of *Bartlett* v. *Ford's Hotel Company* (3) that the consent referred to was a consent given without the intervention of the Court. The application was to the other party and not to the Court.

The later English cases go even further and establish that mere acquiescence in a proceeding initiated by the other party and in an order made on his separate application does amount to a step in the proceedings: *County Theatres and Hotels, Limited* v. *Knowles*(4). Lord Halsbury's Laws of England, Volume I, paragraph 956, summarises the law on the subject as follows: "A party who makes any application whatsoever to the Court, even though it be merely an application for time, takes a step in the proceedings". This seems to me to be also the law here and this application must, therefore, fail.

*Application rejected.*

(1) 34 C. 443; 11 C. W. N. 306.
(2) (1891) 2 Q. B. 252; 60 L. J. Q. B. 554; 65 L. T. 23; 40 W. R. 16.
(3) (1895) 1 Q. B. 850; 64 L. J. Q. B. 452.
(4) (1902) 1 K. B. 480; 71 L. J. K. B. 351; 86 L. T. 132.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1448 OF 1916.

March 13, 1917.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

C. SRINIVASA AIYANGAR AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

MEDDAIKARA ABDUR RAHIM SAHIB AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Madras Estates Land Act (I of* 1908), *ss.* 42 (2), 77 (1), 26 (3)—*Increase in area, discovery of, on re-survey —Enhanced rent, suit for, maintainability of.*

No suit lies for enhanced rent for an increase in the area of a holding discovered on re-survey except on an order of the Collector under section 42 (2) of the Madras Estates Land Act. [p. 82, col. 2; p. 83, col. 1.]

Per *Napier, J.*—Section 26 (3) only gives the landlord the right to claim to revert to the old rate and compels the Collector, in a suit under section 56, to decree it. It is not in the power of the Court in a rent suit to cancel an existing *patta*, and, until that is done, it constitutes the contract between the parties. [p. 83, col. 1.]

Second appeal against the decree of the District Court, North Arcot, in Appeal Suit No. 124 of 1915, preferred against that of the Sub-Collector, Tirupathur Division, in Summary Suit No. 112 of 1913.

Mr. *M. Pattanjali Sastri*, for the Appellants.

Mr. *P. C. Desikachariar*, for the Respondents.

JUDGMENT.

AYLING, J.—The suit out of which this second appeal arises is one for arrears of rent under section 77 (1) of Act I of 1908. The rent sued for is in excess of that paid in previous *faslis*, the differance being due to an increase in wet area discovered by re-survey. The District Judge has disposed of the appeal on the short ground that the suit for excess rent will not lie, until the landlord has obtained an order of the Collector under section 42 (2) sanctioning the enhancement.

I think he is right. Section 42 declares that no alteration of rent in respect of an alteration in area shall be given effect to, except under an order of the Collector passed on an application made to him for that purpose. Admittedly there has been no such application here. The *ryot* is, therefore, not liable to pay the additional rent claimed.

The question of whether a suit for enhanced rent (whatever be the cause of

enhancement) can be brought without first enforcing the acceptance of a *patta* embodying the enhanced rent, on which a long argument was addressed to us, does not really arise in this case.

I would dismiss the second appeal with costs.

NAPIER, J.—The lower Appellate Court has dismissed the claim for excess rent, holding that it falls within the mischief of section 42 (2) of Act I of 1908. The appellant urges that he is protected by section 26 (3), that the old *paimash* rate is the lawful rate and that the landholder who granted the lower rate being dead, he is entitled to sue for it without suing for a *patta* under section 56. I am strongly inclined to think that whereas in this case there is in existence a *patta* and *muchilika* at the lower rate, these terms must be altered either by exchange or by a decree under section 56 before the landlord is entitled to sue for the rent. It seems to me that the old *patta* remains in force, "fresh *pattas* neither having been accepted, exchanged or decreed." Section 26 (3), I think, only gives him the right to claim to revert to the old rate and compels the Collector in a suit under section 56 to decree it. I do not think that it is in the power of the Court in a rent suit to cancel the old *patta* and until that is done, it constitutes the contract between the parties. Whether this be so or not, I do not see why we should not accept the footing on which the suit has been decided in both Courts, namely, that the claim is made in consequence of re-survey as the plaint does not allege the facts necessary to bring the case within section 26 (3). The fact of re-survey is admitted and the case, therefore, falls within section 42 (2). I, therefore, agree that this second appeal be dismissed with costs.

*Appeal dismissed.*

V. R. P.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 600 OF 1915.

January 18, 1917.

*Present*:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

CHHOTTALAL ADITRAM TRAVADI—PPAINTIFF—APPELLANT

*versus*

BAI MAHAKORE AND OTHERS—DEFENDANTS—RESPONDENTS.

*Evidence Act (I of 1872), s. 91—Suit for possession of joint property—Partition, deed of, unregistered, admissibility of.*

The *factum* of a partition, as distinguished from its terms, may be proved by evidence apart from the deed of partition itself. [p. 85, cols. 1 & 2.]

*Augustien* v. *Challis*, (1847) 1 Ex. 279; 17 L. J. Ex. 73; 74 R. R. 670; 154 E. R. 118; *Kedar Nath Joardar* v. *Shurfoonnissa Bibee*, 24 W. R. 425; *Alderson* v. *Clay*, (1816) 1 Stark. 405; 18 R. R. 788; *Cotterill* v. *Hobby*, (1825), 4 B. & C. 465; 6 Dowl. & Ry. 551; 3 L. J. K. B. 276; 107 E. R. 1133; 28 R. R. 328; *Strother* v. *Barr*, (1828) 2 M. & P. 207; 5 Bing. 136; 6 L. J. C. P. 245; 30 R. R. 545; 130 E. R. 1013, relied upon.

Per *Beaman, J.*—A fact which does not necessarily constitute a term, in any real sense, of a contract, grant, or other disposition of property, may be proved, although the writing in which the terms of that contract, grant, or disposition of property are embodied cannot be proved for want of registration. [p. 85, col. 2.]

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 315 of 1913, confirming the decree passed by the Subordinate Judge, Umreth, in Civil Suit No. 148 of 1912.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *N. K. Mehta*, for Respondents Nos. 1 and 2.

Mr. *B. D. Mehta*, for Respondent No. 2.

JUDGMENT.

SCOTT, C. J.—The plaintiff sued to recover possession of certain property, Survey Nos. 535 and 545, and to have a perpetual injunction restraining defendant No. 2 from taking possession of Survey No. 544 and from using the water of the well, alleging that his father left two brothers out of whom one Chhaganlal died in 1897 leaving no issue, while the other brother died in union with him, the plaintiff, in 1905, that defendant No. 3 and he were heirs in joint undivided property under Hindu Law, and that defendant No. 1, the widow of Girdharlal, the uncle who died in 1905, had only a right of maintenance, and he sought to set aside a sale which had been made in favour of defendant No. 2 by defendant No. 1, Girdharlal's widow.

CHHOTTALAL ADITRAM TRAVADI *v.* BAI MAHAKORE.

The plaintiff's case, therefore, rested upon an allegation that the property in suit was the property of an undivided Hindu family. Now with regard to Survey No. 535, there is evidence, which both the Courts have found to be conclusive, that Girdharlal was in exclusive possession from some date long prior to 1899, therefore, apparently Girdharlal was in enjoyment of it as his own separate property.

Then with regard to plots Nos. 545 and 544, there is evidence on the record that arbitration proceedings took place under a reference on the 27th September 1899, the parties being Girdharlal the husband of the first defendant, Amratlal Aditram his nephew on behalf of himself and as guardian of his minor brother Chhotalal, and Ruxmani as guardian of her minor son Manilal. Chhotalal is the present plaintiff. The reference was in these terms:—"We, the undersigned, pass an agreement in writing that we have appointed Pandya Ramchandra Parjaram of Dakore and Tarwadi Bhogilal Valavram of Thasra arbitrators to settle about the partition, moveable and immoveable property, debts and outstandings, lands, trees, etc., belonging to our brother and uncle Chhaganlal Sevakram who is dead and of the joint undivided lands." Chhaganlal was the brother of Girdharlal and the uncle of Amratlal and Chhotalal. Upon that reference an award was made from which it appears that Survey No. 445 and two Koss' share in the well in Survey No. 544 had belonged to Chhaganlal, and these were assigned to Girdharlal. The first defendant claims title both as widow of Girdharlal and as his devisee under his Will, and the second defendant claims title as assignee from her both as widow and devisee.

Upon the facts hitherto referred to, it appears to me clear that the conclusion of the lower Courts that the plaintiff had not established his title to the properties in suit as joint undivided Hindu property, was justified because Survey No. 535 was the separate property of Girdharlal, and Survey No. 545 and the rights in 544 belonged exclusively to Chhaganlal up to the time of his death, and the award shows that there was other property which was joint family property.

It is, however, contended, and this is practically the only contention now put forward, that there is evidence that there was a partition in the family between Chhotalal's father and Girdharlal and Chhaganlal which was recorded in a partition deed, and that the lands 535, 545 and 544 came to the persons who enjoyed them subsequent to 1885 by virtue of the provisions of that partition deed, and it is contended that no other evidence can be referred to as to the nature of the property, that is to say, whether it was separate or joint property under the partition deed, while the partition deed not having been registered cannot be looked at. It is urged that section 91 of the Indian Evidence Act prevents the Court from concluding that there was partition at any time which led to a separation in interest of members of this family, because it is known that there was a partition deed in 1885 which cannot be looked at. In my opinion that is an attempt to carry the provisions of section 91 too far. It provides that "when the terms of a contract, or of a grant, or of any other disposition of property, (within one of which categories the partition fell) have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document (which is not the case with regard to transactions in the nature of partition), no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible."

Now we are not concerned with cases in which the matter is required by law to be reduced to the form of a document. Section 91, therefore, with regard to a disposition of property, such as we are now concerned with, prohibits any evidence of its terms other than the document itself, or secondary evidence of its contents where secondary evidence is admissible. It does not appear to me from the record of the proceedings before the Court that there has been any attempt to prove the terms of any partition deed or of any transaction of partition. All that the Court has been concerned with is to find out whether particular properties claimed by the plaintiff to the joint family

property were at the date of suit joint or separate.

The argument on behalf of the appellant, which has been urged very earnestly, is that the relationship of separated Hindus must in the present case proceed from an act in the law taking the shape of a partition deed, and, therefore, that relationship cannot be proved by oral evidence. According to my reading, section 91 does not go to that length, and the English Law as indicated in Taylor on Evidence, upon which the Indian Evidence Act is known to have been largely founded, does not support the appellant's contention. In paragraph 405 of Taylor (10th edition) it is stated:—"The fact of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing;" and again in the same paragraph: "the fact of partnership may be proved by parol evidence of the acts of the parties, without producing the deed." The leading authority in England for those propositions is the statement of Baron Alderson in *Augustien* v. *Challis* (1), who said that you prove by parol the relationship of landlord and tenant; but without the lease you cannot tell whether any rent was due. A decision to the same effect is to be found in *Kedar Nath Joardar* v. *Shurfoonnissa Bibee* (2). That the fact of partnership may be proved without the production of the deed of partnership was established in *Alderson* v. *Clay* (3). *Cotterill* v. *Hobby* (4) and *Strother* v. *Barr* (5) are good illustrations of the distinction between proof of relationship of landlord and tenant and proof of the terms of the tenancy. In my opinion, therefore, the evidence upon which the lower Court came to the conclusion that the properties in suit were the separate properties of the plaintiff's uncles was rightly admitted. I would dismiss the appeal with costs.

(1) (1847) 1 Ex. 279 at p. 280; 17 L. J. Ex. 73; 74 R. R. 670; 154 E. R. 118.
(2) 24 W. R. 425.
(3) (1816) 1 Stark. 405; 18 R. R. 788.
(4) (1825) 4 B. & C. 465; 6 Dowl. & Ry. 551; 3 L. J. K. B. 276; 107 E. R. 1133; 28 R. R. 328.
(5) (1828) 2 M. & P. 207; 5 Bing. 136; 6 L. J. C. P. 245; 30 R. R. 545; 130 E. R. 1013.

BEAMAN, J.—Three brothers, Chhaganlal, Girdharlal and Aditram, admittedly constituted a joint Hindu family. The present suit is brought by the son of Aditram to recover certain properties set forth in the plaint alienated by Mahakore, the widow of Girdharlal, and the foundation of the claim is that the family was a joint Hindu family. It has been contended here that although it is virtually admitted that a partition was effected in the year 1885, and evidenced by a writing, inasmuch as that writing was not registered, neither can any proof of its terms be given, nor can the fact that the family from that time forward were separate be proved in any other way. If the fact is provable, it has been convincingly proved I think as shown by the Chief Justice *aliunde*. I wish, if possible, to avoid going over any of the grounds, covered by that judgment. The Chief Justice has stated with abundant authority a proposition, of the soundness of which I think there can be no doubt. I agree that under section 91 of the Indian Evidence Act, as contended by the appellant here, the Courts were precluded from seeking the terms of the partition in the document which was inadmissible for want of registration. I agree that that document could not be used in any way as affecting the property, the subject-matter of this suit. But having regard to the carefully drawn terms of section 91, it appears to me clear beyond all doubt that a fact which does not necessarily constitute a term, in any real sense, of a contract, grant, or other disposition of property, may be proved, although the writing in which the terms of that contract, grant, or disposition of property were embodied cannot be proved for want of registration. It follows, I think, that the plaintiff relying on union, and his claim necessarily depending upon the proof of that relationship, the fact of separation is not a term in any sense of the manner in which the parties distributed the property at the time the separation was made and was embodied in writing, and is, therefore, a fact *de hors* the document which can be proved independently. The two Courts below, as far as I can see, made no attempt to look at the terms of the document for the purposes of this suit. It is certain, I think, that separation in the sense of a change of legal relationship is in no sense a term necessary to be included

in a partition deed. A separation ordinarily precedes the distribution of what was formerly joint property. Logically it must always precede it in time. But so far as the terms upon which parties who were formerly joint and have become separate agree thenceforward to distribute and enjoy the property, they are confined to that subject, and the terms have nothing to do with the statement of fact that a change in the relationship of individuals has taken place. For example, suppose that the parties here had never constituted a joint Hindu family at all, but had been merely tenants-in-common, every term in the partition deed might have been exactly the same, and the preliminary statement, if the deed indeed contained such a statement, that the family up to that time had been joint, and thenceforward ceased to be joint, would obviously be a fact standing alone, and not making up any part of the terms of the disposition of the property. I should have thought that this matter would hardly have admitted of any doubt, had it not been for the array of authority apparently bearing upon the point which the learned Pleader for the appellant was able to adduce. Much of that authority is, I think, easily distinguishable. The principle stated by the Chief Justice is the true principle, and is supported by authority of at least equal weight. I think it unnecessary to go more deeply into the question which has been exhaustively treated, and I should not have said this much, but that I wished to express my own emphatic opinion that the law laid down by the Chief Justice in the judgment just delivered is right and governs this case.

I concur in the order proposed.

*Appeal dismissed.*

## LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 158 OF 1915.

February 1, 1917.

*Present*:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Ormond.

KHOO EO KHWET AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

NANIGRAM JAGANATH FIRM—PLAINTIFFS—RESPONDENTS.

*Contract Act (IX of 1872), ss.* 102, 108, 178—*Transfer of Property Act (IV of* 1882), *s.* 137—*Contract—Negotiability—Delivery order, whether negotiable—Document of title—Test.*

Negotiability can be attached to documents by mercantile usage. [p. 89, col. 2.]

A document is negotiable if by the custom of the money market it is transferable as if it were cash; and its *bona fide* transferee obtains a good title to it (because of its currency) although his transferor might have stolen it. [p. 92, col. 1.]

The test whether a document is a "document of title" or a "document showing title" to goods is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. [p. 89, col. 2; p. 92, col. 1.]

A delivery order is a document of title to the goods to which it relates and the property of the transferor in the goods passes to the transferee by delivery of the document; but when once delivery has been made to the person entitled, the delivery order is exhausted and ceases to have any effect. [p. 93, col. 1.]

A delivery order may or may not be negotiable according to the conditions attached to it or according to the usage of trade under which it is issued. [p. 89, col. 2; p. 90, col. 1.]

Case-law discussed.

A document may be negotiable although it contains conditions, but when a seller of goods issues a document the real effect of which is that he will hand over certain goods to any one producing the document provided he has them and he has been paid his price and all charges in connection with them, no usage or custom of trade can compel him to hand the goods over if he has not the goods or has not been paid the price and stipulated charges. [p. 90, col. 2.]

A document showing title to goods represents the goods to which it relates and the law governing its transferability is the same as the law which governs the transferability of the goods themselves and is contained in sections 108 and 178 of the Contract Act. [p. 92, col. 2.]

Mr. *C. R. Connell*, for the Appellants.

Mr. *Bilimoria*, for the Respondents.

JUDGMENT.

FOX, C. J.—Khoo Beng Ok was a Chinese merchant who had a rice mill on the Dalla side of the Rangoon river and his office in Rangoon.

KHOO EO KHWET *v.* NANIGRAM JAGANATH FIRM.

By two contracts in forms usual in the trade he sold 660 bags of boiled rice to S. P. S. Hoosain Nyna, a dealer in rice. According to the terms of the contracts delivery of the rice was to be taken ex-hopper into the buyer's gunny bags, but the bags could not be removed from the mill until the price of the rice in them and other charges (if any) in respect of it had been paid for.

Nyna took delivery of the rice ex-hopper and on the 7th February he paid for it by giving Khoo Beng Ok a Chetty's cheque on one of the European Banks. In exchange for this Khoo Beng Ok gave Nyna his receipted bills for the rice and an order to his godown keeper at the mill which is in the following terms:—

(ON FRONT OF SHEET.)

No. 55.

*Rangoon* 17*th February* 1913.

Subject to Terms of Contract No.....
Dated 4th February 1913, 21st January 1913.

(Chinese characters.)

KHOO BENG OK RICE MILL.
No. 1, Angyi Creek Dalla.

To Godown Keeper.

Deliver to Messrs. S. P. S. Hoosain Nyna or Bearer 660 bags, say six hundred and sixty only Boiled Rice.

Gunnies and Twines supplied by the buyer
Marks
Weight 160/lbs
Bill No. 54/55
M/N No. 43/37

Seal
KHOO BENG OK RICE MILL

One anna stamp
Sd. in Chinese character
Khoo Beng Ok Rice Mill.

*N. B.*—This note is subject to our receipt of the gunnies receipt which has been granted.

(ON BACK OF SHEET.)

*Special attention of holders of this delivery not is drawn to the following paras. copied from the contract subject to which this delivery note has been issued.*

9. Payment to be made in cash before any rice is removed, but not in any case later than immediately after milling. Payment on completion of each day's milling if required.

12. Sellers have the option of disposing of the rice by private or public sale.....account should.....fail to take delivery ex-hopper as above or fail to pay for it as above within two days of presentation of the bill.

13. All risk of fire, damage by rats and other contingencies to be borne by...from the time the rice is milled.

14. Sellers have the right of removing the rice to other than mill godowns at risk of... after 24 hours' notice has been given.

15. Godown rent at the rate of Rs. 5 per 100 bags per week will be charged to...should...fail to remove the rice on or before 15 days after milling.

16. Sellers to have a lien on the rice until it has been paid for as above and until all godown rent and other charges are paid.

17. ...cannot claim the right of leaving the rice in sellers' godown after the 15 days allowed for removal have elapsed.

18. Accidents to machinery, strikes or sickness of mill hands or coolies always excepted.

19. No claim whatever to be made by...after delivery of rice has been taken ex-hopper.

ACKNOWLEDGMENT OF RECEIPT.

| Date 191 . | Boat No. | Mark. | Quality. | Quantity. | Net weight. | Initial. |
|---|---|---|---|---|---|---|
| | | | | | | |

On the same day a *durwan* or messenger from Nyna went to the mill to take away the rice. He did not bring the delivery order but said that on his signature the delivery order could be obtained next day in Rangoon. Khoo Beng Ok's eldest son, who was at the time in charge of the mill, referred to his father in Rangoon by telephone, and was authorized by him to

allow the rice to be removed by the *durwan* on his signing for it. The bags were loaded into cargo boat No. 914 and shipped on the same day on the S. S. Oxfordshire for Colombo. The Bought Note and the Bill of Lading represent S. S. A. S. Sochalingam Chetty, the man who had given the cheque in payment of the rice, as the shipper, and the consignee at Colombo was S. S. A. S. Palaniappa Chetty. It does not appear what rights this firm had over the rice, but having given a cheque for the price of it, and got the shipping documents for it made out in its name, the firm in all probability had the rights of at least a pledgee in respect of it.

There is no evidence as to how Khoo Beng Ok was induced to authorize removal of the rice from his mill without production of the delivery order. His evidence was not available in the case because he died shortly after the suit was filed.

He did not get back the delivery order next day or at all. There is no evidence as to his having made any attempt to get it back.

On the 21st February Nyna went to the plaintiff firm which lends money on the security of delivery orders, and told the plaintiff's son that he had to pay for rice on the following day. The terms of an advance were arranged, and next day Nyna came to the plaintiff's office with a *durwan* who had the delivery order and receipted bills given by Khoo Beng Ok to Nyna on the 17th February. Nyna said that this man was the mill-owner's *durwan*. The plaintiff's son gave Nyna a cheque on a Bank for Rs. 4,000 which Nyna endorsed and handed over to the *durwan*, to whom was also paid Rs. 1,584-10-0, and the *durwan* gave the delivery order and Khoo Beng Ok's receipted bills to the plaintiff's son. The latter believed that the *durwan* was the employee of the miller, and understood that the money and cheque were going to the miller.

Nothing happened in connection with the delivery order until early in the following May, when it became known that Nyna had absconded. The fraud committed by him in connection with the delivery order in suit was not the only one he committed. He apparently used forged delivery orders also, and is undergoing imprisonment on account of such offences. After presenting the delivery order in suit to Khoo Beng Ok and calling on him to deliver the rice mentioned in it, the plaintiff firm, on this being refused, filed their suit for Rs. 5,584-10-0, the price of the rice under the contracts with Nyna, and for Rs. 217-12, the cost of the gunny bags and twine supplied by Nyna. They also claimed interest. They based their claim on the ground that by the custom of the rice trade the delivery order which they held was a negotiable instrument entitling the *bona fide* holder of it for value to the delivery of the bags of rice mentioned in it. In 1890 the Recorder of Rangoon held in *Vyravon Chetty* v. *Oung Zay and Mohr Bros., Ltd.* (1) that a delivery order from the office of a rice-milling firm in Rangoon to one of its mills in the outskirts was neither (1) a document of title to the rice referred to in it, nor (2) a negotiable instrument. He also held that it had not been proved in the case that there was a trade custom prevalent in Rangoon by which holders of delivery orders for rice can claim the rice mentioned therein free from the vendor's lien for the price and the charges thereon.

The first of the above propositions was based on *LeGeyt* v. *Harvey* (2). From the recent decision of their Lordships of the Privy Council in *Ramdas Vithaldas Durbar* v. *Amerchand & Co.* (3), it seems to follow that what was decided in *LeGeyt* v. *Harvey* (2) is no longer good law.

The second proposition that delivery orders could not be negotiable instruments was based on *Crouch* v. *Credit Foncier Co.* (4). In that case Blackburn, J., one of the most eminent of commercial lawyers, laid down in effect that no instrument made in England could be a negotiable instrument unless it was so under the law merchant,

(1) 2 Bur. L. R. 1.
(2) 8 B. 504; 9 Ind. Jur. 151; Chitty's S. C. C. R. 123; 4 Ind. Dec. (N. S.) 709.
(3) 35 Ind. Cas. 954; 20 C. W. N. 1182; (1913) 2 M. W. N. 110; 18 Bom. L. R. 670; 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 342; 14 A. L. J. 1045; 85 L. J. P. C. 214; 24 C. L. J. 329; 40 B. 630 (P. C.).
(4) (1873) 8 Q. B. 374; 42 L. J. Q. B. 183; 29 L. T. 259; 21 W. R. 946.

or it had been made so by legislation. In *Goodwin* v. *Robarts* (5) in the Exchequer Chamber Cockburn, C. J, an equally eminent lawyer expressly dissented from this proposition and held that negotiability could be attached to documents by the usages of a trade. The following are extracts from his judgment:—

"While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts."

* * * * * * * * *

"We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called 'the ancient law merchant'." It has been suggested by Mr. Willis in his work on Negotiable Securities, (1901) W. Willis' Law of Negotiable Securities 37 that the above two decisions are reconcilable, and that the decision in *Crouch* v. *Credit Foncier Co.* (4) was still good law, but Kennedy, J, in *Bechuanaland Exploration Company* v. *London Trading Bank* (6) and Bigham, J, in *Edelstein* v. *Schuler and Co.* (7) held that the ruling of Blackburn, J., to which I have referred, had been overruled. In a note on page 275 of the 12th edition of Sir William Anson's English Law of Contract it is said: "This extension of the range of negotiability by recent usage may perhaps need confirmation by Courts of Appeal."

In *Gilbertson & Co.* v. *Anderson and Coltman* (8), Wills, J., refused to attach the attribute of negotiability to a delivery order by the vendor of goods on board a ship addressed to the master porter of a ship.

Whatever may be the future decision of the English Appeal Courts in England on the controverted ruling of Blackburn, J., this Court has to be guided by the decisions of their Lordships of the Privy Council, and it appears to me that in *Ramdas Vithaldas Durbar* v. *Amerchand & Co.* (3) their Lordships' decision involves the acceptance of the proposition that negotiability can be attached to documents by mercantile usage. In that case the main question was whether a railway receipt was a "document of title" or "a document showing title," but the question of negotiability was also involved, and their Lordships held that by section 102 of the Contract Act the legislature intended to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value. As regards the question whether the railway receipt in question was a "document of title" or a document showing title, their Lordships remark:—

"In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented." They held that the railway receipt in question satisfied this test and that a pledgee who advanced money on the security of a railway receipt was entitled to the goods as against an unpaid vendor.

The effect of section 137 of the Transfer of Property Act is that in the case of the documents mentioned in the explanation to it, a transfer in writing and notice to the holder of goods is not necessary in order to constitute a valid transfer of goods mentioned in them. Amongst the documents mentioned in the explanation is an order for the delivery of goods. In *Anglo Indian Jute Mills Co.* v. *Omademull* (9), a delivery order from the agents of

(5) (1875) 10 Ex. 337; On appeal (1876) 1 App. Cas. 476; 45 L. J. Ex. 748; 35 L. T. 179; 24 W. R. 987.

(6) (1898) 2 Q. B. D. 658; 67 L. J. Q. B. 986; 79 L. T. 270; 3 Com. Cas. 285; 14 T. L. R 587.

(7) (1902) 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 50 W. R. 493; 7 Com. Cas. 172; 18 T. L. R. 597.

(8) (1902) 18 T. L. R. 224.

(9) 10 Ind. Cas. 859; 38 C. 127.

the Company in Calcutta to the Manager of one of its mills to deliver goods to a named firm or order was held to be a document of title, and the evidence establishing that delivery orders of the nature of the one in suit passed from hand to hand by endorsement and were sold and dealt with in the market, and that according to the invariable course of dealing in the Calcutta jute trade delivery orders were only issued on cash payment and were dealt with in the market as absolutely representing the goods to which they related free from any lien of the seller, the Mill Company were held liable to pay the plaintiffs the amount they had advanced on the delivery order, although a postdated cheque which the buyers had given in payment for the goods was dishonoured, and the Mill Company had never received payment. The company by issuing the delivery order lost its seller's lien on the goods in its possession

The main ground of the decision was that the Company had represented that the delivery order would pass and confer a good title to the goods, and they had put it in the power of the buyers to endorse the delivery order with this representation to the plaintiffs who, dealing iu good faith and for value, were induced to alter their position on the faith of the representation so made.

The form of delivery order in the present case differs considerably from the form in an order for delivery without any condition; in the present case the form expressly states that the order for delivery is subject to conditions, one of which appears on the front of the sheet of paper and the others on the back. Although it may be said that by it the miller undertakes to deliver the bags of rice mentioned in it to whoever produces it to the godown keeper, the document itself gives notice to any one asked to advance money on it that he may not be able to obtain the rice at all by means of it if the rice has been destroyed by fire, and that he will not obtain it if the price and all godown rent and other charges in respect of it have not been paid.

The conditions set out are sufficient to put a prudent man on enquiry as to whether the rice was still in existence and as to whether the price and all charges payable to the miller have been paid, when he is asked either to buy the rice or to advance money on the order.

With such conditions plainly stated in the order itself it is difficult to see how the miller can be held to have made a representation to every one into whose hands the documents might come *bona fide* that he would hand over the rice even if he had not been paid its price. The *ratio decidendi* in the Calcutta case does not appear to me to apply in the present case, because of the terms of the delivery order giving every one who reads them notice that the rice may not be in existence, and if in existence may not have been paid for, and that the seller retains his lien for everything due in respect of it. No doubt a document may be negotiable although it contains conditions: a bill of lading usually contains many conditions absolving the carrier from liability for not delivering the goods covered by it, but when a seller of goods issues a document the real effect of which is that he will hand over certain goods to any one producing the document provided he has them and that he has been paid his price and all charges in connection with them, can any usage or custom of trade compel him to hand the goods over if he has not the goods and has not been paid his price and his stipulated charges? I think not.

The above appears to me to be the effect of the delivery order which we have to deal with in the present case, and the right of any one claiming under it must, in my judgment, be determined by the terms of the document itself. Under proviso 5 to section 92 of the Indian Evidence Act a usage or custom by which incidents not expressly mentioned in a contract are usually annexed to contracts of that description may be proved, provided that the annexing of such incidents would not be repugnant to or inconsistent with the express terms of the contract. The usage sought to be applied to the delivery order in this case is that the miller who issues such a delivery order is bound to hand over the goods mentioned in it to any one who produces the document notwithstanding he has not been paid for them. Such a usage would, in my opinion, be repugnant to and inconsistent with the express

terms of the document under which the seller expressly has a lien on the rice mentioned in the delivery order until it has been paid for and until all godown rent and other charges have been paid.

How then can such delivery orders be said to have become negotiable instruments by virtue of a custom or usage in the trade when the custom or usage in the trade cannot be proved?

In my judgment Khoo Beng Ok was not liable to the plaintiff and his representatives are not. So far as it goes, no doubt the evidence shows that delivery orders by mill owners to their mill managers are used to obtain advances on in Rangoon, but I should require better and more cogent evidence than was produced in this case before being satisfied that the general body of mill owners in Rangoon regard their obligations in respect of delivery orders issued by them to their mill managers in the same light as the witnesses for the plaintiff in this case. It would be surprising if mill owners had given up the distinctly advantageous position in which the decision in *Vyravon Chetty* v. *Oung Zay and Mohr Bros. Ltd.* (1) placed them.

If money-lenders choose to advance money without reading and having regard to the terms of the documents on which they are asked to advance, they do so at their own risk.

Khoo Beng Ok fulfilled the contract in respect to which he gave the delivery order. The order itself contains no guarantee or undertaking that he would hold the goods and not deliver to any one except some one who produced the order.

The terms of this order put every one asked to advance money on it on enquiry as to whether the goods exist, and whether the mill owner will deliver them without payment. I am unable to hold that by issuing such a document Khoo Beng Ok estopped himself from denying that he had delivered the goods to the person with whom he had contracted, or to hold that he and his representatives are liable to the plaintiff on the ground of estoppel.

I would allow the appeal, set aside the decree of the Original Court, and dismiss the suit, ordering the plaintiff to pay the defendants' costs of the suit and of this appeal, allowing the defendants extra costs of 10 gold *mohurs* a day for three days in the Original Court.

ORMOND, J.—The respondents are the legal representatives of Khoo Beng Ok (deceased), who owned a rice mill and sold under two contracts 660 bags of boiled rice to Nyna, a dealer in rice. On 17th February Nyna paid for the rice and the miller gave him receipted bills and a delivery order on his godown-keeper (Exhibit A). The document is expressed to be subject to the terms of the two contracts and directed delivery to be given to Nyna or bearer. The goods were ascertained and were the property of Nyna in the custody of the miller. Later, on the same day Nyna obtained delivery of the goods without giving up the delivery order, saying that it was in Rangoon and that he would return it the next day. Nyna at that time was in possession of the delivery order. On the 22nd February Nyna fraudulently obtained from the plaintiff Rs. 5,584-10-0 on the pledge of the two receipted bills and the delivery order; and in May he disappeared. The plaintiff then sued the miller to recover this amount which was also the value of the goods covered by the delivery order. The plaintiff obtained a decree and the defendant now appeals.

The evidence shows that Exhibit A, which is in a form well known in the trade, is transferable by delivery; that it is not issued until the goods have been paid for; that receipted bills showing such payment are attached to the delivery order and the documents are passed on; that Banks will advance money on the delivery order when they are satisfied that the goods have been paid for; and that delivery is given upon production of the document.

In the case of *Vyravon Chetty* v. *Oung Zay and Mohr Bros. Ltd.* (1) (which was decided by the Recorder of Rangoon in 1890) the transferee of delivery orders, similar to Exhibit A, sued the miller. He obtained a decree on the delivery order, the goods for which had been paid for; but this claim on the delivery orders, the goods for which had not been paid for, was dismissed on the ground that the delivery orders were not negotiable instruments and that the vendor had not lost his lien. It was also held in that case

that the delivery orders were not documents of title—following the English decisions—but a decree was given to the plaintiff against the miller in respect of the rice which had been paid for, on the ground that the miller could not have refused to deliver to his buyer and that, therefore, he could not refuse to deliver to the holder of the delivery order.

The test whether a document is a document of title or merely a token of authority to receive possession, is laid down by the Privy Council in *Ramdas Vithaldas Durbar* v. *Amerchand & Co.* (3), where it is said: "The test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods *thereby represented.*" Upon the evidence this delivery order must be taken to be a document showing title to goods. The delivery order expressly states that it is subject to the terms of the contract and that the goods are not to be removed before payment. It thus preserves the vendor's lien for the price of the goods (if not already paid for) and it shows that the person who acquires the property in the goods is subject to any liability which attaches to the original buyer under the contract.

The learned Judge has held that this delivery order is not only a document of title to goods, but that it is also a "negotiable instrument", and that the plaintiff as the "holder", therefore, was entitled to recover as against the defendant; and he also held that the defendant was estopped from saying that the delivery order was exhausted by reason of delivery having been given to the buyer.

The learned Judge has, I think, overlooked the fact that in all the cases where a document has been held to be a "negotiable instrument" an essential element of the decision was that by the custom of the money market, the document was transferable *as if it were cash.* A *bona fide* transferee of cash obtained a good title to the cash (because of its currency) although his transferor might have stolen it. The document in such a case, therefore, had the element of 'negotiability' properly so called; a *bona fide* transferee for value of the document acquired a good title even though his transferor had none. Upon this principle certain securities for money (such as bonds and scrip) have been held to be negotiable instruments, although they would not be covered by the Bills of Exchange Act, 1882.

But a document showing title to goods is on a different footing: the document is taken to represent the goods to which it relates and the law governing its transferability is the same as the law which governs the transferability of the goods themselves. And this law, apart from any question of estoppel, is to be found in sections 108 and 178 of the Contract Act.

In Scrutton on Charter Parties at page 155, Note 1, it is said: "'Negotiable' is a term which perhaps strictly should be reserved for instruments which may give to a transferee a better title than that possessed by the transferor. A bill of lading is not 'negotiable' in this sense; the endorsee does not get a better title than his assignor. A bill of lading is 'negotiable' to the same extent as a cheque marked 'not negotiable', *i. e.*, it is 'not transferable'." Blackburn, J., in *Cole* v. *North Western Bank* (10) says: "The possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession." And Lord Campbell, C. J., in *Gurney* v. *Behrend* (11) says: "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a

(10) (1875) 10 C. P. 354 at p. 363; 44 L. J. C. P. 233; 32 L. T. 733.

(11) (1854) 3 El. & Bl. 622; 23 L. J. Q. B. 265; 18 Jur. 856; 2 W. R. 425; 118 E. R. 1275; 23 L. T. 89; 97 R. R. 687.

bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The Bill of Lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

The delivery order is a document of title to the goods to which it relates and the property of the transferor in the goods passes to the transferee by delivery of the document. This delivery order purported to be a document of title to certain specific goods belonging to Nyna in the custody of the defendant which were deliverable under certain contracts. But when the plaintiff acquired this title, the goods had ceased to exist and there was no title in Nyna; the plaintiff, therefore, acquired no title to any goods. No doubt the defendant, by giving delivery to Nyna without the production of the delivery order, did so at his own risk; and if Nyna had pledged the delivery order with the plaintiff before he received delivery, the defendant would be liable to the plaintiff for having wrongfully disposed of the plaintiff's property. But Nyna was then in possession of the delivery order and was the person entitled to delivery.

When once delivery has been given to the person entitled, the delivery order is exhausted. Channell, J., in *London Joint Stock Bank* v. *British Amsterdam Maritime Agency* (12) says: "If Messrs. Palmers were the persons entitled at that time to have the goods delivered to them, then it seems to me that the bill of lading would be exhausted:" See also Scrutton on Charter Parties, pages 183 and 273. Delivery having been given to the person entitled the delivery order ceased to have any effect.

Sections 178 and 108, Exception 1, of the Contract Act do not help the plaintiff: because there were no goods and the delivery order having become exhausted, there was no delivery order. Moreover, Nyna was not, and never had been, in possession of the document by the consent of the owner (defendant); for Nyna was himself the owner of the delivery order until he took delivery and after delivery, though the defendant was entitled to have the document given up to him, it was not by his consent that Nyna retained it.

As to estoppel, if *A* issues a mercantile document to which, by the custom of the trade, certain incidents are attached, he is estopped from denying that he is bound by those incidents, unless there is something in the document to show the contrary. Thus the maker of a delivery order which by the custom of the trade relates to goods which have been paid for, is estopped from saying that they have not been paid for and he loses his lien: *Merchant Banking Company of London* v. *Phoenix Bessemer Steel Company* (13).

In *Goodwin* v. *Robarts* (5), followed by *Rumball* v. *Metropolitan Bank* (14), it was decided that upon the ground of estoppel a person who deposits with an agent a security on the face of it payable to bearer, cannot recover it from a *bona fide* holder for value to whom the agent had fraudulently transferred it, whether it be a negotiable instrument, recognized by law as such, or not: because he had made a representation on the face of the scrip that it would pass with a good title to anyone who took it in good faith and for value. But as pointed out by Lord Selborne in *France* v. *Clark* (15) and by Lord Esher in *Fine Art Society* v. *Union Bank* (16), the fact that the document in that case was treated as a 'negotiable instrument' by the mercantile world was essential to the decision. And Lord Bramwell in *Colonial Bank* v. *Cady* (17) says: "I cannot, with all respect to Lord Cairns, see any

(12) (1911) 16 Com. Cas. 102 at p. 105; 104 L. T. 148.

(13) (1877) 5 Ch. D. 205; 46 L. J. Ch. 418; 36 L. T. 395; 25 W. R. 457.

(14) (1877) 2 Q. B. D. 194; 46 L. J. Q. B. 346; 36 L. T. 240; 25 W. R. 366.

(15) (1884) 26 Ch. D. 257 at 264; 53 L. J. Ch. 585; 50 L. T. 1; 32 W. R. 466.

(16) (1886) 17 Q. B. D. 705 at p. 710; 56 L. J. Q. B. 70; 55 L. T. 536; 35 W. R. 114; 51 J. P. 69.

(17) (1890) 15 A. C. 267 at p. 282; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17.

ground for applying the doctrine of *Pickard* v. *Sears* (18) in *Goodwin* v. *Robarts* (5). The plaintiff there was not making a claim inconsistent with anything he had theretofore said or done." It clearly could not have been intended to decide that the maker of every document which is transferable by delivery, is estopped from denying that it is a "negotiable instrument", when it is not a negotiable instrument either at law or by custom.

In the present case there was no implied representation by the defendant that he would deliver the goods to anyone who was a *bona fide* transferee for value of the document: but merely that he would deliver the goods to anyone who had a good title to the delivery order, and that an endorsement of the delivery order was not necessary in order to pass the title. If the bailee had notice that the person presenting the delivery order was not entitled to the delivery order, and he gave him delivery, he would do so at his own risk.

Lastly it is urged that the defendant is estopped by his negligence in not taking back the delivery order; and that by his omission to do so, he enabled Nyna to perpetrate the fraud on the plaintiff. There is no question as to the *bona fides* of the defendant. No duty was cast on the defendant to recover the document. Nyna was not the defendant's agent, and the defendant was not responsible for him. So far from there being any negligence on the part of the defendant, he could not possibly have recovered the document if Nyna did not intend to give it up. Nothing on the part of the defendant but actual notice to the plaintiff could have prevented Nyna from perpetrating this fraud on the plaintiff. Though the defendant might have foreseen the possibility of Nyna making a fraudulent use of the document, he could not foretell who the victim might be; and consequently he could not give notice to the plaintiff. The omission by the defendant was not the proximate cause of the loss; but rather the plaintiff's omission in not making enquiries from the defendant and satisfying himself that the document was a genuine delivery order and that the goods were in existence.

(18) (1837) 6 Ad. & E. 469; 2 N. & P. 488; 112 E. R. 179; 45 R. R. 538.

See the judgments of Bramwell and Brett, JJ., in *Baxendale* v. *Bennett* (19).

I would allow the appeal, set aside the decree and dismiss the suit with costs to the defendant in both Courts. On the original side the plaintiff was given extra costs of 10 gold *mohurs* a day for three days—the defendant should have these extra costs.

*Appeal allowed.*

(19) (1878) 3 Q. B. D. 525; 47 L. J. Q. B. 624; 26 W. R. 899.

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## CALCUTTA HIGH COURT.

APPLICATION IN INSOLVENCY SUIT No. 178 OF 1910.

July 20, 1916.

*Present*:—Mr. Justice Greaves.

*Re* HARIPADA RAKSHIT—INSOLVENT.

*Ex parte* BINODINI DASSEE—APPLICANT.

*Presidency Towns Insolvency Act (III of 1909), s. 36—Court, power of—Examination—Application, contents of—Order refusing application, grounds of.*

That litigation may ultimately ensue between the Official Assignee and the party to be examined under section 36 of the Presidency Towns Insolvency Act is no ground for refusing an order for examination under that section. [p. 95, col. 1.]

When the Official Assignee applies for the examination of a person under section 36 of the Act, he should state shortly the nature of the information likely to be given by the person sought to be examined and the dealings or properties of the insolvent to which such information will relate. [p. 95, col. 1.]

An order for the examination of a person under section 36 should not be made upon the allegation in the Official Assignee's petition that the person sought to be examined appears capable of giving information respecting the insolvent's dealings and properties. [p. 95, col. 1.]

The powers of the Court are very wide under section 36 of the Presidency Towns Insolvency Act and no limit has been fixed by the section during which the powers may be exercised. Although the Court would in using these powers be careful to see that they are not used unduly and unnecessarily after a considerable time has elapsed from the time of the discharge of the insolvent, still there is nothing in the Act to limit the exercise of the powers to the period before the discharge. [p. 95, col. 2.]

Mr. *Langford James*, for the Applicant.

Mr. *N. N. Sircar* (with him Mr. *B. K. Ghosh*), for the Official Assignee.

JUDGMENT.—This is an application by Sreemutty Binodini Dassee to set aside an order of the Registrar in Insolvency, dated the 6th June 1916, for her examination

*Re* HARIPADA BAKSHIT.

under section 36 of the Presidency Towns Insolvency Act. The order was obtained upon the application of the Official Assignee and the applicant seeks to set aside the order on three grounds: (*i*) that the insolvent having obtained his discharge no order under section 36 can now be made; (*ii*) that the application on which the order was made disclosed no grounds for making such order; (*iii*) that as litigation may ensue between the applicant and the Official Assignee, an order for her examination would be inequitable.

I deal with the third ground first; and with regard to this ground I hold that the case is upon the facts eminently one for the examination of the applicant under section 36, if such an examination can now be ordered, and I see no ground for refusing an order under section 36 because litigation may ultimately ensue between the Official Assignee and the party to be examined; if this were so, it would in many cases render the valuable provisions of section 36 nugatory. The case seems to me quite different when there is actual litigation in progress between the Official Assignee and the person sought to be examined.

With regard to the second ground, it appears from the petition of the Official Assignee that the order was made upon his allegation that the applicant appeared capable of giving information respecting the insolvent's dealings and properties. I should not myself have made an order upon an application of this kind. I think the Official Assignee should state shortly the nature of the information likely to be given by the person sought to be examined, and the dealings or properties of the insolvent to which such information will relate. But I have before me ample materials to justify the making of the order, if it can be made at this stage, and accordingly I do not propose to set aside the order upon this ground.

It now remains to consider the first and most important ground upon which the order is sought to be set aside.

Section 36 provides that the Court may, on the application of the Official Assignee, or of any creditor who has proved his debt at any time after an order of adjudication has been made, summons before it the insolvent or any persen known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

The section fixes no limit during which the powers under it may be exercised, but it was urged before me, on behalf of the applicant, that the powers cease on the insolvent's discharge, because section 43 of the Act provides what is to be done by a discharged insolvent to assist in the realization of his property and, it is said, that section would not have been necessary if the provisions of sections 33—37 were still subsisting after the insolvency. It may be that so far as the insolvent is concerned, the provisions of section 36 are not applicable after his discharge, having regard to the provisions of section 43, but I see no reason why this should be so in the case of the other persons referred to in section 36. To so hold would, I think, be prejudicial to the insolvent himself, as it might delay his obtaining his discharge, as, if the Court's powers under section 36 came to an end upon the same being granted, the Court might hesitate to grant such discharge at as early a period as, but for this, it would otherwise do. The powers of the Court are very wide under section 36, and I think the Court would, in using them, be careful to see they were not used unduly and unnecessarily after a considerable time had elapsed from the time of the discharge, but I see nothing in the Act to limit the powers of the Court under section 36 to the period before discharge, and accordingly I think, in a proper case, the Court can even after discharge use the powers given by section 36. I think the present is a proper case upon the materials before me, and accordingly the first ground of the application also fails and the application must be dismissed with costs.

*Application dismissed.*

RAMCHARITER SAHU *v.* RAM NARAIN SAHU.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 202 OF 1915.

February 27, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Roe.

RAMCHARITER SAHU—APPELLANT

*versus*

RAM NARAIN SAHU—RESPONDENT.

*Succession Certificate Act (VII of 1889), s. 6—Assignee of representative of deceased, whether can apply.*

A succession certificate may be granted to the assignee of the representative of a deceased person.

Appeal from an order of the District Judge, Muzafferpur, dated the 9th February 1915.

Mr. *Muhammud Mustafa Khan*, for the Appellant.

Rai *Gurusaran Prasad*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—This is an appeal against an order granting a succession certificate. The appellant is Ramchariter Sahu, his brother was one Ramdhari. Ramdhari died leaving a son Bhagwat. It is the debt due to Ramdhari's son Bhagwat (who is dead) which formed the subject of the certificate. The order was made *ex parte*, the appellant not having appeared at the hearing. There was evidence that the brothers Ramchariter and Ramdhari had separated. This evidence is also supported by the judicial proceedings which admittedly took place. That being so, it is difficult to say that the appellant has any *locus standi* to prosecute this appeal. The family being separate the infant son Bhagwat was succeeded by his mother and until the death of his mother Ramchariter has no interest in the estate.

The point taken in appeal is that the succession certificate should not have been granted in this case. It appears that after the death of Bhagwat his mother who succeeded him assigned her rights and the various debts including this one to Ram Narain Sahu, to whom the succession certificate has been granted. It has been argued that a succession certificate cannot be granted to the assignee of the representative of a deceased person. I see no reason why a succession certificate should not have been granted to the assignee. The appeal is dismissed with costs.

ROE, J.—I agree.

*Appeal dismissed.*

MIDNAPUR ZEMINDARY CO. *v.* SECRETARY OF STATE.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 91 OF 1915.

June 8, 1916.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MIDNAPUR ZEMINDARY COMPANY—PLAINTIFFS—APPELLANTS

*versus*

SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

*Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii), s. 7, sub-s. 4, cl. (c)—Bengal Tenancy Act (VIII B. C. of 1885), s. 111A, suit under—Consequential relief—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Rejection of plaint—Court-fee, deficient.*

Where in a suit under section 111A of the Bengal Tenancy Act, the plaintiff tenant asks not only for a declaration of the occupancy right of which he claims he is in possession, but also asks for a declaration that the entry in the Record of Rights as to his status as tenure-holders is a nullity, the plaint comes within section 7, sub-section 4, clause *(c)*, of the Court Fees Act, inasmuch as a consequential relief is asked therein. [p. 97, col. 1.]

The proviso to section 111A of the Bengal Tenancy Act must be strictly applied. [p. 97, col. 1.]

The provision of rule 11, Order VII, Code of Civil Procedure, is mandatory, so that a Court has no alternative but to reject a plaint written upon an insufficiently stamped paper, when the plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court fails to do so. [p. 97, col. 2.]

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 3rd February 1915.

Mr. *U. N. Sen Gupta* (with him Babus *Jogesh Chandra Roy*, *Sitaram Banerjee* and *Probodh Kumar Das*), for the Appellants.

Babu *Ram Charan Mitra* (Senior Government Pleader), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—I think this appeal must be dismissed.

The point arises upon the plaint which was filed in this case. The learned Judge has held that the plaint was not one that merely asked for a declaratory decree, but was one in which a consequential relief was claimed. The stamp which was upon the plaint was one of Rs. 10, the stamp which is applicable to a plaint in a suit to obtain a declaratory decree, under Article 17, clause (*iii*), of the Second Schedule to the Court Fees Act of 1870. The learned Judge held that it was a plaint in which a consequential relief was asked, and consequently it came

within section 7, sub-section 4, clause (*c*) of that Act.

In my judgment there is no doubt that the learned Judge was right. The suit was instituted under section 111A of the Bengal Tenancy Act; and in considering the nature of the suit regard must be had to the actual words of the section. It provides that "No suit shall be brought in any Civil Court in respect of any order directing the preparation of a Record of Rights under this chapter . . . . ", with certain saving clauses, 'Provided that any person who is dissatisfied with any entry in, or omission from, a Record of Rights framed in pursuance of an order made under section 101, sub-section (2), clause (*d*), which concerns a right of which he is in possession, may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1877." In my judgment these words must be strictly applied. What is it he is entitled to ask for in a suit brought under that section? He is entitled to ask for a declaration of the right of which he claims he is in possession. In this case the plaintiff claims that he is in possession of an occupancy right. Therefore, he is quite entitled to ask for such a declaration as is comprised in clause (*a*) of paragraph 11 of his plaint. But he goes on in paragraph (*b*) to ask for a declaration that "the entry in the records as to his status as tenure-holder is a nullity." In my judgment that is not such a declaration as is contemplated by the proviso to section 111A. I think the words are so plain that the point which has been taken on behalf of the plaintiff is not really arguable. Therefore, I think the order of the learned Judge was right. Having come to the conclusion, as he did, that the plaintiff was asking for something more than a mere declaratory decree, and was asking for a consequential relief, what was the learned Judge to do? That is pointed out clearly by Order VII, rule 11, which says this:—"The plaint shall be rejected in the following cases: (*a*) where it does not disclose a cause of action", that is not the case here: (*b*) "where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so", again that is not this case: "(*c*) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so." In this case the relief was properly valued at Rs. 5,225, at least there was nothing said to show that the relief was not properly valued. But the learned Judge rightly came to the conclusion that the plaint was written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court failed to do so. Therefore, he had no other alternative but to reject the plaint in accordance with the terms of the rule. In my judgment, the learned Judge was right in his decision, he had no alternative but to reject the plaint.

The learned Counsel, who appeared on behalf of the plaintiff, asked this Court to give the plaintiff leave to amend his plaint by striking out paragraph (*b*) of clause 11 in his plaint. In my judgment, he ought not to be allowed to do so for the reasons I have already given, and, this Court has no more power than the learned Judge when it is shown that the case comes within Order VII, rule 11. This Court has no jurisdiction, the provision is mandatory, and this Court, just the same as the Court below, is bound by that section which provides that under the above-mentioned circumstances the suit shall be rejected.

The appeal is dismissed with costs.

MOOKERJEE, J.—I agree.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 254 OF 1915.

May 3, 1917.

*Present*:—Sir George Knox, KT.,
Acting Chief Justice.

*Lala* SHAMBHU NATH AND OTHERS—
PLAINTIFFS—APPELLANTS

*versus*

HARI RAM AND AFTER HIS DEATH MANGAT RAI, MAJOR, AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts.* 142, 144—

SHAMBHU NATH *v.* HARI RAM.

*Adverse possession*—Abadi *in agricultural* mahal—*Burden of proof.*

If a person occupying a portion of the *abadi* in a purely agricultural *mahal* raises the defence of adverse possession, the burden of proving that possession lies very heavily on him and he cannot rid himself of that burden by saying that the *zemindar* has not shown that he has been in possession within twelve years next preceding the suit. [p. 98, col. 2.]

Second appeal from the decision of the Additional Judge, Saharanpur, dated the 13th November 1914.

JUDGMENT.—The subject-matter of this appeal is described in the plaint as a shop, the occupant of which carries on grocery business. It is situate within *Mahal* Radhe Lal in *Mauza* Barampur, *Pargana* Manghaur, Tahsil Roorkee. The plaintiffs are *zemindars* of the *mahal*, this is admitted. It is said in the plaint that the defendant Hori Ram occupied a certain plot of land in the *abadi* as a tenant of the *zemindars* and paid *chaukidara* tax for the same. But subsequently under a collusive and fictitious sale-deed dated the 30th of May 1912, he sold the aforesaid shop to defendants Nos. 2, 3 and 4 and he gave up residing in the village and took up his residence in *Qasba* Parkazi, District Muzaffarnagar. That the defendants-vendees took possession of the shop and are now in possession of it. That the defendant No. 1 occupied the land covered by the said shop as a *ryot*. He had legally no right to transfer nor had defendants-vendees any right to remain in possession thereof without the permission and consent of the plaintiffs, who are *zemindars* and proprietors. That immediately on coming to know of the sale, the plaintiffs desired the defendants-vendees several times to remove the materials purchased, to vacate the site and to make over possession thereof to the plaintiffs but they refused to do so. The plaintiffs accordingly pray that defendants Nos. 2, 3 and 4 be ordered to vacate the site of the shop and may be ordered to remove the materials of the shop purchased and absolute possession be given to the plaintiffs.

The answer to the allegations contained in the plaint are that defendant No. 1 was the owner of the property in suit and had been in proprietary and adverse possession for more than twelve years. He was not a tenant of the plaintiffs, nor did he pay the *chaukidara* or any *zemindari* dues. That the defendants have never been in possession within twelve years.

The case is not complicated by any contention that the *mahal* is not a purely agricultural *mahal*, and the dispute between the parties resolves itself into one of a *zemindar* seeking to eject from *abadi* lands persons who without right or permission derived from him occupied portions of the *abadi* land. The Court of first instance decreed the claim and the defendants went in appeal. The appeal was heard by the Additional District Judge of Saharanpur.

I have noticed in more than one case which has come from this Court that the Judge takes a peculiar view of the law on this subject. He starts off in the present case before me, as in other cases, in laying down that in the suit for possession it is the duty of the plaintiff to prove his possession within twelve years next before the institution of the suit. He appears entirely to forget the relation which exists between *zemindar* and tenant with regard to land situate in the *abadi*. It would appear that he had never really studied the leading case on this matter of *Sri Girdhariji Maharaj* v. *Chote Lal* (1). I say this, because if he had he would not have started with the inaccurate premise with which he does. In Second Appeal No. 1040 of 1914, I have pointed out the fallacy of this reasoning and called particular attention to it. If a person occupying a portion of the *abadi* in a purely agricultural *mahal* raises the defence of adverse possession, the burden of proving that possession lies very heavily upon him and he cannot rid himself of that burden by saying that the *zemindar* has not shown that he has been in possession within twelve years next preceding the suit. It is most natural that the plaintiffs should not know on what terms this land was given to the father of Umrao; if they had pretended to have such knowledge the probability would be that they would be setting up a fictitious case. It is enough to say, I am *zemindar* of this *abadi* and it is for you (the *ryot*)

(1) 20 A. 248; A. W. [N. (1898) 27; 9 Ind. Dec. (N. S.) 520.

to shew how contrary to the general custom prevalent in the United Provinces, you prove the plea of adverse possession. I do not mean to say there are not villages in which the Record of Rights does not admit the existence of some custom upon which such a plea might be founded, but I do say that the defendant has to bring forward an opposite custom and to prove that it is a custom prevailing in his village. The learned District Judge writes: "On the other hand, the defendants are purchasers from Umrao, who had been in adverse possession of the site of the shop for more than twelve years." He gives no foundation for the determination of this, but bases it upon what he is pleased to term a "series of rulings beginning with *Nazir Hasan* v. *Shibba* (2)." He has not said where this initial ruling of the series is to be found or where any other rulings of the series are to be met with. No attempt was made to support this judgment by a reference to any of these rulings. Only one case was cited to me with which I shall shortly deal. He goes on to say that "The ruling applicable to this case is *Bhadder* v. *Khair-ud-din Husain* (3)." That was in many ways a peculiar case. The houses in dispute were houses situate in *Mohalla* Daraganj in the city of Allahabad. The judgment does not show to what profession the person who laid claim to the houses as owner belonged. But it is said in the judgment of the learned Chief Justice "that neither the owner of it nor any of his predecessors-in-title ever paid any rent for it, nor gave any acknowledgment of his title to the *zemindar*, nor carried on any trade, such as that of carpenter, blacksmith, etc., for the carrying on of which sites in the *abadi* of a village are usually granted by the *zemindar* free of rent." *Mohalla* Daraganj cannot by any pretence be said to be a purely agricultural *mohalla*, it is a portion of the city of Allahabad inhabited mainly by *pragwals* and it is doubtful whether a single tenant of an agricultural type resides within the four corners of the *mohalla*. The claimant in the present case and his predecessor were apparently petty *banias* dealing in groceries and wares which would find favour in a purely agricultural village and would in most cases be necessary to make the village the self-consisting unit which Indian villages used to be.

The case referred to above is that of *Rai Raj Narain* v. *Kammunu*, First Appeal No. 1176 of 1915, decided on the 10th April 1917. The main point on which that case was decided was the contention of the plaintiff that the learned Judge of the lower Appellate Court had disposed of the appeal on a ground which was not taken in the case and had set up a plea of adverse possession. There was, moreover, a finding that a custom of transfer of houses by tenants without any objection made by the *zemindar* was current and proved. This is a totally different case from the one before me. In this case the learned Judge goes on after these preliminary statements to lay down this startling result. That there being no proof that Umrao or his father was a *ryot* of the plaintiff, their possession must be presumed to be *prima facie* adverse. I allowed time in this present case at the special request of the learned Counsel for the respondents to allow the parties to arrive at some understanding, and I think it is unfortunate that the respondents do not appear to have availed themselves of this opportunity. The pleas taken in appeal prevail.

The appeal is decreed, the order of the lower Appellate Court is set aside and the decree of the Court of first instance is restored with costs in all Courts.

*Appeal accepted.*

(2) 27 A. 81; 1 A. L. J. 479: A. W. N. (1904) 168.
(3) A. W. N. (1906) 305; 3 A. L. J. 760; 29 A. 133.

HASISWARI DEBI v. HARI NATH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2732 OF 1915.

April 23, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

HASISWARI DEBI—PLAINTIFF—APPELLANT

*versus*

HARI NATH CHAKERVERTY—DEFENDANT—RESPONDENT.

*Landlord and tenant—Permanent tenure—Registered lease, necessity of.*

A permanent tenure cannot be created under the Bengal Tenancy Act or any other Act except by a registered instrument, even where the land is agricultural land situate outside a town and let out for the purpose of growing thatching grass. [p. 101, col. 1.]

Therefore, a person who enters upon land as a tenant, cannot set up a permanent tenure unless his lease is registered in accordance with law. [p. 101, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Jessore, dated the 15th July 1915, reversing that of the Munsif, Narail, dated the 9th March 1914.

FACTS of the case will appear from the following extract from the judgment of the lower Appellate Court:—

"The suit out of which this appeal arises is one for a declaration of the plaintiff's title to an eight-anna share of the land in suit and for recovery of possession thereof. The land in suit. . . . . was the property of Guru Prosad and his brother Durga Prosad, who owned it in equal shares. On Guru Prosad's death his eight-anna share of the land passed to his daughter Manorama, and on Durga Prosad's death his eight-anna share passed to his son Dwarka Nath. Dwarka Nath sold his eight-anna share to Durga Charan Chakravarty, and that share passed on Durga Charan's death to his sons Hari Nath and Jagabandhu, defendants in this suit, who are admittedly in possession thereof. The other eight-anna share which was inherited by Manorama from her father Guru Prosad is the subject-matter of this suit.

The plaintiff's case is that in consideration of the plaintiff Hasiswari having given her daughter in marriage to one Joygopal, so that there might be a *palti* marriage without payment of bride's price between Joygopal's sister and the said Manorama's son Kedar, Manorama granted a *kaimi mourasi patta*, dated the 9th *Baisakh* 1282 *B. S.*, for some lands including the eight-anna share in the land in suit, reserving a yearly rent of Re. 1 to the plaintiff, that the *patta* was not registered on account of Manorama having died shortly after the grant of the *patta*, but the plaintiff remained in possession under the *patta* . . . . Manorama's son did not realize from her the rent reserved by the lease, and that the defendants wrongfully dispossessed her of her said eight-anna share of the land..... Defendant No. 1 denies the grant of a *patta* by Manorama Devi . . . . to the plaintiff or the acquisition by the plaintiff of any right ..... under any *patta* granted to her by Manorama or otherwise....."

Babu *Hamendra Chandra Sen*, for the Appellant.—The lower Appellate Court has found that because the *patta* on which the plaintiff's title rests was not registered in conformity with the provisions of law, the plaintiff has failed to prove her tenancy. I submit that even if the *patta* is not admissible in evidence to prove the tenancy in question, yet under the Bengal Tenancy Act which is applicable to this case a tenant can prove his tenancy right irrespective of any lease which he holds. The plaintiff can prove her tenancy by oral evidence although she cannot prove the lease for want of registration.

My next submission is that even if the plaintiff fails to establish her tenancy right she can show that she has acquired title by adverse possession for more than 12 years. The lower Appellate Court has found that by being admitted to occupation as a tenant the possession of the plaintiff is permissive possession, and, therefore, she is not entitled to prove adverse possession. I submit that the tenant (plaintiff) is entitled in such a case to prove advese possession. There are authorities showing that if a plaintiff fails to prove his title by tenancy he can prove his title by adverse possession. See *Uma Churn Ghose* v. *Bishwa Nath Ghose* (1), *Nisa Chand Gaita* v. *Kanchiram Bagani* (2), *Sundari Dassee* v. *Mudhoo Chunder Sircar* (3). The above cases fully support my contention.

Babu *Hiralall Chakerbutty*, for the Respondent, was not called upon.

JUDGMENT.

FLETCHER, J.—This appeal must be dismissed. The first point that has been made

(1) 3 C. W. N. cxliii (143).

(2) 3 C. W. N. 568; 26 C. 579; 13 Ind. Dec. (N. S.) 972.

(3) 14 C. 592; 7 Ind. Dec. (N. S.) 892.

is that, though this document which created the permanent tenure required registration under the provisions of the Indian Registration Act, yet, because the land was a land situated outside the town and let out for the purpose of growing thatching grass, therefore, the interest of the plaintiff that was a permanent interest could have been created without a registered document. I do not agree with that view. This is not a *raiyatee* holding, nor is it one in which the plaintiff could have acquired a right of occupancy. It is merely a permanent tenure of this small piece of land, and one cannot get a permanent tenure under the Bengal Tenancy Act or under any other Act except by a registered document. The learned Vakil who has argued the appeal on behalf of the plaintiff-appellant thinks that whenever the land is an agricultural land one can get a permanent tenure without a registered document. It is quite true that one can get an interest as a *raiyat* by way of occupancy.

The other point as to the case of adverse possession has got no foundation at all. The plaintiff's case is that she entered upon the property as a tenant. She has not been able to prove that she was a permanent tenant, because the law requires that in such a case the lease should be registered. She says that her case is that at the time she entered into possession as tenant her possession became adverse. Obviously, that is not so. The appeal fails and is dismissed with costs.

NEWBOULD, J.—I agree.

*Appeal dismissed.*

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OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 110 OF 1916.

March 14, 1917.

*Present*:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

THE HON'BLE MR. JUSTICE *Saiyid*

SHARFUDDIN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

*Musammat* MAQBULUNNISA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 92—*Trust created for public purposes of religious nature—Muhammadan, religious, founder of new religious order—Mausoleum, mosque and* khanqah *built to his memory, management of—Offerings, title to.*

The management of the mausoleum, mosque and *khanqah* of a religious Muhammadan, who was the founder of a new religious order and to whom there could be no succession under any recognised rules, is a constructive trust created for public purposes of a religious nature, such as a Civil Court is competent to interfere with. [p. 105, col. 2.]

The offerings made at the mausoleum not to the sect of the deceased but to his memory belong to his heirs and not to his followers. [p. 105, col. 2.]

Appeal from the decree of the District Judge, Lucknow, dated the 8th August 1916.

Messrs. *Mohammad Nasim*, *Shahid Husain* and *Chaudhri Niamat Ullah*, for the Appellants.

The Hon'ble Syed *Wazir Hasan*, for Respondents Nos. 1 and 4.

Mr. *Haider Husain*, for Respondents Nos. 2 and 3.

JUDGMENT.

STUART, A. J. C.—The six plaintiffs in the suit against the dismissal of which the present appeal has been brought are members of an association known as the Dargah Warsi Association.

They instituted a suit under section 92, Civil Procedure Code, in the Court of the District Judge of Lucknow, after having obtained the consent in writing of the Legal Remembrancer of the United Provinces, who is the Advocate-General within the meaning of the section, in which they prayed that certain moveable property appertaining to the mausoleum at Dewa, in the Bara Banki District, of Haji Waris Ali Shah, a mosque, a *khanqah* and an enclosure containing the tomb of Kurban Ali Shah, father of Haji Waris Ali Shah, should be vested in their Association, that the eight persons mentioned as defendants should be removed from the management of the properties and ordered not to interfere with the trust or with the offerings made at the mausoleum and the tomb, and that the Court should prepare a scheme of management for the properties. The learned District Judge dismissed the suit. The present appeal is preferred.

The history of the case is as follows:—Haji Waris Ali Shah was a Sunni Muhammadan by religion. He was born about 1817 or 1818. In 1820 his father Kurban Ali Shah

died. There is no reliable evidence to show that Kurban Ali Shah had embraced a religious life or was other than a religious Muhammadan who pursued a secular calling. It is admitted on all sides that at a very early age Haji Waris Ali Shah showed an extraordinary inclination for a religious life and that even in his extreme boyhood he was regarded as amazingly proficient in his knowledge and practice of religion. He attached himself when he was a small boy to Haji Khadim Ali Shah, a Sufi Durwesh of Golaganj, Lucknow. Khadim Ali Shah died about 1832 or 1833 when Haji Waris Ali Shah was 16 years old. On the death of Khadim Ali Shah, Haji Waris Ali Shah started extensive travels in the course of which he visited Mecca on many occasions and is said to have gone through the greater part of Arabia, Persia, Turkey and other foreign countries. From 1845 and onwards he resided mainly in India. He wandered from place to place teaching his special doctrines until towards the end of his long life he settled in Dewa in the Bara Banki District and resided permanently there. He died in 1905 at the advanced age of 85 years. There has been considerable argument as to the nature of his teaching and as to the constitution of his sect. It is admitted that he remained in most matters of ceremonial an orthodox Muhammadan, and that at no time did he ever depart from the recognised tenets of the Sunni faith. But his mind was the mind of a mystic and the doctrines which he taught were transcendental and esoteric. Further his teaching had one marked peculiarity. It made no distinction between members of different faiths. He preached to and accepted as suitable recipients for his teaching Muhammadans, Hindus, and Christians alike, and it is clear that he did not make as a condition of participating in the benefit of his doctrines a change of faith from those who were not Muhammadans. It is not easy to ascertain exactly what his teaching was: and, although among the witnesses who are his declared disciples and who based the whole of their conduct upon the precepts which Haji Waris Ali Shah (whom they call and whom I shall call in future the Saint) laid down, there are many gentlemen of high intellectual attainments, not one has been able to give in the witness-box anything like a compendium of the principles taught by the Saint upon which their lives are based. This is not surprising in the circumstances. It is difficult anywhere except in a religious treatise to explain succinctly the tenets of any faith, and when that faith is esoteric and mystical the difficulties are greatly increased. This much is clear: the Saint taught as a fundamental principle the power of Divine Love. This Divine Love was of the purest and holiest type. It linked God to man and one man to another irrespective of the religious beliefs on other points of the human recipients. The Hon'ble Mr. Justice Sharfuddin, one of the plaintiffs in this case, has stated in evidence that the Saint taught that the real religion was Love in which sinners and the virtuous, the rich and the poor, were all equal. The Saint once stated: "Whoever of mine here loves me is mine, be he a *chamar* or a sweeper." Although in his own life the Saint was celibate and pure, although he dressed in the meanest apparel and never permitted himself even the luxury of a bed, although he ate sparingly and abstemiously, and subsisted entirety on offerings made to him, never owning any sort of property, he was considerate to all, and did not demand from his followers the sacrifices that he made himself. To quote Mr. Justice Sharfuddin again: he treated all alike, the sinners and the people who call themselves virtuous. The sinners excited more pity in him as he preached Love in its spiritual sense, and he was the more anxious to redeem such sinners, even taking repentant prostitutes of advanced age as his disciples.

I have stated this much as to the Saint's history, life, and teaching in order to make clear the main point of controversy. The plaintiffs contend on one hand that the Saint's teaching was unique and essentially different from the teaching of any other religious teacher who had gone before. The defendants, while maintaining the Saint's position as that of an inspired holy man, do not admit that there was anything unique about his doctrines. They assert that the Saint was the disciple (or *murid*) of a Sufi named Haji Khadim Ali Shah, that he joined the Sufi college of Durweshes of which Haji Khadim Ali Shah

was the head, that he succeeded Khadim Ali Shah as his *sajjadanashin*, and that he remained during his lifetime head of his college of Durweshes, preaching with unimportant amplifications and additions the mystic doctrines prevalent in the Sufi college to which he was attached. This view of the defendants has been accepted by the learned District Judge, and it is for this reason in the main that the learned District Judge has dismissed the suit. I do not agree with this view. I shall make no attempt to enter into a disquisition on the exact import and limits of the Sufi doctrines. The insistence on a mystical acceptance of the Love of God is a matter common to many of the recognized colleges of Sufi Durweshes. Haji Khadim Ali Shah was undoubtedly once a Sufi. It is admitted that he approved of the doctrines of the Kadiria and Chishtia orders of the Sufis, but after having gone through the voluminous evidence which has been produced in the case, I hold a strong view that the Saint, although he commenced life as a Sufi, so developed the various views which he had acquired during his youth that from the time that he became a great power for religious instruction he must be considered to have created doctrines peculiarly and essentially his own, although those doctrines had emanated largely from the Sufi doctrines which he had assimilated in his youth. His readiness to take disciples of all creeds, his insistence upon nothing else than repentance and complete acceptance of Divine Love and his extraordinary large-mindedness are to my mind indications of something more than exceptionally high principles found in a follower of recognized Sufi beliefs. He made a new religion in effect. Further, there are facts on the record which controvert absolutely the theory that the Saint commenced as a *murid* and ended as a *sajjadanashin* of a Durwesh college. The Durwesh college in question is the college of which Haji Khadim Ali Shah was the head: Had the Saint, as suggested by the defendants, been the successor of Haji Khadim Ali Shah it is impossible to suppose that he would have left Lucknow on the death of his master in 1832 and never returned (as it is shown that he nev er did return) to Golaganj. One of the duties of a *sajjadasnashin* in a recognized Sufi institution is to perform the *urs* ceremony of his predecessor and to wash the tomb of the founder of the college. The Saint did neither. The learned District Judge does not consider these circumstances inconsistent with the view that the Saint was the *sajjadanashin* of Haji Khadim Ali Shah. He points out that the tomb of Haji Khadim Ali Shah is at present surrounded by the grounds of a Mission College, and he draws the inference that the Saint would not have been likely to go near a tomb so situated. But he overlooks the fact that Haji Khadim Ali Shah died in 1832. There is no evidence to show when the Mission College in question came into existence but it certainly could not have come into existence until after the Mutiny of 1857, and for a large number of years the Saint could, had he so desired, have performed the duties of *sajjadanashin* of Haji Khadim Ali Shah's institution before Haji Khadim Ali Shah's tomb was enclosed in the grounds in question. It is clear that at no time did he ever perform such duties. Taking the view which I take to the effect that the Saint, if he ever did belong to a college of Durweshes as a member of their body, broke away from that college at a very early age and afterwards instituted a new teaching, a new religion, and a new order, nothing can be elicited useful for determination of this case from the principle of succession adopted in recognised colleges of Sufi Durweshes, and the rulings upon which the learned District Judge has relied for his assistance lay down no principles which can be applied to this case. We have it proved clearly and distinctly that the Saint in his lifetime declared strenuously on more than one occasion that when he died there could be no successor to him, and we have it from the evidence of his followers that they believe that although his body has undergone the ordinary process of natural decay the Spirit of Divine Love is in his tomb, and a mysterious influence emanates from there to all his disciples. It is not clear that the Saint in his lifetime ever permitted any person other than himself to receive disciples as followers of his order. But, if he did so, that circumstance would not show that he tolerated the thought of a successor. Some of his disciples undoubtedly embraced the celibate and ascetice life; others

did not do so. He appears to have left largely to the choice of individual persons whether they should attach themselves entirely to a life of religion or should while adopting his doctrines pursue their ordinary avocations. It is possible that he may have permitted some of his disciples who had embraced a full religious life, to initiate others as members of his sect. It is to be remarked that the evidence shows that non-Muhammadans could be admitted as members of the sect without giving up their own religion. One of the witnesses in this case who is an initiated disciple is a Hindu. From the evidence as a whole it appears clear to me that, while the Saint admitted disciples, some of whom devoted themselves entirely to religion, and others of whom continued to pursue their ordinary avocations, and preached to all whether they were or were not his disciples, he laid down as a cardinal principle that no one could take his place after his death. I have dealt with this point sufficiently and now come to the matters with which this suit is directly concerned.

The first of these is with regard to the tomb of Kurban Ali Shah. Kurban Ali Shah, as I have already stated, was the father of the Saint and was an orthodox and religious Muhammadan, who had not embraced the life of a Durwesh or that of a religious teacher. The Saint was in no sense the spiritual successor of his father and could not have owed anything to the latter's teaching, as his father died when he was two or three years old. After the reputation of the Saint had become established certain of the less educated and the more superstitious made a practice of worshipping at the tomb of Haji Kurban Ali Shah and presented offerings there, and finally a religious fair has come into existence at Dewa on the recognized date of the father's death where offerings of substantial value are made. The Saint in his lifetime did not discourage the making of these offerings or the prayers at the tomb of his father; in accordance with his principle of retaining no property he took the offerings and distributed them in charity. In the Saint's lifetime an enclosure was constructed by offerings of his followers round the tomb of his father.

Before the Saint took up his residence in Dewa he visited the place periodically and in 1876 a certain M. Zahiruddin, a Pleader of the Bara Banki District, built a house at Dewa at a sort of *khanqah* for the accommodation of the Saint and his visitors. Additions were made to this building by the Raja of Ramnagar about 1880 and in 1886 further additions were made by Mr. Justice Sharfuddin. It was used as a *khanqah* accordingly. Another *khanqah* was built by Thakur Pancham Singh for the accommodation of visiors in 1900 or 1901. After the death of the Saint his disciples raised a large sum of money. Out of the subscription so raised a costly mausoleum and a mosque were erected. The Saint had been buried on the premises of the old *khanqah* in which he had resided. That *khanqah* was pulled down and the present mausoleum and the mosque are erected on its site. When the Saint died his disciples appointed at a large meeting which was convened Saiyid Muhammad Ibrahim, the Saint's sister's daughter's son, in some sort of capacity to look after the tombs and the existing *khanqah* and to superintend the construction of the new buildings. This Saiyid Muhammad Ibrahim died in 1915.

The dispute which has now arisen is as follows:—The plaintiffs as the Saint's disciples and representing the subscribers to the buildings request the Court to frame a scheme of management. Certain of the defendants put forward a claim that this is not a public trust but a private Durwesh institution in which Saiyid Muhammad Ibrahim succeded the Saint as *sajjadanashin*, that the Court has no right to interfere in the matter, and that the management of the property should be left entirely to the *sajjadanashin* who has succeded Saiyid Muhammad Ibrahim. There is a dispute as to who has succeeded Saiyid Muhammad Ibrahim. This dispute has not been determined by the learned District Judge. We understand that the question of succession to Saiyid Muhammad Ibrahim is at present before another Court. Others of the defendants assert that the offerings should be divided among the members of the Saint's family under the provisions of the Hanafi law. I have already stated that there is an annual religious fair on the recognized date of the death of the Saint's father at which substantial offerings are made at his grave. Since the death of the Saint another

and much more important religious fair has come into existence at which offerings are made in the mausoleum of the Saint himself. The dispute before this Court is largely with regard to these offerings. The plaintiffs desire that the expenses for the upkeep of the buildings, a proper provision for the ceremonial, and the entertainment of the recognized officials and attendants at the mosque and at the graves should be met from these offerings, and that the Court should prepare a scheme directing how much should be disbursed and how the balance should be disposed of. The learned District Judge took the view that there was a recognized college of Durweshes and that the Civil Courts had no right to interfere. As I have already stated, I do not accept his view that there was anything of the nature of a recognized college of Durweshes. But I do not accept the plaintiffs' case in entirety. In the first place the offerings made at the tomb of the Saint's father stand in a different category to the offerings made in the mausoleum. The followers of the Saint have no concern with the offerings made at the tomb of the Saint's father. Those are not offerings in any way made to the Saint, or to the sect, or to his followers, and in the preparation of the scheme no provision can be made for the receipt of those offerings. It is not for us to say in this case who in particular is entitled to them or whether they should go to the family of Haji Kurban Ali Shah. A great deal of unnecessary controversy has taken place with regard to the exact position of Saiyid Muhammad Ibrahim. The learned District Judge has been greatly affected by the facts that on the appointment of Saiyid Muhammad Ibrahim certain formalities were observed such as are ordinarily observed at the time of installation of the *sajjadanashin* in a Sufi sect and that Saiyid Muhammad Ibrahim was on many occasions treated by disciples of the Saint (some of them persons of standing) as *sajjadanashin*. All this is besides the point, in view of my finding that the Saint did not belong to any Sufi body. As there is no body there are no recognized rules of succession. The appointment of Saiyid Muhammad Ibrahim was an appointment made by the followers of the Saint of their own free will and it does not in any way bind the Court to appoint a successor to the office of Saiyid Muhammad Ibrahim (whatever the office may be) in the manner in which Saiyid Muhammad Ibrahim was appointed. Saiyid Muhammad Ibrahim is dead now, and it is immaterial what he was appointed to do. The Court in my opinion has a perfect right to frame a scheme for the management of the mausoleum, the mosque, and the *khanqah*, and as has been established conclusively by the evidence, it is necessary that such a scheme should be prepared. It has been argued that many of the offerings which are made at the mausoleum are not made to the sect of the Saint but to the memory of the Saint himself and if they are made to the memory of the Saint himself, they should go to his family and not to his followers. As the case stands at present it is impossible to say how many of the worshippers made offerings at the mausoleum to the sect of the Saint and how many make them to the memory of the Saint. In preparing a scheme it will be possible to direct that the worshippers should be instructed in the difference of the objects and that separate receptacles should be made for offerings for one purpose or the other.

The general conclusion at which I have arrived is that the Saint was unconnected with any recognized religious order, that he founded a new order for himself, that the management of his mausoleum and the mosque and the *khanqah* is a constructive trust created for public purposes of a religious nature, and that the direction of the Court is necessary to the administration of the trust. It has been fully established that it is necessary to settle a scheme for such management.

The appeal is accordingly allowed except with regard to the management of the tomb of Haji Kurban Ali Shah and the disposal of the offerings made there. As the appellants have succeeded to the extent of something like three quarters of their claim, I direct that the respondents pay three quarters of their own costs and three quarters of the costs of the appellants in both Courts and that the appellants pay one quarter of their own costs and one-quarter of the costs of the respondents in both Courts.

The following is the scheme which I have adopted after consultation with my learned colleague:—

SHARFUDDIN *v.* MAQBULUNNISA.

*Draft Scheme.*

1. This Trust shall be called the Haji Waris Ali Shah Mausoleum Trust of Dewa.

2. It shall comprise the mausoleum of the late Haji Waris Ali Shah and the mosque and the *khanqah* attached to it built by his disciples and followers by subscription and shall include gifts and offerings made at the mausoleum or outside it for the purposes of the trust and any property that may hereafter be acquired from the income derived from the trust property.

3. The object of the trust shall be—

(*a*) to maintain the mausoleum, mosque and *khanqah* in proper repairs and good sanitary condition and to make such improvements therein as its funds permit:

(*b*) to arrange for the performance of the *urs* and *fatiha* ceremonies at the mausoleum and for the lighting of the same in accordance with the existing usage:

(*c*) to provide facilities for the performance of worship and religious ceremonies by the disciples and followers of the late Haji Waris Ali Shah and for persons visiting the said mausoleum, mosque or *khanqah* for religious purposes:

(*d*) to arrange for the charitable distribution of alms and gifts of food and clothing to the poor in honour of the memory of the Saint:

(*e*) to take such steps as the committee of management may deem necessary for carrying on the teaching of the late Haji Waris Ali Shah.

4. The trust shall be administered by a committee consisting of ten members:—

(*a*) four of them shall be elected by the Muhammadan gentlemen for the time being of the Municipal Board of Bara Banki:

(*b*) four by the Muhammadan gentlemen for the time being of the District Board of Bara Banki:

(*c*) two shall be nominated by the Local Government.

5. In making selections under rule 4, classes (*a*) add (*b*), preference will be given as far as practicable to the disciples and followers of the late Haji Waris Ali Shah or to those who have contributed Rs. 500 or over to the objects of the trust or the raising of the existing mausoleum, mosque and *khanqah* in honour of his memory.

6. The committee shall maintain a register of subscribers who have paid Rs. 500 or over to the objects of the trust or to the construction of the present mausoleum, mosque and *khanqah*, or pay such sum hereafter.

7. No person shall be eligible to be member of the committee unless he has an income of at least Rs. 500 P. M. and is a Muhammadan of the Hanafi persuasion or is a disciple or follower of the late Haji Waris Ali Shah.

8. Vacancies occurring in classes (*a*) and (*b*) of rule 4 shall be filled up by election by the Muhammadan members of the various bodies therein mentioned. Vacancies occurring in class (*c*) of the same rule shall be filled up by the Local Government.

9. The committee shall elect a President and a Secretary from among its members for a period not exceeding two years at a time, unless a vacancy occurs earlier, and in any case the retiring President and Secretary shall be eligible for re-election.

10. The committee shall meet, as far as possible, once in every quarter to examine the accounts of receipts and expenditure for the preceding quarter and pass such orders thereon as it may deem fit, and consider any other matter connected with the administration of the shrine and its property or for carrying out the objects of the trust which may be laid before the meeting or for which the meeting may have been adjourned.

11. Any member absenting himself from the meetings of the committee for a period of one year shall be liable to be removed from his office by a resolution of the committee.

12. A member shall be liable to be removed from his office for misconduct or misbehaviour or if his annual income falls below Rs. 500 by a resolution of the committee, provided that not less than six members vote for his removal on an application being made for that purpose to the District Judge having jurisdiction over the shrine and its property.

13. In the absence of the president, the members present at any meeting shall elect one of their number to preside over the meeting.

14. The proceedings and resolutions of all meetings of the committee shall be recorded in a book to be kept for the purpose and shall be signed by the president or chairman for the time being or attested in such manner as it may by resolution prescribe.

15. Three members shall form a quorum for the meetings of the committee; but where a meeting has been adjourned for want of a quorum the business before it may be transacted although a quorum is not present, provided that no business which was not announced for consideration at the original meeting shall be disposed of at the adjourned meeting.

16. The committee shall appoint a manager and such servants to look after the shrine and its property as it may consider necessary and shall have power to fine, suspend, remove or dismiss them at any time it thinks proper.

17. The committee shall exercise close supervision over all the affairs of the trust and the proceedings of the manager and other servants so as to prevent defalcations, mismanagement or discomfort of the persons visiting the shrine.

18. All offerings made at the tomb or on the roof of the mausoleum shall be taken by the committee, which shall collect the same and debit the amount realised each day in the accounts.

19. The committee shall keep a box in the shrine close to the tomb to serve as a receptacle for offerings made for the benefit of the heirs of the late Haji Waris Ali Shah and the proceeds of such box shall from day to day or from time to time, as may be convenient, be made over to such persons as may be found to be the lawful heirs of the said Saint.

20. The manager shall be bound to keep proper accounts of all receipts and expenditure both in money and goods and to submit all such accounts to the committee in such manner and at such times as the committee may direct.

21. The manager shall not incur any expenditure without previously obtaining the sanction of the committee to it. The manager shall be responsible for the safe custody of all moneys which may come into his hands on account of the committee and of the goods belonging to the mausoleum, mosque and *khanqah*.

22. Any amount in excess of Rs. 100 shall be deposited with the secretary, who shall arrange for its safe custody in such manner as the committee may determine.

23. The committee shall from time to time by resolutions declare which two persons will be authorized to sign receipts or orders of payment on its behalf.

24. The executive management of the shrine and its property shall be vested in the manager under the immediate supervision of the secretary and the general control of the committee.

25. The committee shall sue and be sued in the name of the trust.

26. Any application made in connection with this trust in accordance with any of the above rules shall be deemed to have been made in continuation of the present proceedings.

27. It will be lawful to this Court to amend or alter this scheme in any particular on its own initiative or on a motion being made on that behalf by not less than six members of the committee.

KANHAIYA LAL, A. J. C.—I agree in the order proposed.

*Appeal mostly allowed.*

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## PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 902 OF 1916.

January 29, 1917.

*Present*:—Mr. Justice Chevis.

AHMAD—PLAINTIFF—APPELLANT

*versus*

*Musammat* RAHMATAN—DEFENDANT—RESPONDENT.

*Guardians and Wards Act* (*VIII of* 1890), *s.* 17—*Minor, appointment of, guardian of—Mother, right of—Reversioner, right of, as against step-father.*

An infant minor's mother, even in case of her remarriage, is the natural guardian of the person of the minor. [p. 108, col, 1.]

A reversioner of the deceased father of the minor is a fit person to be appointed guardian of the property of the minor as against the new husband of the minor's mother. [p. 108, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Jhelum,

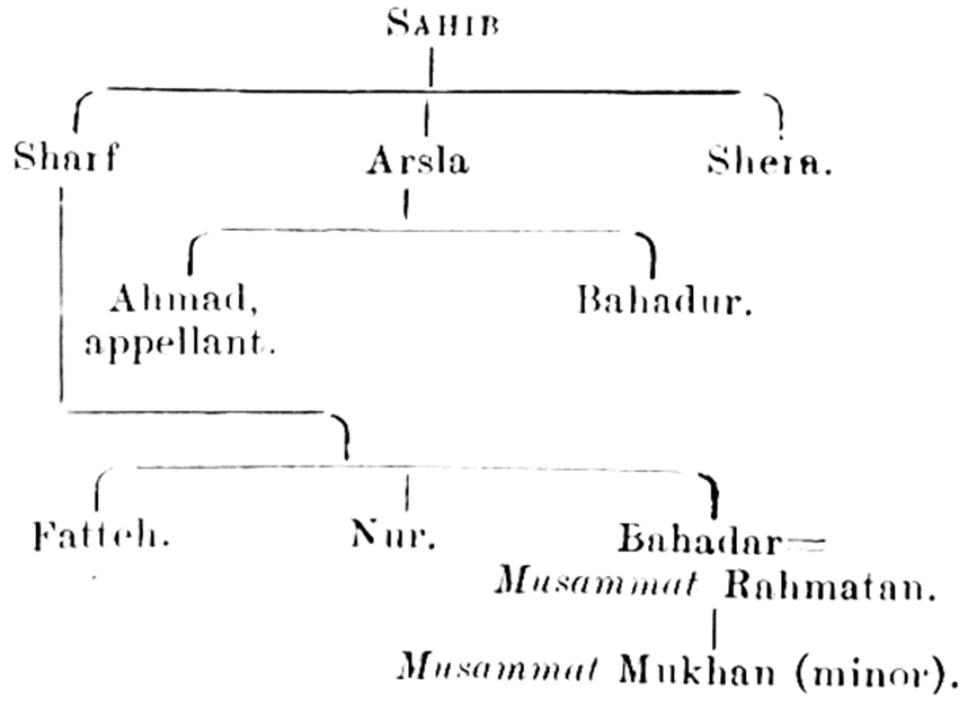
SHEOLAL SAHU *v.* SAGAR MAL.

dated the 5th February 1916, rejecting the application.

Mr. *Nand Lal*, for the Appellant.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—The appellant is related to the minor as shown in the following tree.




*Mussammat* Rahmatan is a lady with a tragic history. She first married Fatteh, who was hanged for committing a murder. She then married Nur who was murdered. She then married the third brother, Bahadar who also was murdered. She has now married again. The infant, Mukhan, is the daughter of Bahadar, so it appears. She is far too young to be taken from her mother, who is the natural guardian of the person of the minor.

As to the property there were three applicants in the lower Court, *viz.*, Ahmad, first cousin of the girl's father, and a paternal aunt and the maternal grandfathar. The property is large enough in my opinion to make it expedient that someone should be appointed a guardian. The Senior Subordinate Judge says most of the property has come from the child's grandmother. This is not clear. What appears from the record is that 1415 *kanals* 1 *marla* came to Sharf, father of Bahadar, by gift from his mother-in-law. The rest apparently Sharf got from his father. I fail to see why *Musammat* Rahmatan's new husband should have the handling of any of this land. It would be best to appoint a reversioner as guardian, and unless the donor's collaterals claim the land would go to Sharf's nephews apparently, and so I speak of them as reversioners.

Mr. Nanak Chand also speaks of some land which *Musammat* Rahmatan got from her brother. This presumably still belongs to *Musammat* Rahmatan and not to the minor. But *Musammat* Rahmatan may at any time wish to get it mutated in her child's name. I do not see that Ahmad has any claim to take charge of this land.

I so far accept the appeal as to appoint Ahmad guardian of the paternal estate of the minor, *i.e.*, of whatever she has inherited from her father. This appointment is made subject to Ahmad's giving security, the extent of which and the time for furnishing which the learned Senior Subordinate Jugde will decide.

No order as to costs of this appeal.

*Appeal accepted.*

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## PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 788 OF 1916.

April 24, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

SHEO LAL SAHU AND ANOTHER—APPELLANT

*versus*

SAGAR MAL—RESPONDENT.

*Partnership debt—Co-partner, whether can sue in name of partneship—Right of other co-partners—Costs, indemnity for.*

One partner cannot sue alone to recover a debt due to the partnership; but a partner may use the name of his firm and the names of his co-partners to enable him to recover a debt due to the partnership firm, and any individual member of the partnership who is unwilling to join in recovering the debt has only a right to claim as against the partner who desires to sue an indemnity for costs. [p. 109, col. 1.]

*Seal* v. *Kingston*, (1908) 2 K. B. 579; 77 L. J. K. B. 965; 99 L. T. 504; 24 T. L. R. 650, followed.

Appeal from a decision of the District Judge, Gaya, dated the 6th April 1916, reversing that of the Additional Subordinate Judge, Gaya, dated the 28th July 1916.

Mr. *Kailash Pati*, for the Appellant.

Mr. *S. N. Palit*, for the Respondent.

JUDGMENT.

ATKINSON, J.—This second appeal comes before us from the decision of the District Judge of Gaya, reversing the decree pronounc-

ed by the Subordinate Judge dismissing the plaintiff's claim in this suit.

The plaintiff and the defendants Nos. 3 and 4 are members of a partnership carrying on business under the style and title of "Anand Mall Sagar Mall," the business being that of cloth merchants.

The partnership dealings commenced on the 29th October 1906, and continued up to the 15th of March 1911; but the partnership does not seem to have been dissolved. The defendants Nos. 1 and 2 are father and son, members of a joint family carrying on business. These defendants Nos. 1 and 2 had dealings with the plaintiff's firm and they contracted a debt which prior to the time of action amounted to Rs. 1,020-9-6. There was a dispute as to this amount and eventually the defendant No. 1 signed the partnership account book admitting his liability to the amount claimed, and agreeing to pay interest at the rate of 12 annas per cent. per mensem upon the amount so admitted by him to be due until payment. Thus at the time that this suit was instituted a debt of Rs. 1,296-3 6 was due by the defendants Nos. 1 and 2 to the partnership.

The learned Subordinate Judge dismissed the case on the ground that he found on issue No. 4 that the suit was improperly constituted. In the suit as constituted in its present form the plaintiff sues in his own name as one member of the firm and named the defendants Nos. 1 and 2 as debtors to the firm. He also named as party defendants the defendants Nos. 3 and 4, who are his joint co-partners. The scheme of the plaint clearly shows that the plaintiff was seeking to recover the debt in suit as a debt due to the partnership. It is well settled that one partner cannot alone sue to recover a debt due to the partnership; but it is equally well settled that a partner may use the name of his firm and the names of his co-partners to enable him to recover a debt due to the partnership firm; and that any individual member of a partnership who is unwilling to join in recovering the debt has only a right to claim as against the partner who desires to sue an indemnity for costs. Now in the form in which this plaint was prepared I think that the Subordinate Judge was right in holding that the suit was not properly constituted. The Subordinate Judge, however, did not dispose of any question of fact, having dismissed the suit on the preliminary ground. The learned Judge in appeal came to the conclusion that the suit was one really by the firm to recover a debt due to the firm; and as all the parties to the partnership business were on the record he considered he could give a decree, and decide the outstanding question of fact which had not been determined by the Subordinate Judge; and the learned Judge on appeal accordingly pronounced a decree in favour of the partnership firm and directed that the defendants Nos. 1 and 2 should pay costs to the plaintiff personally. Now the relief which was given by the learned Judge in appeal was substantially right; but in order to make the record conform with his judgment it is essential that the record must be amended. The learned Judge if he wanted to give the relief which he has given by the order he has made should have, I think, amended the record so as to bring it into harmony with the judgment of the Court.

We think it is open to us to make the necessary amendment in the record so that it may accord with the decision arrived at by the learned Judge. Order I, rule 10, gives very wide powers to the Court to amend the record; and this is a case in which we think we are justified in applying its provisions. We do not intend to make a person a party as plaintiff against his will. All that we shall decide is that the plaint be amended by describing the partnership firm as plaintiff and specifying in paragraph No. 1 of the plaint the names of the members constituting the partnership; and we shall strike out of the record the names of the defendants Nos. 3 and 4 as defendants to the suit. Thus the record will be brought into harmony with the judgment of the learned Judge in appeal, the partnership firm suing to recover the partnership debt, the suit being instituted by one partner in the name of the firm on behalf of the other partners. This is a mere technicality and affords no prejudice to the defendant No. 2, and thus with the record amended

the decree will stand. The authority for the proposition of the law which we have laid down will be found in the case of *Seal* v. *Kingston* (1). At page 582 the Court of Appeal says: "One of several partners has a clear right to use the names of the other partners. If they object to their names being used, they may apply for an indemnity against the costs to which they might be subjected by the use of their names."

Accordingly we shall disallow this appeal but we will direct that Sagar Mal shall pay to the defendant No. 2 his costs of this appeal. The defendant No. 2 will pay to the plaintiff personally the costs in the lower Appellate and in the Court of First Instance as the surviving joint debtor, defendant No. 1 having died pending the suit.

CHAPMAN, J.—I agree.

*Appeal dismissed.*

(1) (1908) 2 K. B. 579; 77 L. J. K. B. 965; 99 L. T. 504; 24 T. L. R. 650.

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ALLAHABAD HIGH COURT.
PRIVY COUNCIL APPEAL NO. 19 OF 1916 IN FIRST CIVIL APPEAL NO. 92 OF 1915.
November 17, 1916.
*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
KALLYAN SINGH—DEFENDANT—APPELLANT
*versus*
KANHIYA LAL—PLAINTIFF—RESPONDENT.

*Civil Procedure Code* (*Act of* 1908), *s.* 110– *Appeal to Privy Council*—"*Substantial question of law*"—*Construction of document.*

*Semble.*—The construction of any particular document is not a substantial question of law within the meaning of section 110 of the Civil Procedure Code.

*Lali* v. *Murlidhar*, 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.), distinguished.

Application under Order XLV, rule 2, Civil Procedure Code, for leave to appeal to His Majesty in Council against the decree of the Hon'ble. Court, dated the 8th July 1916.

Mr. *J. M. Banerji*, for the Appellant.

Mr. *M. Baleshwari Prasad*, for the Respondent.

JUDGMENT.—The value of the subject-matter of the suit and of the proposed appeal to His Majesty in Council is less than Rs. 10,000. Furthermore this Court confirmed the decision of the Court of first instance. The case *prima facie* does not comply with the requirements of section 110 of the Code of Civil Procedure. We are, however, asked to certify that the case is "otherwise a fit one" for appeal on the ground that a substantial question of law is involved. The question of law, if any, is the construction of a Will as to whether the person to whom the property was bequeathed took it "as an adopted" son and on that condition, or that he was entitled to the property under the terms of the Will irrespective whether he was adopted or not. It is difficult to say that the construction of any particular document is a substantial question of law, that is, a question of law of general public importance. No doubt some portions of the Will closely resembled the terms of a Will which was considered by their Lordships of the Privy Council in the case of *Lali* v. *Murlidhar* (4), but the terms of the whole Will are far from identical. The Will which their Lordships of the Privy Council were considering, was embodied in the *wajib-ul-arz* and their Lordships seem to have thought that one of the objects of the testator was to establish a particular custom. We think that the two documents are quite capable of being distinguished and we are unable to certify that any substantial question of law of general importance is involved. We accordingly reject the application with costs.

*Application rejected.*

(1) 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.).

PUNJAB CHIEF COURT.
CIVIL REVISION PETITION No. 990 OF 1916.
January 16, 1917.
*Present*:—Mr. Justice Broadway.
ALI NAKI—PLAINTIFF—PETITIONER
*versus*
DAMODAR DAS AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 24—*Transfer of suit—Notice to parties, whether necessary—Jurisdiction to transfer suits—Senior Subordinate Judge, powers of—Punjab Courts Act* (*III of* 1914), *ss.* 37, 44.

The transfer of a suit under section 24 of the Civil Procedure Code without giving notice to the parties is illegal.

A Subordinate Judge has no jurisdiction to exercise the powers conferred by section 24 of the Civil Procedure Code, unless such powers have been delegated to him by the District Judge with the previous sanction of the Local Government as provided by sections 37 and 44 of the Punjab Courts Act, 1914.

**Petition, under section 44 of Act III of 1914, for revision of the order of the Senior Subordinate Judge, Lahore, dated 28th August 1916, transferring the case from the Court of the Munsif, Lahore, to that of the Subordinate Judge, 1st class, Lahore.**

Mr. *Saunders*, for the Petitioner.

JUDGMENT.—In this case the plaintiff-petitioner has come up to this Court under section 44 of Act III of 1914 complaining against the order passed by the learned Senior Subordinate Judge of Lahore, by which order on application filed by the defendants-respondents he transferred the case from the Court of *Sheikh* Ata Ilahi, Munsif of Lahore, to the Court of *Lala* Maya Ram, Subordinate Judge. On behalf of the petitioner Mr. Saunders has urged that the action of the Senior Subordinate Judge was against law inasmuch as he passed the order of transfer without giving notice to his client. He also urged that the Senior Subordinate Judge of Lahore had no jurisdiction in such matters and that there had been no legal delegation of the powers conferred by section 24, Civil Procedure Code, on District Courts to the Senior Subordinate Judge, Lahore. From enquiries I have made, it appears that this latter contention is correct. Under section 37 of Act III of 1914 the District Judge may, with the previous sanction of the Local Government, delegate to any Subordinate Judge in his District the powers conferred on a District Court by section 24 of the Code of Civil Procedure. As I have said, I have been unable to find that the sanction of the Local Government for any such delegation by the District Court to the Senior Subordinate Judge has been made and I, therefore, consider that the Senior Subordinate Judge is not authorised to hear applications to exercise the powers under section 24, Civil Procedure Code. In any event section 24, Civil Procedure Code, is perfectly clear and notice was bound to be given. The order is also bad for that reason.

I, therefore, accept this revision and set aside the order transferring the case to Mr. Maya Ram and direct that the case proceed before the Court of *Sheikh* Ata Ilahi. The respondents must pay petitioner's costs in this Court.

*Appeal accepted.*

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OUDH JUDICIAL COMMISSIONER'S COURT.
FIRST CIVIL APPEAL No. 53 OF 1913.
April 30, 1915.
*Present*:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.
PARTAB BALI AND ANOTHER—PLAINTIFFS—
APPELLANTS
*versus*
*Raja* BINDESHRI PRASAD SINGH AND
OTHERS—DEFENDANTS—RESPONDENTS.

Dasaundh, *right to, whether connotes right to possession or under-proprietary right in land.*

A right to cash *dasaundh* in a village is in the nature of a charge on its rents. It does not connote a right to possession of the village nor can it be deemed to be an under-proprietary right in its land. [p. 112, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 29th March 1913.

Babus *Jiban Krishna Banerji* and *Aditya Prasad*, for the Appellants.

Babu *Basdeo Lal* and Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—These appeals arise out of rival suits for pre-emption, brought by the appellants to each of these appeals in respect of a sale of proprietary rights of village Basbharya, effected by the Court of Wards in charge of the Ajudhya Estate in

PARTAB BALI v. BINDESHRI PRASAD SINGH.

favour of the defendants-respondents. The allegation of the plaintiffs Partab Bali and Sheo Narayan, in Suit No. 144 of 1912, was that they were under-proprietors and inhabitants of *Mauza* Basbharya, and also held a share in *Mahal* Behra Chak situated in the said village, and were entitled to a right of pre-emption as against the defendant-vendee, who was a stranger. The allegation of the plaintiffs, Gokaran and eleven others, in the other suit, was that they were under-proprietors of the said village and had a preferential right of purchase as against the defendant-vendee, who had no connection with the village. The defendant-vendee denied that either of the plaintiffs had any right in the village. He further pleaded that the plaintiffs had lost their right to pre-emption, if any, by reason of their failure to deposit the purchase money on receiving intimation of the proposed sale within the time allowed by section 11 of Act XVIII of 1876, and that the plaintiffs were estopped from claiming the property.

The learned Subordinate Judge found that the notice sent by the Court of Wards under section 10 of the Act was issued after the sale was effected and was consequently of no avail and that the plaintiffs did not refuse to purchase the property. He, however, dismissed the claim on the ground that neither of the plaintiffs had any proprietary or under-proprietary interest in the land of the village. The plaintiffs in each suit have appealed and the main question for consideration is whether they hold any proprietary or under-proprietary interest in the land of the village and have a right to sue for pre-emption.

It appears from the settlement decree obtained by Bhawani Shankar and others on the 10th March 1875 against the Court of Wards in charge of the Ajudhya Estate that a right of *pukhtadar* was claimed by the predecessors-in-title of the plaintiffs to these suits, but was disallowed by the Settlement Officer and that what was granted was a right to cash *dasaundh* or a 1/10th share in the gross rental of the village (Exhibits A-6 and 2). A right to cash *dasaundh* does not, however, connote a right to possession of the village and as held in *Deputy Commissioner, Gonda* v. *Bhagwan* (1) and *Parmeshar Dat* v. *Raja Mohammad Abul Hasan Khan* (2), such a right cannot be deemed to be an under-proprietary right in the land of the village. The entry of the names of the plaintiffs as under-proprietors in the recent settlement is, in the face of the settlement decree, of no value. In 1894 the Court of Wards issued a notice of ejectment against Sheoratan, brother of Gokaran, treating him as a tenant-at-will. Sheoratan contested the notice and succeeded in getting it cancelled on the ground that he was holding the plots of land in regard to which the notice was issued as a *quasi* sub proprietor, entitled to *dasaundh* (Exhibit 7). The Maharaja of Ajudhya subsequently filed a suit against Sheoratan for a declaration that the latter had no under-proprietary or *birtdari* right in the village, and obtained a decree from the Court of the Munsif of Gonda on the 27th June 1906 (Exhibit A 10). In 1899 the Ajudhya Estate made a similar attempt to eject Patan, the predecessor-in-interest of some of the other appellants, and was unsuccessful in the Revenue Court, but the estate succeeded in obtaining a decree from the Civil Court, which was confirmed by this Court on the 30th January 1902 (Exhibit A 11). No question of adverse possession, therefore, arises. None of the plaintiffs in either suit holds an under-proprietary right in the land of the village as distinct from a cash *dasaundh* which is in the nature of a charge on the rents. Partab Bali and Sheo Narayan plaintiffs have also failed to establish that they hold any proprietary right in any land of the village in question.

The appeals, therefore, fail and are dismissed with costs.

*Appeal dismissed.*

(1) 2 Ind. Cas. 297; 12 O. C. 124.
(2) 13 Ind. Cas. 809; 14 O. C. 335.

SATIS CHUNDRA MUSTAFI *v.* AMANULLA BEPARI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 453 OF 1915.

February 12, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

SATIS CHUNDRA MUSTAFI AND ANOTHER —PLAINTIFFS—APPELLANTS

*versus*

AMANULLA BEPARI AND ANOTHER— DEFENDANTS - RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 29—Rent reserved with temporary remission, whether recoverable in full—Penalty.*

Where the original rent of an occupancy holding was Rs. 18 a year, but, for some unexplained reason, in a *kabuliyat* taken from the *ryot*, the rent was stated to be Rs. 19-14-0, out of which, for the term of the *kabuliyat*, a remission was allowed and the actual rent payable for the term was stated to be Rs. 12 only, and it was further provided that if the tenant failed to take a fresh settlement at an enhanced rent on the expiry of the term of the *kabuliyat* he would be liable to pay the full rent reserved in the *kabuliyat*:

*Held*, that the true rent of the holding, when the *kabuliyat* was executed, being Rs. 12, the provision as to the payment of rent at the rate of Rs. 19-14-0 offended against or was a device to evade the provisions of section 29 of the Bengal Tenancy Act, and was, therefore, inoperative. [p. 114, col. 1]

Per *Fletcher, J.*—That the provision as to the enhanced rent was a penal one, held *in terrorem* over the head of the tenant to make him come to the landlord and enter into a new settlement after the expiry of the *kabuliyat*, and was merely an attempt to evade the provisions of section 29 of the Bengal Tenancy Act [p 114, col 1]

Appeal against the decree of the Additional Subordinate Judge, Rangpur, dated the 4th December 1914, modifying that of the Munsif, second Court, Gaibandha, dated the 24th November 1913.

FACTS appear from the judgment.

The *kabuliyat* in question set out in its heading in a tabular form the name of the tenant, the area of the holding, the total rent fixed (*jama gujasta*), which was stated to be Rs. 19-14-0, the remission granted till the pericd of the *kabuliyat*, *viz.*, Rs. 7-14 0, and the rent payable on demand (*talabi jama*) *viz.*, Rs. 12 only.

The body of the *kabuliyat*, in its material portions, ran thus:—

"* * * Fixing and agreeing to the annual rent at Rs. 19-14 0 out of which a sum of Rs. 7-12 0 is kept in abeyance during the whole period of the *kabuliyat* owing to my poverty and agreeing to the balance of Rs. 12 as the rent payable on demand, etc.

"On the expiration of the term I shall file a regular *kabuliyat* at an enhanced rent within a month and take a *patta*. If within the aforesaid period I do not come to a fresh settlement, then immediately on the expiry of the term or at any time thereafter you will be entitled to realise rent year after year at the full rate of Rs. 19-14 0 according to your wish."

Babu *Nagendra Nath Ghose*, for the Appellants.

Babu *Atul Chandra Gupta*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against a judgment of the learned Additional Subordinate Judge of Rangpur, dated the 4th December 1914, reversing the decision of the Munsif of Gaibandha. The suit was brought to recover the rent due under a *kabuliyat*. The first Court decreed the suit. On appeal to the learned Additional Subordinate Judge, he reversed that decision. It has been found by the learned Subordinate Judge that the holding is an old holding and that the tenants have a right of occupancy in the land within the meaning of the Bengal Tenancy Act. The rent was orignally Rs. 18, but for some reason which the learned Judge of the lower Appellate Court was not satisfied with—and he was also not satisfied as to whether the truth had been told to him—the cash rent was reduced in the *kabuliyat* sued upon to Rs. 12, but it was stated that the balance of the rent, namely, Rs. 7-14-0 was kept in suspense and would not be payable during the term of the *kabuliyat*, but that if the tenants fail to come to a new agreement as to the rent to be paid to the landlords at the expiration of the term, then a rent of Rs. 19-14 0 was to be payable. I do not know whether in this case it was stated that the suspense for three years was granted by the landlords owing to the charitable feeling that they bore to mankind in general and to these tenants in particular. But it is a matter for comment that no day practically passes before the Court, at any rate before this Bench, without leases of this sort being brought up in review. There can be little doubt that these leases are put forward by the landlords with intent to evade the stringent provisions contained in section 29 of the Bengal Tenancy Act. It cannot be that a

particular Bench of the Court should every day have its attention called to cases where the landlord out of the good nature and kindness of heart has voluntarily reduced the rent for a few years owing to the poverty or other circumstances of the tenants and subsequently sues for rent at the original rate and the tenant litigates with his landlord on the terms of his lease up to the final Court of Appeal. The present case seems to me to be a perfectly simple one, The cash rent, the *talabi jama*, *i. e.*, the rent to be paid is stated to be Rs. 18. Why the original cash rent was reduced to Rs. 12, no satisfactory explanation has been given. The story why Rs. 7-14-0 was kept in suspense has been totally disbelieved by the learned Subordinate Judge and there cannot be any doubt that the learned Judge meant to find that the rent payable under the terms of this *kabuliyat* was Rs. 12. Then it was pointed out by Mr. Gupta, who conducted the appeal on behalf of the tenant-respondents, that the condition for enhancement was purely *in terrorem*—a penalty held over the heads of the tenants—that unless the tenants should come to the landlords and enter into a new agreement satisfactory to the landlords, the rent would be enhanced from Rs. 12 to Rs. 19-14. That is, a method of enhancement which is altogether opposed to the terms of the Bengal Tenancy Act and such an enhancement, in my opinion, cannot be supported. I think in this case that the provision as to enhanced rent was merely one held *in terrorem* over the heads of the tenants to make them come to the landlords and enter into a new settlement and that it was only in the event of such settlement not being assented to by the tenants it was provided that the suspense rent should become payable. But that was merely an attempt to evade the provisions of the Bengal Tenancy Act and to enhance the rent in the manner prohibited by section 29 of the Bengal Tenancy Act. In my opinion, the result arrived at by the learned Subordinate Judge is correct. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—In my opinion, there is a sufficient finding in the judgment of the lower Appellate Court that the true rent of the holding when the *kabuliyat* in question was executed was Rs. 12. If that be so, it is clear that the *kabuliyat* offends or is a device to evade the provisions of section 29 of the Bengal Tenancy Act and is inoperative. The landlord cannot, therefore, without taking proper proceedings for enhancement recover rent at a higher rate than Rs. 12. I agree that the appeal must be dismissed.

*Appeal dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 122 OF 1915-16 OF HARDOI DISTRICT.

August 21, 1916.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

HAFIZ ALI—PLAINTIFF—APPELLANT

*versus*

MUMTAZ HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Oudh Rent Act (XXII of 1886), s. 61—'Landlord,' meaning of—Co-sharer collecting rent separately from tenant, power of—Ejectment.*

The word 'landlord' in section 61 of the Oudh Rent Act means the person or persons to whom a tenant is liable to pay the whole of his rent. A petty co-sharer who collects rent separately from a tenant is not, therefore, by reason of an unsatisfied decree for rent entitled alone to eject the tenant. [p. 115, col. 1.]

Appeal from the decree of the Commissioner, Lucknow, dated the 8th January 1916, upholding the order of the Assistant Collector, Hardoi, dated the 26th August 1915.

Mr. *Mumtaz Husain*, for the Appellant.

Babu *Lachhman Prasad*, for the Respondents.

### JUDGMENT.

HOLMS, S. M.—(*August* 8, 1916).—I cannot agree with the view taken by the lower Courts. It appears that in this village which is not partitioned, each co-sharer collects from each tenant his share of the rent and two of the co-sharers, the present respondents, obtained a decree for arrears of rent against the appellant for their share of the rent only. These two co-sharers now wish to eject the appellant under section 61 from the whole of his holding on account of the unsatisfied decree for their quota of the rent. It is admitted by both sides that there are two *lambardars* in the village, one Mumtaz Ali (one of the respondents) and the other Bishambhar Nath, and that their duties are

not divided. Bishambhar Nath does not wish to eject the appellant. It seems to me that the word 'landlord' in section 61 must be understood to mean the person or persons to whom a tenant is liable to pay the whole of his rent, and that it is opposed both to the law and to ordinary convenience that a petty co-sharer who collects rent separately from a tenant should, by reason of an unsatisfied decree for rent, be entitled alone to eject the tenant.

I would set aside the orders of the lower Courts and decree the suit for recovery of possession, respondents paying costs throughout.

CAMPBELL, J. M.—I agree.

*Appeal allowed.*

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## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1186 OF 1916.

April 25, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

*Lala* JAGDAMB LAL AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Lala* BIKU LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Joint family—Partition, partial, effect of—Possession of undivided property by one member—Right of other members.*

Where after a partial partition of joint family property one member continues in possession of certain properties not divided between the members of the family, his possession still continues to be the possession of the other members of the family though they may be divided, till some event happens which renders his possession exclusive or hostile to the others. [p. 116, cols. 1 & 2.]

*Vaidyanath Aiyar* v. *Aiyasamy Aiyar*, 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 94, relied upon.

Appeal from a decision of the District Judge, Shahabad.

Mr. *Sushil Madho Mullick*, for the Appellants.

Messrs. *Rajindra Prasad* and *Saroshi Charan Mitra*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit for partition. The plaintiffs' case appears to have been that they and the defendants were members of a Hindu family to whom some fifty years ago or more a grant of 127 *bighas* of land had been made. Subsequently to that grant there had been a partition between the plaintiffs' branch and the defendants' branch of the family of 45 *bighas* out of the 127 *bighas*. The suit prayed for a partition of the remaining 82 *bighas*. The original Court held against the plaintiffs' case and held that the plaintiffs had no joint title in respect of these 82 *bighas* of any kind.

In appeal the District Judge Mr. Monahan held that the plaintiffs' case had been made out; that the grant of the entire 127 *bighas* was originally joint; that there had been a partial partition, and that the plaintiffs still have a joint title. There was an appeal to the Calcutta High Court. The Calcutta High Court remanded the case for a fresh disposal. They did so upon the ground that the learned District Judge had nowhere in his judgment referred to the question of limitation. The learned Judges, however, did not in their judgment set aside the judgment of Mr. Monahan, and in disposing of the cross-appeal they say that the cross-appeal was concluded by the finding of fact arrived at by Mr. Monahan.

Upon the case coming on before Mr. Monahan's successor Mr. Rowland, it was contended before Mr. Rowland that the entire case had been re-opened and that the appellants-defendants were entitled to re-open the question of title to the land. Mr. Rowland held that he was bound by the findings of his predecessor upon that point and that it was only open to him to go into the question of limitation. He held that for the purposes of establishing limitation it was necessary to prove that there had at some time been a definite ouster of the plaintiffs. "There being no evidence to that effect the plea of limitation must fail. I accordingly dismiss this appeal."

The defendants now again appeal to this Court. After some discussion it was conceded that it was in any event open to the District Judge to go into the question whether there was an original grant of the entire 127 *bighas* to this family or not. It was contended before us that from the fact of there having been a

partial partition of this 127 *bighas* it should have been presumed that there was an entire partition of the entire 127 *bighas*. It appears to me that if there be any doctrine of presumption of that kind it cannot refer to a specific area of land; it is only applicable to a case of a Hindu family the properties of which are not ascertained. If then one side can show that under some sort of partition some of the members of the family held separate properties, there probably would be some presumption that the entire family properties had been partitioned; but where there is specific evidence that the whole area of 127 *bighas* had been partially partitioned, that evidence is in itself sufficient to dispose of any presumption that there was an entire partition of the whole. In any case it seems to me clear from the judgment of the High Court in appeal that it was not open to the learned District Judge to interfere with the finding of his predecessor upon the question whether there was a partial partition or not, for if there had been a complete partition it would be quite unnecessary to consider any question of limitation at all; the suit would have failed if there had already been a complete partition. The remand of the question of limitation by the High Court assumes that there is a right to par ition, unless that right can be shown to have been defeated by the law of limitation.

It is then contended in appeal that the principle under which co-owners can only be defeated by the law of limitation by evidence that one co-owner has been in adverse possession of the property does not apply to a case in which there has been a partial partition. No authority for this contention has been cited. The authority which was mentioned is an authority which is against the appellants, namely, the case of *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (1), where at page 197 it is said: "Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him, however, in possession of certain properties not divided between them, his possession will still continue to be the possession of the other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to the others."

All the contentions made on behalf of the appellants fail. It has not been suggested that upon the facts of the case the learned District Judge fell into error in saying that there was nothing to support the plea of ouster or adverse possession. The result is that this appeal fails and is dismiseed with costs.

ATKINSON, J.—I agree.

*Appeal dismissed.*

(1) 1 Ind. Cas. 408; 32 M. 191; 5 M L. T 49; 19 M. L. J. 94.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 327 OF 1915-16 OF SULTANPUR DISTRICT.

July 25, 1916.

*Present*:—Mr. Holms, S. M.

RAMESHAR AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ABBAS ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Construction of document—Lease—Heritable rights—Lessee holding over, position of.*

A lease was granted for thirty years at a fixed rent, which was to be increased at the end of the term if the revenue was increased. There was no mention whatever of hereditary rights:

*Held*, that the tenure created by the lease was not heritable except possibly for the unexpired period of the thirty years. [p 117, col. 1.]

In the case of an ordinary lease for a term of years when the lessee is allowed to hold on after the lease has come to a conclusion, the result is not that he is to hold on for his lifetime but he is merely treated as holding from year to year. [p. 117, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 5th April 1916.

JUDGMENT.—The facts are these. In 1869 A.D. the *zemindars* gave a lease to two ancestors of the present appellants. The lease was for thirty years at a fixed rent and if at the end of that time the revenue was increased the rent was also to be increased. There was no mention whatever of hereditary rights. The thirty years expired in 1899 A. D. and some four or five years later the last of the two lessees died. Since then the appellants have been holding the land and in the receipts for rent given to

them the rent has been described as money paid under the lease. Most certainly, apart from the subsequent conduct of the *zemindars*, the tenure created by the lease was not heritable except possibly for an unexpired period of the thirty years. There are several rulings to support this view, as for example, *Nabi Bukhsh* v. *Muhammad Mohsin Ali* (1) and *Thakur Muhammad Nawab Ali Khan* v. *Mathra* (2) and several decisions of the Judicial Commissioner's Court. It is urged that the lease must be interpreted by the subsequent conduct of the *zemindars* and that even if the result of the conduct is not held to justify the lease being treated as a perpetual heritable lease, then at any rate the appellants are entitled to hold the land for their lifetime. In the case of an ordinary lease for a term of years when the lessee is allowed to hold on after the lease has come to a conclusion, the result is not that he is to hold on for his lifetime but he is merely treated as holding from year to year, and I do not think in the present case the result can be otherwise. Appeal dismissed with costs.

*Appeal dismissed.*

(1) Selected Decision No. 2 of 1893.
(2) Selected Decision No. 4 of 1905.

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ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1638 OF 1915.
March 27, 1917.
*Present*:—Mr. Justice Tudball and
Mr. Justice Rafique.
SHAM RATHI RAI—PLAINTIFF—APPELLANT
*versus*
*Musammat* JAICHHA KUNWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow—Surrender—Gift of whole estate to presumptive reversioner, validity of.*

A Hindu widow is competent to surrender by way of gift the whole of her husband's estate in favour of the presumptive reversioner of her deceased husband. [p. 117, col. 2.]

Second appeal from the decision of the District Judge, Ghazipur, dated the 14th July 1915.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

The Hon'ble Sir *Sundar Lal*, The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Uma Shankar Bajpai*, for the Respondents.

JUDGMENT.—Ths facts as found by the Court below are as follows:—That *Musammat* Jaichha Kunwar is the widow of a separated Hindu; that the second defendant Shivatahal Rai is the nearest reversioner at the present time; and that *Musammat* Jaichha Kunwar had, on the 14th of April 1914, transferred the whole of her husband's estate to Shivatahal Rai, the next reversioner, without any consideration whatsoever. The plaintiff-appellant, whose suit has been dismissed by both the Courts below, is a more remote reversioner, and his plea before us is that upon the facts found, the Courts below ought to have declared that the deed of gift, dated the 14th of April 1914, is not binding upon him after the death of the widow. We have no hesitation in saying that the suit has been properly dismissed by the Court below. The rule of law which governs such a case as this is to be found in the judgment of their Lordships of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1). At page 20 of the report their Lordships say as follows:—"The High Court of Allahabad, indeed, does not recognise the validity of surrenders in favour, or alienations with the consent of, presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara Law prevails. Their Lordships have not been referred to any cases in the Province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High Court of Calcutta, that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

(1) 30 A. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 3 M. L. T. 1; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605; 11 O. C. 78 (P. C.).

APPAN PATRACHARIAR v. SRINIVASACHARIAR.

The present is not a case of an alienation with the consent of presumptive reversioners. Our attention has been called to a decision of this Court reported as *Bakhtawar* v. *Bhagwana* (2), in which the decision of their Lordships of the Privy Council has been considered. That was a case of gift by a widow to a third person with the consent of the next reversioner, and this Court held that the decision in *Bajrangi Singh's* case (1) covered only alienations for consideration with the consent of reversioners, and not cases of gifts or transfers without consideration with such consent. The point which is now before us, that is, the surrender by a Hindu widow of the whole of her husband's estate in favour of the presumptive reversioners did not arise for decision in any of the cases to which our attention has been called. On the contrary, there are many cases in which the transfer by a widow of her husband's estate to the next reversioner has been upheld. The case reported as *Bhupal Ram* v. *Lachma Kuar* (3) is a case where a widow transferred the estate to her own daughter who was the next in the line of succession to herself. There have been several other cases in which the principle has been adopted without any hesitation whatsoever. In the present case it is moreover the whole estate which has been surrendered and not a portion of the estate. In our opinion the law on the question has been finally settled and requires no further discussion. The decision of the Court below is correct and the appeal, therefore, fails and is dismissed with costs, including fees on the higher scale. We allow no costs for the objection.

*Appeal dismissed.*

(2) 5 Ind. Cas. 270; 32 A. 176; 7 A. L. J. 121.
(3) 11 A. 253; A. W. N. (1889) 22; 6 Ind. Dec. (N. S.) 589.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1379 OF 1915.

February 6, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

APPAN PATRACHARIAR—PLAINTIFF—APPELLANT

*versus*

V. S. SRINIVASACHARIAR AND OTHERS—DEFENDANTS NOS. 1 TO 5—RESPONDENTS.

*Hindu Law—Ancestral property—Will—Dispositions in favour of female members, validity of.*

The father in a joint and undivided Hindu family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by Will in favour of the female members of his family, provided the said provisions are reasonable in extent and value. [p. 120, col. 1.]

A disposition by Will of ancestral property may, in certain circumstances, stand on the same footing as a disposition by deed *inter vivos* provided the consent of the party to be affected is obtained. [p. 121, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Trichinopoly, in Appeals Suits Nos. 266 and 320 of 1914, preferred against that of the Additional District Munsif, Trichinopoly, in Original Suit No. 49 of 1914 (Original Suit No. 207 of 1912 on the file of the Principal District Munsif, Trichinopoly).

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Messrs. *T. R. Venkatarama Sastri* and *M. S. Vythinatha Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. He purchased the plaint lands in December 1909 from the 1st defendant. The 1st defendant had a minor step-brother who is the 2nd defendant and also an uterine sister, the 3rd defendant. The 1st and the 3rd defendants' mother was the predeceased first wife of one Srinivasachariar who died on the 14th November 1908. Within a fortnight before his death and on the 1st November 1908 (when he was on his deathbed and with the knowledge that his dissolution was not far off) he executed the Will Exhibit V (*a*), by which he gave the properties mentioned in the schedule A attached to the Will to his eldest son, the 1st defendant, gave the properties mentioned in the schedule B to his minor son, the 2nd defendant, and the land mentioned in the C schedule to his daughter,

the 3rd defendant, besides making some other provisions. It is not denied that relatively to the A and the B schedule properties bequeathed to the two sons, the C schedule property left to the daughter is one of small value and it would not be an unreasonably large gift to be made by a very well-to-do father to his only daughter, though he has two undivided sons. It is further found that the 1st defendant, the elder of the two sons who was a major at the time of the Will, consented to this provision being made in favour of his sister and attested the Will and that the 2nd defendant's mother, the testator's second wife, also consented.

Within a year of the testator's death, however, the widow acting as the guardian of her minor son (the 2nd defendant) repudiated in one respect the validity of the very fair testamentary arrangements made by her husband and while willing that the A schedule properties which were given to her step-son, the 1st defendant, for his share by her husband should be his and that the B schedule properties given to her son, the 2nd defendant, should belong to the said son absolutely, grudged the gift of the C schedule properties to her step-daughter, the 3rd defendant. Thereupon on the 3rd November 1909, the 1st defendant and the step-mother acting as guardian of the 2nd defendant executed the agreement Exhibit K, by which the C schedule properties were arranged to be sold and converted to cash and the sale proceeds divided equally between the two sons. It was in pursuance of this agreement that the 1st defendant sold the properties to the plaintiff in December 1909 under Exhibit A.

The lower Appellate Court held that though the properties dealt with under the Will Exhibit V (*a*) were ancestral properties in which the two sons of the testator owned interests by birth, a reasonable gift could be made by the father in favour of his only daughter so as to bind his sons and that such a gift, even though made by Will, would be binding on the sons if they consented to it. It also held that the 1st defendant having consented to the dispositions in the Will was bound thereby, and that the 2nd defendant though a minor at the time was also bound as consent could be given on his behalf by his mother in his interests and such consent was given. On these findings it held that the 3rd defendant became the sole owner of the C schedule properties, that is, the plaint lands by the testamentary gift and that the plaintiff purchased nothing but a bag of wind under the sale-deed Exhibit A. The lower Appellate Court accordingly dismissed the plaintiff's suit with the costs of the defendants Nos. 2 and 3.

The plaintiff's memorandum of second appeal contains 12 grounds, but leaving aside the general grounds and those which relate to the binding nature of the plaintiff's sale-deed on the 2nd defendant and those which relate to questions of fact, those which attack the legal validity of the 3rd defendant's title as claimed under the Will Exhibit V (*a*) may be shortly stated thus:—

(1) "The Will can only operate from the date of the death of the testator at which time all the properties would pass to the two sons by right of survivorship, being ancestral property."

(2) "It is not within the scope and powers of the guardian of a minor son to consent to the giving of property by a father to a third person."

(3) "The said consent is also inoperative as it was given by a person who was not the guardian at the time, when she so consented."

(4) "The authorities relied upon by the Subordinate Judge are clearly distinguishable and they only refer to gifts *inter vivos* and not to testamentary dispositions."

Besides these 4 grounds, Mr. G. S. Ramachandra Aiyar who appeared for the appellant raised a new contention before us that the document Exhibit V (*a*) was not a Will but was a settlement *inter vivos* and as it was not registered, it was wholly inoperative and invalid. But this contention was not raised in the lower Courts and not even in the grounds of the second appeal memorandum and I must decline to allow it to be raised at this stage.

As regards the 2nd and 3rd grounds, I agree with Mr. Ramachandra Aiyar that the 2nd defendant's mother was not the legal guardian of the 2nd defendant so long as his father was alive, His consent, therefore, to the testamentary dispositions under

Exhibit V (*a*) cannot give legal validity to the Will, but can only be an item of the evidence proving that the dispositions under the Will were in the nature of a fair family settlement to take effect after the death of the testator and were intended to avoid disputes and litigation and to promote peace. Of course the father himself as guardian of his son could act in his son's interest.

I shall now consider the first and the fourth contentions which may be dealt with together. I think that, on the authorities, the father in a joint and undivided family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by Will in favour of the female members of his family provided the said provisions are reasonable in extent and value. I shall refer only to a few cases.

The first and the most important case is the Privy Council decision in *Brijraj Singh* v. *Sheodan Singh* (1). The following sentence occurs in the judgment of their Lordships of the Privy Council at page 346: "But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by Will of that property among the various members of the family *except with their consent*." The words I have italicised afford, in my opinion, clear indication of their Lordships' view that with "their" consent, (that is, the consent of other members of the family) a disposition of property by Will by the managing member would be binding on them after his death. No doubt, the observation is an *obiter dictum*, as their Lordships found in that case that the document called "Will" was really a disposition *inter vivos*, but I think that the dictum which was so clearly laid down is binding on this Court especially as, in my opinion, there is nothing in the Hindu Shastras opposed to the above dictum, which (if I may say so with respect) is eminently just and equitable.

In *Kudutamma* v. *Narasimhacharyulu* (2) it was held that a Hindu brother who is the managing member of a joint Hindu family would not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters who, though married in their father's lifetime, were left, for some reason or other, without a marriage portion.

In *Anivilla Sundararamayya* v. *Cherla Sitamma* (3) it was held that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid against his adult sons even without their consent.

I shall next consider the case of *Arunachalla Pillai* v. *Sampurna Thachi* (4) which, in my opinion, is a very strong case. There the undivided paternal grandfather of a minor gave a portion of the family property (about 30 per cent. in value of the whole) to his third wife and daughters with the consent of his only grandson's widowed mother. It was held that the gift was binding upon the grandson. The learned Judges say: "It is clear that it was open to the grandfather, if he had chosen and without any one's consent, to effect a partition and leave the whole of his half share to his third wife and her daughters and it was, in our opinion, clearly for the benefit of the minor for his guardians to avoid an eventuality so injurious to his interests by consenting to the alienations effected by Exhibit I." In the present case also, the testator could have separated from his two sons and taken one-third share as his separate share and given it away to his daughter, the 3rd defendant. This would have been much more to the detriment of the 2nd defendant than the provision made in the Will, by which he got half of the whole ancestral properties except the C schedule properties. In the present case, the testator could have made a gift of the C schedule properties validly to his daughter and effected a partition between his two sons *during his lifetime*. But with the consent of his major son and with the consent of his minor son's mother, and in what

(1) 19 Ind. Cas. 826; 35 A. 337; 17 C. W. N. 949; (1913) M. W. N. 515; 11 A. L. J. 698; 14 M. L. T. 11; 18 C. L. J. 57; 15 Bom. L. R. 652; 25 M. L. J. 188; 40 I. A. 161 (P. C.).

(2) 17 M. L. J. 528; 5 M. L. T. 40.

(3) 10 Ind. Cas. 56; 21 M. L. J. 695; 9 M. L. T. 469; (1911) 1 M. W. N. 422; 35 M. 628.

(4) 26 Ind. Cas. 208; 27 M. L. J. 485.

he himself, as the guardian of his minor son, considered to be in the interests of his said son, he made a gift by Will to take effect after his death, instead of by a deed to come into effect at once. I think that on the logical application of the principles laid down in the cases I have referred to above and seeing that their Lordships of the Privy Council treated the disposition by Will in certain circumstances, though of ancestral property, as standing on the same footing as dispositions by deed *inter vivos*, provided the consent of the parties to be affected is obtained, the family settlement made by the Will Exhibit V (*a*) in this case ought to be upheld. In the result the second appeal will be dismissed with costs.

SPENCER, J.—I concur.

*Appeal dismissed.*

V. R. P.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1072 OF 1915.

March 16, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

KHEDU RAI—PLAINTIFF—APPELLANT

*versus*

SHEOPARSAN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage—Redemption suit—Compromise, non-registration of, effect of—Registration Act (VIII of 1871), s. 49—Mortgagee, possession of, under compromise—Adverse possession.*

By an unregistered deed of compromise a mortgagor and mortgagee consented to the complete transfer of the equity of redemption to the latter. The mortgagee took possession of the property in pursuance of the compromise and both parties acted upon it for nearly forty years:

*Held*, that the possession of the mortgagee since the compromise was adverse to the mortgagor and his heirs. [p. 122, col. 2.]

Second appeal from the decision of the District Judge, Azamgarh, dated the 1st May 1915.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—This is a second appeal preferred by the plaintiff in a suit brought for redemption of certain property. The plaintiff Khedu Rai is the heir of one Zalim Rai. In the year 1869, Zalim Rai mortgaged the property in suit to the predecessors-in-title of the present defendants first party. In the year 1876 a dispute arose between the mortgagor and the mortgagees and a case arose in the Revenue Courts in respect to the entry of names in the Record of Rights. We are informed that a grove had actually been sold by the mortgagees to the predecessors-in-title of the defendants second party. The dispute in the Revenue Court resulted in a compromise in which Zalim Rai gave up all his equity of redemption in the property. The mortgagees agreed to certain property being held by Zalim Rai and his wife as long as either of them should live, it, on their death, reverting to the mortgagees. The compromise was not registered. Entries were made in the Government record accordingly and from that date the mortgagees were recorded as the full owners of the property. The mortgage was one by conditional sale. From that time onwards the mortgagees have always been recorded as owners of the property and they dealt with it as such. In the year 1900 and again in 1904 the defendants first party transferred various portions of the property to the defendants second party. In the year 1908, a co-sharer in the village named Mahabir Rai applied for partition of his own share in the *mahal*. The defendants first party, on the 26th of January 1909, applied for partition of part of the property which is now in dispute, and the defendants second party applied for partition of the rest of the property which is now in dispute. On the 19th of August 1909, the present plaintiff Khedu Rai, who is the heir of Zalim Rai, applied for partition of his own share in the village and in his application laid no claim whatsoever to the property now in dispute, as a mortgagor. The partition was completed on the 20th of October 1910, and came into force on the 1st of July 1911. In 1912, the plaintiff brought the present suit for redemption of the mortgage. The Courts below have dismissed the suit. The plaintiff appeals.

HALIMA *v.* MATHRADAS RAMCHAND.

The first point urged on his behalf before us was that the compromise of 1876, being unregistered, conveyed no title, and under section 49 of the Registration Act, VIII of 1871, it could not be taken as evidence of any transfer of property. It is urged that there was no transfer of the equity of redemption; that the mortgagees cannot, by asserting adverse possession, change the nature of their possession, and, therefore, the plaintiff is entitled to redeem. On behalf of the respondents, however, it is pointed out that though the document was not registered, the parties had acted upon the transaction from the year 1876 up to the date of the present suit; that the nature of the mortgagees' possession has been changed with effect from the date of the compromise; that the defendants first party have transferred portions of the property, and that the defendants' possession has really been adverse to that of the plaintiff or his predecessor-in-title. Reliance is placed upon the decision of their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1) and our attention has also been called to the decision in *Usuman Khan* v. *Nagalla Dasanna* (2). It will be noted that the transaction of 1876 took place at a period prior to the coming into force of the Transfer of Property Act of 1882. It is true that the Registration Act was then in force, but it seems to us that this was not a case of the mortgagee merely setting up adverse possession without any act on the part of the mortgagor in the matter. In other words, the present case is not of mere unilateral action by the mortgagee. Both parties consented to the complete transfer of the equity of redemption to the mortgagees and both parties have acted upon it for very nearly forty years. The case is very similar indeed to the case reported as *Usman Khan* v. *Dasanna* (2). We think the principle of that decision and also of the decision in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1) is applicable to the present case, and we hold that the defendants have held possession of this property since the year 1876 as owners adversely to the mortgagor and his heirs. We do not think it necessary to go into the other point which has been raised in the appeal. The appeal fails and is, therefore, dismissed with costs, including in this Court fees on the higher scale.

*Appeal dismissed.*

(1) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(2) 16 Ind. Cas. 694; 12 M. L. T. 330; 23 M. L. J. 360; (1912) M. W. N. 995; 37 M. 545.

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## SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 36 OF 1914.

September 21, 1916.

*Present*:—Mr. Hayward, J. C, and Mr. Crouch, A. J. C.

*Musammat* HALIMA—PLAINTIFF—APPELLANT

*versus*

MATHRADAS RAMCHAND AND OTHEES—DEFENDANTS—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 16, cl. (2) (b), 22—Receiver, suit against by third person—Leave of Court, whether necessary.*

There is no general rule of law making it necessary for a plaintiff to obtain leave of the Insolvency Court before suing the Receiver in insolvency. [p. 123, col. 1.]

A plaintiff who is not a creditor but a third person claiming adversely to the insolvent is not affected by the provisions of section 16, clause (2) (*b*), of the Provincial Insolvency Act, and is not, therefore, bound to obtain leave of the Court before suing the Receiver. [p. 123, col. 2.]

Section 22 of the Provincial Insolvency Act does not in any way prohibit the enforcement of rights by suit without the leave of the Court. [p. 123 col. 2.]

Mr. *Hirdaram Mewaram*, for the Appellant.

Mr. *Motiram Ramchand*, for the Respondents.

### JUDGMENT.

HAYWARD, J. C.—The plaintiff sued for declaration of ownership of certain property in her possession as against the defendants Nos. 1 and 2, who were Receivers in insolvency. The first Class Sub-Judge, Hyderabad, dismissed the suit on the ground that it could not be brought without the prior leave of the Insolvency Court. The District Judge of Hyderabad, on first appeal, confirmed this decision, also holding that no suit would lie against the Receivers in

insolvency without the prior leave of the Insolvency Court. This second appeal has been brought to obtain a reversal of this decision and the trial of the suit on the merits by the lower Courts.

It appears to me that there has in this case been some misapprehension as to the rule regarding prior leave for a suit against a Receiver. There is an old rule of the common law that no suit may be brought against a Receiver appointed in a suit without leave of the Trying Court. But even that rule is limited to a case where the claimant is not in possession of the property and where actual possession has been taken by the Receiver. The rule and the authorities upon which it is based will be found in paragraph 709 of Volume 24 of Halsbury's Laws of England. It is that rule which was apparently applied by the Madras High Court in 1903 in the case of *Kamatchi Ammal* v. *Sundaram Ayyar* (1). That also must, no doubt, have been the rule which was referred to in general terms by the single Judge of the Calcutta High Court, who decided the case of *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (2). But it must be observed that both those cases were cases of Receivers appointed in suits under the Civil Procedure Code. There would appear to be no authority for holding that that rule, which has been applied to Receivers in suits who are merely officers appointed to hold the property on behalf of the Court, has also been applied to Receivers in insolvency or, as they are otherwise termed, Official Assignees in insolvency in whom the property is actually vested under the Insolvency Act. That, no doubt, would explain why no reference whatever was made to the necessity of obtaining the leave of the Court in the case in which it was held that the common law right to sue the Official Assignee was not taken away by the provision enabling a person aggrieved by any act of the Official Assignee to bring the matter before the Insolvency Court. That was the case of *Naginlal* v. *Official Assignee* (3) decided by the Bench of the Bombay High Court. But that there is no such rule applicable to Receivers in insolvency or in other words to Official Assignees in insolvency has been expressly stated in the case of *Ramalinga Chetty* v. *Ananthachariar* (4) by the Madras High Court. It appears, therefore, to me that there was no necessity in this case to obtain leave before suit under any general rule and the appellant, not being a creditor but being a third person claiming adversely to the insolvents, was not affected by the special provisions of section 16, clause 2 (*b*), of the Provincial Insolvency Act of 1907. And though affected by the provisions of section 22 that section contains no special provisions prohibiting the enforcement of rights by suit without the leave of the Court.

We ought, in my opinion, for these reasons to reverse the decisions of the lower Courts and to remand the case for trial upon the merits under Order XLI, rule 23, Civil Procedure Code.

Costs to be costs in the cause.

CROUCH, A. J. C.—Plaintiff is in possession of a house which the Official Receiver in a certain insolvency claims to be a portion of the estate vested in him. The plaintiff has, *prima facie*, a right of suit under section 42 of the Specific Relief Act to obtain a declaration that she is entitled to such property, unless it can be shown that such right is either expressly or impliedly barred by some rule of law. The view of the lower Court is that such a rule exists. The authority cited is reported as *Kamatchi Ammal* v. *Sundaram Ayyar* (1). The theory there put forward is that the Receiver is an officer of the Court and that any party aggrieved by his conduct should seek redress against him in the proceedings in which he was appointed, and that no separate proceedings can be taken against him, either in that Court or elsewhere, without the leave of the Court under whose authority the Receiver was acting. On consulting the authorities upon which the lower Court Judge relied we find that the decision rests ultimately on an English rule of procedure. Now, if any citizen of the Province of Sind desires to know what is the law of insolvency

(1) 26 M. 492.
(2) 32 C. 270; 9 C. W. N. 247.
(3) 12 Ind. Cas. 391; 13 Bom. L. R. 900; 35 B. 473.
(4) 18 Ind. Cas. 722; 24 M. L. J. 350; (1913) M. W. N. 287; 13 M. L. T. 303.

in this province and whether or not his right of suit in any particular case is barred by such law, he is entitled to consult the Provincial Insolvency Act, III of 1907, which was framed for the express purpose of consolidating and amending the law relating to insolvency in British India as administered by Courts having jurisdiction outside the Presidency Towns. Now the only section in this Act which can conceivably limit plaintiff's right of suit is section 22. This section does not expressly bar the suit, and I fully agree with the Judges who decided the case reported as *Bai Samrat* v. *Sardarsang Hamabhai* (5) that its terms are not such as to justify the view that the right of suit is impliedly barred. In my opinion it is always dangerous for any Indian Court to apply an English common law rule of procedure, unless such rule has been expressly adopted and the present case offers an instructive illustration of the danger of doing so. The rule relied on seems never to have been limited by strict definition, and both the scope and the limits of its application are open to question.

I am, therefore, of opinion that the right of suit in this case is not barred and I remand the case as suggested by the learned Judicial Commissioner.

*Appeal allowed; Case remanded.*

(5) 12 Ind. Cas. 381; 13 Bom. L. R. 905.

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ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 98 OF 1916.

January 30, 1917.

*Present*:—Mr. Justice Piggott and Mr Justice Walsh.

*Musammat* NARAIN DEI—APPLICANT—APPELLANT

*versus*

*Musammat* PARMESHARI AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

*Succession Certificate Act (VII of 1889) - Succession certificate, application for, rejection of—Review - Appeal, whether lies.*

No appeal lies against an order rejecting an application for review of an order granting a succession certificate. But an appeal will lie from an order rejecting an application for the grant of a succession certificate. [p. 125, cols. 1 & 2.]

First appeal against the decision of the District Judge, Moradabad, dated the 8th December 1915.

Mr. *Radha Kant Malaviya* (for Mr *Rama Kant Malaviya*), for the Applicant

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Opposite Parties.

JUDGMENT.

PIGGOTT, J.—This is an appeal from an order passed under the Succession Certificate Act. It arises under the following circumstances :—The applicant, the appellant before this Court, is the widow of one Umrao Singh. She applied to the District Judge for a certificate entitling her to collect the debts of her late husband, to the amount of Rs. 1,246-11-0. The application was opposed by certain persons, the respondents now before us, who claim to be interested as reversioners in the estate of Umrao Singh. The District Judge decided in favour of the present appellant, but held that the succession certificate should be granted only subject to her furnishing security for the amount of the debts specified in her application. He fixed the amount at Rs. 1,250, and we think it is worthwhile to notice this point, because it would seem that, by some copyist's error, the lady was left under the impression that she was ordered to furnish security to the amount of Rs. 1,750. Some months later the present appellant applied to the District Judge, the successor-in-office of the Judge who had originally passed the order, asking him to grant her a certificate without any condition as to security, the reason alleged being that she was not in a position to furnish security. Thereupon an order was passed on the 8th of December 1915, to the effect that the learned Judge refused to reconsider his predecessor's order. The appeal is against this order of the 8th December 1915.

A preliminary objection is taken before us that no appeal lies and we have come to the conclusion, although not without some reluctance, that this objection must prevail. The question we have to consider is altogether distinct from the question whether an appeal could have been prosecuted by either party against the original order of July the 30th, 1915, granting a certificate subject to conditions. According to the existing state of authorities

in this Court, such an appeal would not lie, *vide Nannhu Mal* v. *Gulabo* (1) and the cases therein cited. Our attention has been drawn to a later decision of this Court in *Gauri Dutt* v. *Musammat Maikia* (2) questioning the correctness of the older rulings, though not dissenting from them. If the question had come before us in a pure form, namely, whether this lady had or had not a right of appeal from the order of the 30th July 1915, we might have felt disposed to see whether the older decisions of this Court could not be re-considered. The lady, however, has submitted to the existing current of authority in this Court and has refrained from appealing from this order of the 30th July 1915. We must, therefore, accept the position that that order was not appealable, or, at any rate, has not been appealed against. The order of the 8th of December, as it stands, is merely an order rejecting what the learned Judge took to be an application for review of the order of the 30th July 1915. From this order, as it stands, it is quite clear that no appeal lies. The only question, which could be argued and which has been argued before us, was whether we could treat this latter order as being in substance one refusing a certificate in favour of the present appellant. We are afraid under the circumstances stated that it is impossible for us to do this. If the appellant wished to obtain from the District Judge an appealable order, in accordance with the view of the law taken in *Nannhu Mal* v. *Gulabo* (1), she should have moved the District Judge, upon her representation that she was unable to furnish security, to pass an order finally disposing of her application for the certificate. Such an order, in the circumstances, if the District Judge had refused to review his predecessor's order, would have to be an order rejecting this lady's application for the certificate, and from such an order, according to the view of the law hitherto accepted in this Court, an appeal would lie. It may be that it is not too late even now for the appellant to adopt this course. For the reasons stated, we dismiss this appeal with costs including fees on the higher scale.

(1) 26 A. 173; A. W. N. (1903) 225
(2) 2 A. L. J. 606.

WALSH, J.—I agree. I think the whole thing is a lamentable exhibition of the results which may accrue to parties of a misunderstanding and an attempt to fight about the form instead of the substance. The whole point in the case is as to who should collect the debts of the deceased man, and there is no question between the parties, such as arises in a suit, which need have led to several months being spent upon an idle discussion of this kind. There seems to have been a misunderstanding. Mr. Malaviya tells us, and I see no reason to doubt him, that the intention was to get an order from the District Judge on the 8th of December 1915, refusing a certificate without furnishing security. For some reason, which has not hitherto been explained, there was an order on that application which is dated the 4th of May. It is quite clear from the order which was drawn up that the learned Judge treated the application as one to review or modify the previous order. Whether it was that owing to the time which had elapsed when the formal order came to be drawn up what had really happened was forgotten and the formal order does not represent the real result, or whether it was due to the fact that the learned gentleman representing the appellant did not make himself clear to the learned Judge of the Court below, it is impossible for us to say that it is an order refusing a certificate. It is not such an order. It is an order refusing to entertain an application to review or modify the previous order. Therefore we cannot deal with it as something which it is not. It seems to us, however, that there is no obstacle to the applicant, the appellant before us, taking immediate steps to make a fresh application to the District Judge, and if possible supported by an affidavit, for grant of an unconditional certificate, or in the alternative for a certificate on such terms as the Judge thinks right. And if she is advised to appeal against the order made on such fresh application, speaking for myself, if I am satisfied that unless this Court makes some order to accelerate the hearing of the appeal, some of the debts will become statute-barred, I should be prepared to accelerate the appeal to prevent such result. That seems to be required in the interest of

the parties themselves and reasonable as against the debtors who owe the money.

*Appeal rejected.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 835 AND 1349 OF 1915.

January 24, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

P. V. NAGANATHA SASTRI—PLAINTIFF—APPELLANT IN S. A. NO. 835 OF 1915 AND RESPONDENT IN S. A. NO. 1349 OF 1915

*versus*

N. P. SUBRAMANIA IYER—DEFENDANT—RESPONDENT IN S A. NO. 835 OF 1915 AND APPELLANT IN S. A. NO. 1349 OF 1915.

*Defamation -- Libellous statements in document—Innuendo—Party defamed, question as to—Fair comment—Justification—Damages, quantum of—Findings by Court—Questions of fact—Appeal, second—High Court, interference by—Civil Procedure Code (Act V of 1908), s. 100—Legal Practitioners, duty of, in accepting professional engagements.*

The question whether the whole or part of an alleged defamatory writing would be construed by an ordinary reader to refer to a particular person is a question of fact which, in English Courts, would be left to a Jury, and where the Jury arrives at its verdict on this particular point through a misconstruction of the writing read as a whole or through other circumstances appearing in the case, that verdict is a verdict upon a question of fact. [p. 126, col. 2.]

The questions of justification, fair comment, *bona fides* and quantum of damages, in an action for defamation, are also all questions of fact. [p. 128, col. 1.]

Though it is a question for the Judge to say whether if certain facts were proved they would amount to justification, yet it is a question for the Jury to say whether an article complained of is a fair comment on a matter of public interest. It is only where the article is so clearly fair that there can be no question of libel on the admitted facts that a Judge may stop the case. [p. 128, cols. 1 & 2.]

The High Court cannot, in second appeal, interfere with a finding on any of the above matters. [p. 127, col. 1.]

Per *Sadasiva Aiyar, J.*—In modern times the tendency is to expect from the legal profession a greater amount of care and conscience in accepting engagements than was done in the days of Lord Erskine or Lord Brougham. [p. 127, col. 2.]

The doctrine of penal and exemplary damages is due to an illegitimate encroachment on the considerations of punishment by fine in criminal jurisprudence into realms of civil law and such doctrine should not be introduced into British India. [p. 128, col. 1.]

Second appeals against the decrees of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suits Nos. 165 and 173 of 1914, preferred against those of the District Munsif, Tanjore, in Original Suit No. 559 of 1912.

The Hon'ble Mr. *T. Rangachariar*, Messrs. *P. R. Ganapathi Aiyar* and *K. S. Ramabhadra Aiyar*, for the Appellant in S. A. No. 835 and for the Respondent in S. A. No. 1349.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent in S. A. 835 and for the Appellant in S. A. No. 1349.

JUDGMENT.

SADASIVA AIYAR, J.—These two connected appeals arise out of the same suit brought by the plaintiff, a leading Vakil of the Tanjore Bar, for the recovery of Rs. 2,000 for damages for the libel contained in a letter sent to the "Madras Standard" by the defendant and published in that paper on the 22nd August 1912. The letter is marked as Exhibit A in the case. The District Munsif awarded Rs. 500 damages and full costs. Both sides appealed and the learned Subordinate Judge on appeal reduced the damages to Rs. 10 but awarded full costs to the plaintiff in the defendant's appeal and dismissed the plaintiff's appeal without costs. In the defendant's Second Appeal No. 1349 of 1915, Mr. G. S. Ramachandra Aiyar argues that only the last eleven lines of Exhibit A were intended by him to refer to the plaintiff, and that even as regards the matter contained in those eleven lines his letter amounts to a fair comment made *bona fide* upon the plaintiff's condnct as Vakil in putting forward arguments in a particular mode in a case conducted by him and that, therefore, he is not liable, in law, to the plaintiff for such comments.

I think the question whether the whole of a writing or any part of that writing would be construed by an ordinary reader to refer to plaintiff is a question of fact which in English Courts would be left to a Jury, and where the Jury arrives at ist verdict on this particular point, through a misconstruction of the writing read as a whole or through other circumstances appearing in the case, that verdict is a verdict upon a question of fact. While, therefore, I am of opinion that the Subordinate Judge in arriving at his conclusion that the first

portion of the letter, Exhibit A, would not be read by an ordinary newspaper reader as referring to the plaintiff, did so through a construction of the letter which according to legal canons of construction was wholly unjustified, I am unable to hold that his finding as to the implication that would be put by an ordinary newspaper reader on that portion of the letter A (that is, whether it referred to the plaintiff or not), is not a question of fact but one of law and is, therefore, open to be questioned in second appeal.

As regards the remaining portions (that is, the last eleven lines) they clearly accuse Mr. Naganatha Sastri of the six faults, numbered 1 to 6, in the next previous portion and also of sophistry. The defendant in his own evidence admits that Mr. Naganatha Sastri was not guilty, in the conduct of the case, of five of the above seven faults. If, however, an ordinary reader would read the document as charging Mr. Naganatha Sastri with these five faults also, then the defendant is clearly guilty of libel. The defendant's appeal, therefore, must be dismissed with costs.

As regards the plaintiff's second appeal, it is valued at Rs. 1,990. I find from the Subordinate Judge's judgment that the plaintiff left the question of the quantum of damages entirely in the hands of that Court. That Court in respect of the defamatory matter contained in the last eleven lines assessed the damages at Rs. 10 and in respect of the whole letter (if the whole was a libel on plaintiff) at Rs. 100. I think, therefore, that the plaintiff's appeal on the question of the inadequacy of damages should have been confined to the difference between the Rs. 100 and the Rs. 10, that is, to Rs. 90. I have already observed, in considering the defendant's appeal, that the question whether the first portion of the letter applied to plaintiff is a question of fact with which I cannot interfere in second appeal. The quantum of damages is also a question of fact. The plaintiff's appeal is, therefore, also dismissed with costs.

In thus confirming the judgment of the Subordinats Judge I should not be understood as affirming all the observations as to the ethics of the profession contained in that judgment. The remark that "members of the profession have no duty to judge of the case for themselves before accepting an engagement", seems to me to be too broadly stated. I think the tendency in modern times is to expect from the legal profession a greater amount of care and conscience in accepting engagements and in putting forward arguments than was thought sufficient in the days of Lord Erskine or Lord Brougham, when the duty of practitioners to clients was exalted to such an extent as to obscure the duty of the practitioner to see that his own delicacy of conscience and sense of right is not gradually blunted and that his position as a promoter of justice and a helper of the Court in its administration is not gradually made subordinate to his position as a mere paid advocate of the claims of others.

I shall notice also very shortly two points referred to by Mr. T. Rangachariar in the course of his argument. He referred to the House of Lords' case in *Hulton & Co.* v. *Jones* (1) to support his position that whether the plaintiff was intended or not intended to be attacked, the defendant would be liable if an ordinary reader would reasonably come to that conclusion. Supposing that the English Law as developed by the English precedents is to that effect, I do not see why the Indian Law should follow suit unless the doctrine is in consonance with justice, equity and good conscience. I am strongly of opinion that the dissenting opinion of Lord Justice Fletcher Moulton on the question (an opinion which was expressed in the same case when it was before the Court of Appeal) [see *Jones* v. *Hulton & Co.* (2)] is much more in consonance with justice and equity than the law as now settled in England on this point.

The other point mentioned by Mr. T. Rangachariar is that penal and exemplary damages ought to be awarded in such cases as the present. I shall content myself with observing that the

(1) (1910) A. C. 20; 79 L. J. K. B. 198; 101 L. T. 831; 54 S. J. 116; 26 T. L. R. 128.

(2) (1909) 2 K. B. 444 at pp. 458 to 476; 101 L. T. 330; 25 T. L. R. 597; 78 L. J K. B. 937.

whole doctrine of penal and exemplary damages is due to the illegitimate encroachment of the considerations of punishment by fine in criminal jurisprudence into the realms of civil litigation and I wholly deprecate the introduction of such complications of the English system into India. I wish to remark in conclusion that the plaintiff would have been better advised if he had treated the whole matter, even in the beginning, with indifference (I shall not say contempt). At any rate, he should not, in my opinion, have pursued the matter in the Appellate Court after he had obtained a judgment in the First Court, nor have filed a second appeal in this Court after both Courts had decided in his favour that the defendant was not justified in his attacking the plaintiff, though they differed as to whether the whole of the letter or only a portion constituted such attack.

SPENCER, J.—I entirely agree with what has fallen from my learned brother as to the undesirability of this matter having formed the subject of a civil action after the defendant had tendered an apology.

The Subordinate Judge found, as a finding on a question of fact, that only the latter part of the newsparer publication referred to the plaintiff.

It has been argued that as the alleged libel is contained in a document, it is open to us to interpret this document according as we think proper. In my opinion, it is not the legal construction which is to be put on this document that we have to consider but what an ordinary person would understand by the language used, and this is a matter which would be in a case tried with a Jury a question for the Jury to decide. Therefore, whether the first part of the article referred to the plaintiff or not is a question of fact into which we cannot go in second appeal. I am not prepared to say that, if this matter had come before us in first appeal, I should have taken the same view as the Subordinate Judge has taken.

Then as to the questions of justification, fair comment and *bona fides* these also are questions of fact, and the first Court found them against the defendant in paragraphs 21, 22 and 24 of its judgment and the learned Subordinate Judge agreed with the District Munsif. It has always been held that, although it is a question for the Judge to say whether if certain facts were proved they would amount to justification, yet it is a question for the Jury to say whether an article complained of is a fair comment on a matter of public interest. It is only where the article is so clearly fair that there can be no question of libel on the admitted facts that a Judge may stop the case. We must, therefore, accept the findings as to fair comment and *bona fides*.

The quantum of damages is also a question of fact, and even were it otherwise, the circumstances of this case do not seem to require any interference.

I, therefore, agree that both appeals should be dismissed with costs.

*Both appeals dismissed.*

V.R.P.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1266 OF 1914.

November 13, 1916.

*Present*:—Mr. Justice Walsh and Mr. Justice Stuart.

*Kuer* NEHAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Lala* SEWA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Findings on issues referred to lower Appellate Court—High Court, interference by—Specific Relief Act (I of 1877), s. 27 (b)—Specific performance—Contract of sale—Notice of sale before registration.*

Findings on issues referred to a lower Appellate Court in second appeal are just as much findings of fact as the findings in the original suit and cannot be disturbed by the High Court in second appeal. [p. 129, col. 2]

*Bal Kishen* v. *Jasoda Kuar*, 7 A. 765; A. W. N. (1885) 225; 4 Ind. Dec. (N. S.) 908, followed.

*Mubarak Husain* v. *Bihari*, 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec (N. S.) 199, distinguished.

If a defendant to a suit for specific performance, has notice of the sale to the plaintiff before the registration of his own contract of sale is completed he is liable to the plaintiff under section 27 (*b*) of the Specific Relief Act. [p. 130, col. 1.]

Second appeal from the decision of the District Judge, Mainpuri, dated the 2nd July 1914.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Kailash Nath Katju*, for the Appellants.

NEHAL SINGH *v.* SEWA RAM.

Messrs. *Lakshmi Narain* and *Girdhari Lal Agarwala*, for the Respondents.

JUDGMENT.

WALSH, J.—This is by no means a simple matter, having regard to what has previously happened in the history of the case. The circumstances out of which the suit arises appear in every judgment on the record (I think this is the fifth judgment in the case), and need not be reiterated. When the case was last before my brother Mr. Justice Sunder Lal, as he then was, and myself, certain issues were sent down to the lower Appellate Court. The result of the findings is that the District Judge has held that the plaintiff had no contract with defendant No. 2 and that defendant No. 1 only received notice of a contract, if there was one, during the registration proceedings.

Either of these findings, if they are sound, would be fatal to the plaintiff's case.

The second is clearly untenable. The point is covered by authority, and we have no alternative but to hold that the notice was sufficient to render defendant No. 1 liable under section 27, sub-section (*b*) of the Specific Relief Act, if there was a contract. The first point raises considerable difficulty. At the first hearing in the first Court defendant No. 2, who is alleged to have made the contract, did not appear to dispute it. It would be idle to ignore that significant fact. The first Court held that there had been an executory contract for Rs. 2,900 and that Rs. 100 had been accepted by defendant No. 2 as part payment thereunder. Defendant No. 1, who succeeded on the question of notice, did not challenge this finding when he was respondent in appeal, but as he again succeeded in the lower Appellate Court on the question of notice, this Court in referring the issues gave him the opportunity to do so at the second hearing.

At the trial of the issues the plaintiff set out to support the formation of the contract, which hitherto had not been seriously disputed, by advancing a good deal of additional evidence tending to show prior negotiations as far back as 1908. The learned District Judge, for reasons we are quite unable to follow, rejected this evidence and has drawn an inference against the plaintiff for having failed to produce it on the former occasion which we think is not justified, as on the former occasion there was no dispute. They are, however, findings of fact which we are by law prohibited from disturbing. It was urged by the appellants that the case of *Mubarak Husain* v. *Bihari* (1) was a decision justifying our ignoring the findings. All that that case decided was that where in second appeal issues have been referred, and after they have been decided, the case comes back to this Court and another Judge thinks that the case could have been disposed of and can still be disposed of without reference to the issues which have been referred and which need not have been referred, he is at liberty to decide the case without reference to the issues. That is a totally different thing from overruling the findings on the issues and we must take it to be the law, as decided in *Bal Kishen* v. *Jasoda Kuar* (2), that findings on issues referred to a lower Appellate Court in second appeal are just as much findings of fact as the findings in the original suit and cannot be disturbed by this Court in second appeal. These findings, however, do not dispose of the case. The learned Judge treated the case when referred as *res integra*. In this he was wrong. He entirely ignored, so far as anything in his judgment shows, the evidence and the findings of the first Court to which we have already referred. He has come to a conclusion that there was no contract because he has rejected the evidence of 1908, and because defendant No. 2 did not authorise the sale-deed which was prepared. This was a misdirection in law. It is quite true that we may again refer this part of the case for the facts to be found by the lower Appellate Court. We think, however, that the case has occupied too much time already and that when this Court can it ought, in the interests of the parties, to dispose finally of issues which have been left undetermined by the lower Appellate Court. Exercising our jurisdiction under section

(1) 16 A. 206; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199.
(2) 7 A. 765; A. W. N. (1885) 225; 4 Ind. Dec. (N. S.) 908.

103 we have been taken thoroughly through the evidence upon the record and we are satisfied as a fact that having regard to the evidence in the first Court and to the surrounding circumstances of the case, the plaintiff did agree, and defendant No. 2 agreed with the plaintiff, for the sale of this property for Rs. 2,900 and that Rs. 100 was paid in part payment of the purchase-money.

The evidence further shows and this point has also been entirely ignored by the learned District Judge, that defendant No. 1 himself, in a suit in which the title to this identical property was in question and when he himself was asserting that defendant No. 2 had been as against his wife the owner, put the present plaintiff into the box and as part of his, defendant No. 1's own case, attempted to prove the very contract which he now denies. In our opinion a person is not permitted to affirm and disaffirm a transaction when it suits his interest so to do, and that being apparently what defendant No. 1 is seeking to do in this case, we hold on this second ground that he is estopped from asserting, as against the parties to this suit, that this contract which he himself relied upon in another suit did not exist in fact. On this ground we hold that the property had already been sold on the 19th of February to the plaintiff when the contract of June was entered into with defendant No. 1, and that the defendant No. 1 had notice of such transaction before the registration of his own contract was completed, and that he is, therefore, liable in this suit to the plaintiff under section 27, sub-section (*b*), and that the plaintiff is, therefore, entitled to a decree against defendant No. 1 as well as against defendant No. 2 for possession of the property and for an order that the sale-deed of the property in suit be executed by defendants Nos. 1 and 2 in favour of the plaintiff. The appellant must have his costs here and in the Courts below, which will include in this Court fees on the higher scale.

STUART, J.—I concur in the order passed.

*Appeal accepted.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 50 OF 1916.

April 17, 1917.

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

FATEH BAHADUR KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

*Thakurain* JAGRAJ KUNWAR—PLAINTIFF—RESPONDENT.

*Oudh Rent Act* (*XXII of* 1886), *ss.* 4 (1), 47 (1)—*Landlord and tenant—Ejectment—Tenant, re-admission of, to portion of previous holding—Enhancement of rent, legality of.*

Where a tenant after his ejectment from the holding is re-admitted to only a portion of the same at an enhanced rent, the enhancement is illegal if it exceeds by more than one anna in the rupee or 6¼ per cent. the rent payable by him before his ejectment. [p 131, col. 1.]

Appeal against the order of the District Judge, Rae Bareli, dated the 18th July 1916, modifying that of the Assistant Collector, 1st Class, Rae Bareli, dated the 15th May 1916.

The Hon'ble Mr. *Samiullah Beg*, for the Appellants.

Mr. *Brij Bhan Chandar*, for the Respondent.

JUDGMENT.—The decision of this second rent appeal has been referred to a Bench by the order of the Judicial Commissioner, dated the 24th January 1917. The facts are very simple. The defendants-appellants held the land in suit from the plaintiff as agricultural tenants together with 5 *bighas* 17 *biswas* and 3 *biswansis* at a rent of Rs. 89-2-0. On 19th July 1913, the plaintiff gave them a lease of the land in suit only for Rs. 163-4-6 reducing the area of the previous holding by 5 *bighas* 17 *biswas* and 3 *biswansis*. The question for our decision is whether the enhancement of rent thereby provided can be enforced in view of the provisions of sections 4 (1) and 47 (1) of Act XXII of 1886. The effect of an enhancement, other than an enhancement in accordance with the provisions of section 47, is discussed in a Bench case, *Rama Nand* v. *Nadir Ali Khan* (1). In a subsequent decision of the Judicial Commissioner sitting alone, *Lachhman Singh* v. *Sarfaraz Kunwar* (2), it was decided that where a tenant who had been ejected from

(1) 1 O. C. 78.

(2) 33 Ind. Cas. 560; 18 O. C. 361; 3 O. L. J. 126.

his holding was re-admitted to a holding with an increased area on an enhanced rental, section 47 did not apply. This decision does not affect the present case. It is no authority for the converse proposition that section 47 does not apply to a case where a tenant who has been ejected from his holding has been re-admitted to a portion of the same holding. Section 47 (1) states: "Except in the cases mentioned in sections 49 and 50" (these sections have no application to the present case), "the rent of a tenant admitted to the occupation of any land, the tenancy of which has determined according to the provisions of this Act, shall not exceed by more than one anna in the rupee, or six and a quarter per cent., the rent payable by the tenant immediately preceding him." The tenancy of the land in suit had determined according to the provisions of this Act, and the only question for our decision is whether the words "any land" would include a portion of the land in the area of the previous holding. The greater includes the less, and in our opinion the words "any land" must be interpreted as including a portion of the previous holding.

We, therefore, restore the decree of the learned Assistant Collector and set aside the decree of the learned District Judge. The respondent will pay her own costs and those of the appellants in the Court of the District Judge and in this Court.

*Decree restored.*

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PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 367 OF 1915.
April 2, 1917.
*Present*:—Mr. Justice Mullick and
Mr. Justice Atkinson.
AJODHYA PRASAD—PLAINTIFF—APPELLANT
*versus*
MANOHAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Mitakshara—Joint family—Ancestral property—Partition, suit for, by son in father's lifetime, whether maintainable—Partition decree—Minor unrepresented in suit, whether bound.*

A suit for partition of ancestral property by a Mitakshara son in the lifetime of his father is maintainable. [p. 133, col. 2.]

A minor unrepresented in a partition suit, is, in the absence of prejudice, bound by the partition decree. [p. 134, col. 1.]

Appeal from the decision of the Subordinate Judge, Patna.

Messrs. *Ganesh Dutta Singh*, *Sivnandan Roy* and *Karunamoy Bose*, for the Appellant.

Rai *Tribhuan Nath Sahay* and Mr. *Dwarkanath Pathak*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition instituted by the plaintiff in the Court of the Subordinate Judge of Patna in respect of the properties enumerated in Schedules I, II and III to the plaint. Defendant No. 1 is the father of the plaintiff; defendant No. 2 is the brother of the plaintiff's father; and defendants Nos. 3 and 4 are the adult sons of the plaintiff's father, who have declined to join as plaintiffs in this suit. Defendant No. 5 is the grandson of defendant No. 2.

Paragraph 19 of the plaint, contains prayers for the following reliefs:—

1. That on getting all the properties mentioned in Schedules I, II and III of the plaint partitioned through an Amin Commissioner, the plaintiff's 2-annas out of the 16-annas share may be separated and "*khas*" possession thereof be delivered to the plaintiff.

2. That the property mentioned in Schedule II may be given to the defendant No. 2 and that in Schedule III to the defendant No. 1 or an additional share in proportion to the price of those properties may be allowed to the plaintiff after including it in the share of the defendants Nos. 1 and 2.

3. That the cost of the suit with interest may be realised form the contesting defendants and awarded to the plaintiff.

4. That such other order as be found proper, may be passed in favour of the plaintiff.

No less than 10 issues were framed by the learned Judge who tried the suit but those material for the purposes of this appeal are issues Nos. 6 and 7. Issue No. 6 runs as follows:—"What are the joint family properties? Has plaintiff omitted to mention in the plaint any of the joint family properties?" And issue No. 7 runs as follows:—"Is the plaintiff in joint possession of the properties in suit with the

defendant? If not, does his suit for partition lie?"

The learned Judge found that the plaintiff was not entitled to maintain the suit during the lifetime of his father. He further found that there was no evidence that the plaintiff's interest in the property in suit was being imperilled. He also found that even if the suit lay, it was incompetent because the property now in suit had been partitioned in a previous suit brought before the Court of the Subordinate Judge of Meerut in the United Provinces. He accordingly dismissed the suit, but without costs. The plaintiff now prefers the present appeal before us.

Now, the first question that arises is whether upon the plaint as it is framed the suit can be said to be a simple suit for partition. On behalf of the respondent it has been strongly urged that unless the plaintiff brings upon the record certain persons into whose possession the properties mentioned in Schedules II and III have passed, he cannot proceed with the partition against the defendants before us. It appears that some of the properties enumerated in Schedule II or a share in these properties have been sold in execution of a decree against defendant No. 2; and that the auction-purchasers have taken possession. These auction-purchasers are not impleaded as defendants in the present suit, and it is contended that unless the plaintiff brings a properly framed suit for the recovery of possession of these properties he cannot ask the Court to proceed with this partition.

It also appears that the poperties in Schedule III have been alienated by the plaintiff's father and are now in the possession of third parties.

It is similarly contended that unless these transferees are brought upon the record and the porperty recovered from their possession the partition cannot proceed.

In my opinion there is considerable force in these contentions. The plaint as it stands is for partition of the properties in Schedules I, II and III; and unless the persons in possession of these properties are impleaded and unless it is decided in their presence that the transfers are invalid or not binding upon the plaintiff, the suit as a suit for partition is clearly incompetent. The plaintiff must bring all the persons in possession of the properties which he seeks to partition before the Court and the Court will then give him the equitable relief which he seeks.

Mr. Pugh on behalf of the plaintiff-appellant recognises this difficulty and suggests that we should allow him to amend the plaint in the following manner:— He requests that clause (1) of paragraph 19 of the plaint should run as follows:—

1. That on getting all the properties mentioned in Schedule I, save that portion of items 5 and 7 of the said schedule which remains unsold, partitioned through an Amin Commissioner the plaintiff's 2-annas out of the 16-annas share may be separated and "*khas*" possession thereof be delivered to the plaintiff.

He next asks that clause (2) of paragraph 19 may be expunged and the following clause be substituted therefor:—

(2) That an account be taken from defendant No. 1 in respect of that part of the properties which has been sold by defendant No. 1 since the institution of this suit.

It is necessary to explain that item No. 15 was the subject-matter of partition in the Meerut suit, three-fourths of the house which comprised this item falling to the share of the plaintiff's uncle, defendant No. 2, and one-fourth to the share of the plaintiff's father, defendant No. 1. Since the institution of the present suit defendant No. 1 and defendant No. 2 have jointly sold the house and the sale-proceeds are now in deposit in a bank. Defendant No. 1 is required by the plaintiff to account for the plaintiff's share in the one-fourth share of the sale-proceeds of the house.

We think that it is competent to the plaintiff in the present suit to take the account he seeks. He is not bound to ask for the partition of the properties which have been alienated. In a partition suit the other members of the joint family are liable to account for any expenditure out of the joint family funds which has been incurred for expenses not

legitimate to the purposes of the joint family and if, as the plaintiff alleges, there has been any misappropriation or waste on the part of the defendants, all the defendants are liable to account to the plaintiff for the same. Therefore, it seems to me that the plaint as amended is in order and the plaintiff is competent to prosecute the suit without being required to file the additional Court-fees which he would have been required to file if a prayer for declaration of title and recovery of possession had been added to the plaint. In my opinion the suit as amended is competent and triable as an ordinary partition suit.

The next question is whether or not the suit is at all maintainable during the life-time of the plaintiff's father. The learned Vakil for the respondent relies upon *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (1). Their Lordships in that case held that the plaintiff could maintain a suit for partition of ancestral property even when his father and grandfather were both alive, if they allowed the property to be wasted and the plaintiff's interest therein imperilled. Apparently in that case there was evidence of waste and the learned Judge, while holding that the suit was maintainable, decided on the merits that the plaintiff had no right to the property in suit. The learned Judges, however, approved of the judgment of Mr. Justice Telang in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulakarni* (2), in which that learned Judge expressed the opinion, without any qualification whatever that a suit by a Mitakshara son for partition was maintainable in the lifetime of both the father and the grand-father. The same view was taken in *Subba Ayyar* v. *Ganasa Ayyar* (3). The learned Judges of the Madras High Court in this case made the following observation: "We should have considered ourselves concluded by authority, had it not been for the decision of the majority of the High Court at Bombay in *Apaji Narhar Kulakarni* v. *Ramchandra Ravji Kulakarni* (2). After carefully reading the judgments in that case and comparing them with the Mitakshara and the decision in *Nagalinga Mudali* v. *Subbiramaniya Mudali* (4), we agree in the opinion of Mr. Justice Telang, who has reviewed at length all the authorities on the subject and dissented from the conclusion arrived at by the majority of the Court." In our opinion the present case is fully covered by this last mentioned authority.

The Calcutta decision upon which the learned Vakil for the respondent relies does not go the full length of his contention; and, in my opinion, that decision does not afford any authority for the proposition that the present suit is not maintainable, if the plaintiff is unable to prove waste or circumstances showing that his interest in the joint family property is being imperilled. The suit, therefore, is maintainable.

Then there remains the question whether the present suit is incompetent by reason of the partition in the Meerut District referred to above. It appears that out of the fifteen items enumerated in Schedule No. I, items Nos. 1, 2, 3, 4, 6 and 15 were covered by the decision of the Sub-ordinate Judge of Meerut which was appealed against to the High Court of Allahabad and although Mr. Pugh at first contended that in spite of the decision of the Appellate Court he was still competent to re-open the partition on the ground that the partition was made in his absence, he does not press this contention very strongly. His argument was that under no circumstances could the plaintiff, who was a minor during the partition proceedings, be bound by a decree in a suit in which his uncle was the plaintiff and his father the principal defendant. Mr. Pugh points out that the defendant No. 1 in that suit set up a claim adverse to that of the plaintiff and raised the plea that the properties were his own self-acquired properties and not the joint family property at all. It is contended that as the interest set up by the defendant in that suit was adverse to the interest of the plaintiff, he would not have been competent to act as guardian *ad litem* for the plaintiff in that suit and that, therefore,

(1) 31 C. 111; 7 C. W. N. 688.
(2) 16 B. 29; 8 Ind. Dec. (N. S.) 497.
(3) 18 M. 179; 6 Ind. Dec. (N. S.) 474.
(4) 1 M. H. C. R. 77.

the decision in that suit should not in any way prejudice the plaintiff's suit.

It appears, however, on the authorities that the plaintiff, though a minor and unrepresented, would, in the absence of prejudice, be bound by the partition decree. It has not been shown on the evidence recorded by the learned Subordinate Judge that the plaintiff was in any way prejudiced. It is certainly not necessary that he should have been represented in that suit. The only circumstance which is material is whether or not the results were prejudicial to the plaintiff's interest.

Although the plaintiff's father set up in that suit a plea that the properties were his own self-acquired properties, the Court found that they were in fact joint family property. The partition, as between plaintiff's uncle on the one hand and plaintiff's father representing the plaintiff's branch of the family on the other, appears to have been a fair and equitable partition and is binding upon the plaintiff in the present suit.

Items Nos. 1, 2, 3, 4, 6 and 15, therefore, cannot be partitioned a second time and the present appeal so far as these properties are concerned must be dismissed against defendants Nos. 2 and 5.

With regard to property No. 15, as has already been mentioned, the plaintiff's father has sold his one-fourth share and the money is in deposit in the bank. The plaintiff's share can be easily ascertained and the plaintiff's father will be liable to account to the plaintiff for that portion of the sale-proceeds which represents the plaintiff's share.

With regard to properties Nos. 7, 8, 9, 10 11, 12, 13, 14 and 5, it is admitted that they were not covered by the partition proceedings in the Meerut District. But then the learned Vakil for the respondents urges that these properties were the subject-matter of a private partition in the year 1883 and that, therefore, the present suit in respect of them cannot proceed.

He relies upon an arbitration award as evidence of the fact that these properties were partitioned by an arbitrator in 1883. Now it appears from the judgment of the learned Judges of the Allahabad High Court in 1913, to which reference has already been made, that this arbitration award was considered and the learned Judges came to the conclusion that so far at least as the properties then in suit were concerned, the arbitration award did not touch those properties and that at the time of the partition proceedings at Meerut they were still joint family property and liable to partition, and it is on this basis that the learned Judges allowed the partition to proceed.

It does not appear on a careful perusal of the Appellate Court's judgment that the Court definitely found either that the rest of the property was joint family property or that the alleged partition of 1883 did not take place. We find, therefore, that there is no bar of *res judicata* as regards items Nos. 7, 8, 9, 10, 11, 12, 13, 14 and 5 in the present suit and the learned Subordinate Judge is in error in holding that these properties were partitioned by the Allahabad High Court and the present suit is on that account incompetent.

It will be a question for determination whether any of these properties are joint family properties or not and that matter will have to be gone into in the course of the remand which we propose to make.

The order, therefore, which we shall make is this. The order and decree of the lower Court will be set aside, and the case will be remanded for trial with the following directions:—

1. It has been represented to us that the mother of the plaintiff is still alive and under the Mitakshara Law she is entitled to a share in the joint family property. The partition cannot and ought not to proceed in her absence and we think it desirable that she should be brought on the record as defendant and that she should be allowed to file a written statement, if she wishes to do so. If out of the pleadings in that written statement any issue arises which is not covered by the issues already framed, a fresh issue or issues will have to be framed and evidence taken thereon. If no other issue is framed upon the written statement of the added defendant, the Court will proceed to try issues Nos. 6 and 7 as already framed by him. The remaining issues will be taken as decided in the plaintiff's favour and no further evidence will be allowed to be given on them.

2. With regard to properties Nos. 1, 2, 3, 4, 6,

and 15, Schedule I, the suit is dismissed as against defendants Nos. 2 and 5. But the plaintiff will be entitled to a partition as against the remaining defendants.

3. With regard to the remaining properties of Schedule I, the Court will take evidence on issues Nos 6 and 7 as framed by him and will decide to what portions of these properties the plaintiff is entitled as against all the defendants in the present suit including the added defendant, his mother.

4. Defendant No. 2 will not be liable to account to the plaintiff in respect of properties alleged to have been alienated by him, but defendant No. 1 will account to the plaintiff for that part of items Nos. 5, 7 and 15 of Schedule I and for the whole of Schedule III, which is alleged to have been alienated by the said defendant No. 1.

5. The parties will be entitled to adduce whatever oral and doeumentary evidence they may consider necessary for the decision of issues Nos. 6 and 7.

6. With regard to the properties in Schedule II the plaintiff, if so advised, must bring a separate suit for recovery of possession before suing for partition. In my opinion he cannot prosecute a suit for partition without first recovering that part of the property which has passed out of the joint family in execution of the decree obtained against defendant No. 2.

As a partial partition has already once been made in respect of this estate by the Allahabad High Court, we think that having regard to the special circumstances that have arisen since that partition we ought to allow the present partition suit to proceed, although incomplete; and we give leave to the plaintiff, if he so desires, to bring a third partition suit in respect of the properties mentioned in Schedule II. The circumstances of this case are exceptional and that is the reason why we allow this course.

The result is that the appeal is decreed in this modified form; each party will bear its own costs.

We direct that the learned Judge will take up and dispose of this matter within four months of the record reaching him.

It appears that there is an injunction in respect of properties Nos. 2 and 4 of Schedule I, prohibiting defendant No. 2 for taking possession thereof. In the view we have taken above the injunction must necessarily be dissolved.

*Appeal allowed in part:*
*Case remanded.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3013 OF 1914.

January 8, 1917.

*Present:*—Mr. Justice Beachcroft and Mr. Justice Walmsley.

KALANDAR MANDAL—PLAINTIFF—APPELLANT

*versus*

AJIMUDEE MANDAL—DEFENDANT—RESPONDENT.

*Specific Relief Act (I of 1877), s. 54—Easement—Right to catch fish—Owner of lower land, whether can restrain owner of higher land from catching fish in his own land—Injunction.*

The plaintiff, who had some paddy fields on the lower levels of a tract of paddy land, had for over 20 years openly, peaceably and uninterruptedly caught fish in a trap set on his own land. The defendant set a similar trap by the side of a tank belonging to him, and caught some of the fish which would otherwise have come to the plaintiff's trap, whereupon the latter brought a suit to establish his right of easement and for damages, and for an injunction restraining the former from catching fish in his trap:

*Held*, that the plaintiff could not acquire an easement by catching fish on his own land and was not entitled to restrain the defendant from catching fish on his own land [p. 136, col. 2.]

A man, who has exercised the natural right of catching fish in his own property for upwards of 20 years, does not thereby acquire the right to prevent everybody else holding land in the vicinity from exercising a similar right. [p. 136, col. 2.]

Every person has a natural right to catch fish, which are *res nullius*, while on his land. [p. 136, cols. 1 & 2]

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 15th June 1914, reversing that of the Munsif, 2nd Court, Jangipur, dated the 12th September 1913.

Babu *Jogesh Chandra Bose*, for the Appellant.

Babu *Taradas Chatterjee*, for the Respondent.

### JUDGMENT.

BEACHCROFT, J.—In the suit out of which this appeal arises the plaintiff claimed a right of easement for catching fish in the surface

water of some paddy land. The plaintiff has some paddy fields on the lower levels of a tract of paddy land and it has been found as a fact that for over 20 years he has openly, peaceably and uninterruptedly caught fish in an *arah* or trap which he has been setting on his own land. The defendant, it is alleged, set a similar trap by the side of a tank belonging to him and as he caught some of the fish, which would otherwise have come to plaintiff's trap, the latter brought the suit to establish his right of easement and for damages. The Munsif gave him a decree declaring his right to catch fish to be established, giving him Rs. 4 as damages and ordering issue of a permanent injunction restraining the defendant from catching fish in his trap.

The Subordinate Judge on appeal, while finding that plaintiff had been catching fish in his trap for over 20 years, held that plaintiff had no exclusive right to catch all the fish in the tract of paddy land and that the defendant in catching fish on his own land acted within his natural right. He accordingly allowed the appeal and dismissed the suit.

It is now argued on appeal by the plaintiff that on his finding as to user the Subordinate Judge ought to have affirmed the Munsif's decree.

If we examine the facts alleged and the prayers in the plaint, it is quite clear that no question of easement arises at all and that no declaratory decree should have been made. The first prayer runs "that the Court be pleased to establish the plaintiff's right to ca'ch fish which grow spontaneously in the paddy land within the plot specified in Schedule (*Kha*) and pass with the flowing water, by putting up *angti* in th place specified in the Schedule (*Ga*)." Now the land in Schedule (*Kha*) is the plaintiff's land and the place (*Ga*) is a spot within the plaintiff's land. As it stands, the prayer refers only to fish growing in the plaintiff's own land and passing from it with the flowing water. The case, however, appears to have been dealt with on the footing that the plaintiff claimed the exclusive right to catch fish coming from above, which would in the ordinary course of things come down to his land with the flow of water and it has been argued on that footing before us. The plaintiff would obviously have a right to catch these fish, which are *res nullius*, while on his land. That right has never been denied by any one and no one is interested to deny it. There was no place then for any declaratory decree. It is also obvious that he could not acquire an easement by catching fish on his own land.

The learned Vakil who appeared for the plaintiff admitted at first that the plaintiff's right in the fish commenced only when they reached the plaintiff's land, but seeing where this admission led to, he subsequently modified it by asserting a right in the fish as soon as the water began to overflow from the land on the higher levels. For this assertion he could show neither principle nor authority, and apart from some supposed virtue in the word "easement," I failed to understand on what principle he argued for a position which leads to this that a man, who has exercised the natural right of catching fish in his own property for upwards of 20 years, thereby acquires the right to prevent everybody else holding land in the vicinity from exercising a similar right.

The case of *Ram Dass Surmah* v. *Sonatun Goohoo* (1), which concerned a fishery in a *khal*, has no application to the case of a man catching fish in the surface water of his own paddy fields.

I would dismiss the appeal with costs.

WALMSLEY, J.—I agree.

*Appeal dismissed.*

(1) W. R. (1864) 275.

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 80 OF 1916.

December 4, 1916.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

MOHAMMAD FASAHAT ULLAH—APPLICANT - APPELLANT

*versus*

*Musammat* TAHIRA BIBI—OPPOSITE PARTY—RESPONDENT.

*Guardians and Wards Act* (*VIII of* 1890), *s.* 39 (d), (g) - *Guardian of minor's person, removal of—Marriage of minor—Court, duty of—Muhammadan Law—Puberty, effect of.*

It is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility for the marriage of a minor. But a ward of Court cannot marry without the consent of the Court and if a proposed marriage is unsuitable, the Court may

restrain the marriage, even though the guardian has given his consent. [p. 137, col. 2.]

The Court cannot interfere in a case where a minor girl completes her fifteenth year of age and thus becomes competent under the Muhammadan Law to contract a valid marriage with a husband of her own choice. [p. 138, col. 1.]

First appeal from the order of the District Judge, Shahjehanpore, dated the 22nd January 1916.

Mr. *S. M. Y. Hasan*, for the Appellant.

Messrs. *Binod Behari* and *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—This is an appeal under the Guardians and Wards Act. The appellant before us, Muhammad Fasahat Ullah, is the father's brother of a certain minor girl. The respondent *Musammat* Tahira Bibi is the mother's mother of the same girl. In a previous proceeding, with which we are not now concerned, the District Judge had appointed Fasahat Ullah to be the guardian of the property and Tahira Bibi to be the guardian of the person of the aforesaid girl. It is evident that these two persons are not on good terms and the record before us shows that the District Court has been frequently asked to adjudicate upon disputes between them. The dispute out of which this appeal has arisen was as to the right of disposing of the hand of this girl in marriage. The position was a somewhat curious one, inasmuch as the paternal uncle has undoubtedly under the Muhammadan Law a preferential right over the mother's mother to dispose of the hand of this girl in marriage, so long as she remains a minor under the Muhammadan Law, that is to say, so long as she neither attains the age of fifteen nor attains puberty. Now Fasahat Ullah applied to the District Judge for two things. He asked him to remove *Musammat* Tahira Bibi from her position as guardian of the person of the minor; *secondly*, he asked the Court to order or direct that this girl should be married to a certain person named by him as a suitable bridegroom. The District Judge came to the conclusion that adequate cause for the removal of Tahira Bibi was not shown. He went on apparently to presume that he had sufficient jurisdiction over the person of this minor to pass an order, one way or the other, as to the suitability of any proposed bridegroom. Indeed, curiously enough, this point seems to have been conceded by the parties in the Court below; for Fasahat Ullah had acquiesced in a previous order of the same Court rejecting a bridegroom proposed by him as unsuitable and the form of the application on which the present order has been passed seems to assume the existence of jurisdiction on the part of the Court to which it is made either to grant or refuse it. At any rate the District Judge has come to the conclusion that the proposed bridegroom was unsuitable and that it was not in the interests of the minor that she should be married to him. He accordingly dismissed the whole of the application.

The appeal before us is against the entire order of the District Judge, and it apparently intends to raise both the points decided against the appellant. With regard to the removal of Tahira Bibi from the guardianship over the person of the minor girl, the application for removal has been supported befor us on the basis of section 39, clauses (*d*) and (*g*) of the Guardians and Wards Act, VIII of 1890. Without going into unnecessary details, it seems sufficient for us to say that we have considered the points pressed upon our notice and that we are not satisfied that sufficient cause has been shown for the removal of this guardian. The question of the respective rights of the parties, and of the rights and duties of the Court, in the matter of the marriage of this minor is a more difficult one. In *Lal Singh* v. *Sham Lal* (1) the Punjab Chief Court held that it is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility for the marriage of a minor. In *Monijan Bibi* v. *District Judge, Birbhoom* (2) the Calcutta High Court has held that award of Court cannot marry without the consent of the Court and that, if a proposed marriage is unsuitable, the Court, representing the Sovereign power, may restrain the marriage, even though the guardian has given his consent. These two principles are not irreconcilable so far as the case now before us goes. We think that there is

(1) 27 Ind. Cas. 381; 98 P. R. 1914; 201 P. L. R. 1915.

(2) 25 Ind. Cas. 229; 20 C. L. J. 91; 19 C. W. N. 290; 42 C. 351.

no necessity for us to interfere with the order of the District Judge. Since the order was passed the girl in question has completed her fifteenth year of age and is now competent under the Muhammadan Law to contract a valid marriage with a husband of her own choice. As the case now stands, we certainly do not think that it would be right for us to reverse the order of the Court below, in such a manner as to direct that the person of the minor be made over to the appellant in order that he may force upon her a husband of his own choice. The District Judge acted in what appeared to him to be best interests of the minor and we are not satisfied that he made any mistake in the view which he took of what those interests demanded. The result is that as the case stands at present we do not think that any good purpose will be served by allowing this appeal. We dismiss it accordingly with costs.

*Appeal dismissed.*

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PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 17 OF 1916.

May 2, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

*Babu* JOGENDRA PRASAD NARAIN SINGH—DEFENDANT NO. 2—JUDGMENT-DEBTOR—APPELLANT

*versus*

GOURI SANKAR PRASAD SAHU AND OTHER—DECREE-HOLDERS—DEFENDANTS NOS. 6 AND 7—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, O. XXXIV, r. 5—Preliminary decree—Part payment out of Court—Adjustment of such payment, whether permissible at final decree.*

There is nothing in Order XXXIV, rule 5, of the Civil Procedure Code to justify the view that Order XXIII, rule 3, does not apply to adjustments of accounts made between the date of the preliminary decree and the date on which the accounts between the parties are finally settled.

If a preliminary decree is satisfied in part out of Court, the Court at the final taking of accounts will permit such payment towards the satisfaction of the decree.

Appeal from a decision of the Officiating Subordinate Judge, Muzaffarpur, dated the 1st May 1915.

JUDGMENT.—The appellant in this case is a judgment-debtor against whom a preliminary mortgage decree was obtained on the 18th of September 1911. On the 13th of December 1914 the decree-holders put in a petition to make the decree absolute. The appellants, thereupon, put in a petition to the effect that the decree had been satisfied in part by an arrangement out of Court, this arrangement being that the value of an elephant taken by the decree-holders from the judgment-debtors before the making of the decree absolute should be credited to the accounts to be taken on the mortgage. The lower Court refused to take cognizance of this plea on the ground that it could not be recognized at that stage. Against that decision this appeal is filed.

We are of opinion that the order of the learned Subordinate Judge cannot be supported. It is true that under Order XXXIV, rule 5, it is contemplated that all payments made upon a preliminary decree should be paid into Court. There is nothing in the section to justify the view that Order XXIII, rule 3, does not apply to adjustments of accounts made between the date of preliminary decree and the date on which the accounts between the parties are finally settled. The question of what is actually due upon the mortgage on the date of the final taking of accounts is clearly a matter relating to the suit. We, therefore, direct that the case be remanded to the lower Court for an enquiry into the allegations made in the judgment-debtor's petition and to settle the account upon the result of that enquiry. The respondents will pay the costs of this appeal. Hearing fee three gold *mohurs*.

*Case remanded.*

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 64 OF 1915-16 OF KHERI DISTRICT.

July 27, 1916.

*Present*:—Mr. Holms, S. M., and Mr. Lovett, J. M.

*Thakur* GANGA BAKHSH SINGH—PLAINTIFF—APPELLANT

*versus*

HAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Question of law—Summary dismissal—Board's Circular, 8-II, r.* 19.

An allegation that there is no evidence to support a specific finding of fact is a ground of law; and where such a ground is taken in second appeal, the Court is not justified in summarily dismissing the appeal under the Board's Circular 8-II, rule 19.

Appeal from the decree of the Commissioner, Lucknow, dated the 16th August 1915.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Pandit *Suraj Narayan Dikshit*, for the Respondents.

JUDGMENT.

HOLMS, S. M.—(*July* 22, 1916.)—The Commissioner summarily dismissed the appeal without giving notice to the parties, and this he had power to do under rule 19, Board's Circular 8-II. All that he said in his order was that it is clear that no grounds for a second appeal exist. The grounds taken before the Commissioner were four in number. Three of them practically amount to statements that the order of the lower Courts was wrong, but the second ground is to the effect that there is nothing on the record to show that the land in dispute was acquired from the *zemindar* in lieu of previous rights. That is to say, an allegation was made that there is no evidence to support a specific finding of fact. A ground of this kind is treated as a ground of law and should have been decided by the Commissioner in second appeal.

I would, therefore, set aside the order of the Commissioner and direct that he hear the appeal on the merits. Costs to follow the event.

LOVETT, J. M.—I concur.

*Case remanded.*



## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT

December 8, 1916.

*Present*:—The Lord Chancellor (Lord Bukmaster), Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.

SASHI BUSHAN MISRA AND OTHERS—APPELLANTS

*versus*

*Raja* JYOTI PRASHAD SINGH DEO AND OTHERS—RESPONDENTS.

*Grant, construction of, in England and India—Permanent, heritable and transferable tenure—Mineral rights.*

When a grant is made by a *zemindar* of a tenure at a fixed rent, even though the tenure may be permanent, heritable and transferable, minerals cannot be held to have formed part of the grant in the absence of express evidence to that effect. [p. 142, col. 2.]

A Talabi Brahmattar grant does not, by its mere character, create title to minerals. [p. 141, col. 1; p. 142, col. 1.]

The word 'grant' as used in legal transactions in India is not to be understood in its technical English meaning of a conveyance at common law of remainders, reversions and incorporeal hereditaments which did not lie in livery or of which livery could not be given. [p. 140, col. 2.]

Appeal from a judgment and decree of the Calcutta High Court (Coxe and Teunon, JJ.), dated July 11th, 1911, reported as 12 Ind. Cas. 482, reversing those of the Subordinate Judge, Burdwan, dated the 16th May 1906.

FACTS of the case will appear from the judgment and from 12 Ind. Cas. 482; 38 C. 845.

Mr. *A. M. Dunne*, for the Appellants.—The gift is a grant or conveyance of the village. The appellants are tenure-holders paying a small rent and their tenure is permanent, heritable and transferable. It is a grant of the land and hence there is no reversion in the *zemindar* who has only the right to receive the rent. See *Sonet Kooer* v. *Himmut Bahadoor* (1). Brahmattar grant is explained in Wilson's Glossary. See also Bengal Regulation I of 1793, preamble sections 1 and 3, and *Khagendra Narain Chowdhry* v. *Matangini Bebi* (2). The *zemindar* was the owner of the minerals and the grant transferred the ownership to the appellants. The grant carries with it also the right to minerals.

(1) 3 I. A. 92; 1 C. 391; 25 W. R. 239; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.).

(2) 17 C. 814; 17 I. A. 62; 5 Sar. P. C. J. 528; 8 Ind. Dec. (N. S.) 1087.

*Hari Narayan Singh* v. *Sriram Chakravarti* (3) is distinguishable on the ground that there the tenure was not permanent, transferable or heritable. In *Durga Prashad Singh* v. *Brojo Nath Bose* (4) the tenure was a service tenure. The question whether the *zemindar* has any right but to demand and receive rent in the case of these tenures is *res integra*.

Sir *Robert Finlay*, *K. C.*, Messrs. *L. DeGruyther*, *K. C.*, *J. M. Parekh* and *Arfan Ali*, for the Respondents.--The appeal is concluded by the decisions in *Hari Narayan Singh* v. *Sriram Chakravarti* (3) and *Durga Prashad Singh* v. *Brojo Nath Bose* (4). The Privy Council have held in those cases that the right to the minerals still remained in the *zemindar* unless it was shown that the *zemindar* had parted with it, even if the tenure was permanent, heritable and transferable. Lord Macnaghten took part in both appeals. This was followed in *Kunja Behari Seal* v. *Raja Durga Prasad Singh* (5). A permanent tenure is not a conveyance in fee-simple. The question that a permanent tenure-holder has all the rights of the *zemindar* is, therefore, not *res integra*. The relation between the plaintiff and the defendants is one of landlord and tenant. The tenancy may be agricultural or non-agricultural. In any case the right to minerals will not pass to the tenant. See Bengal Tenancy Act, sections 4, 5, 6, 10, 11, 18, 19, 20, 65 and 73 and Transfer of Property Act, section 108.

JUDGMENT.

LORD BUCKMASTER, L. C.--The appellants in this case are the descendants and representatives of certain Brahmins to whom, at a date uncertain, but antecedent to 1790, the then Raja of Pachete made a *mokurari* grant of the village known as *Mouzah* Panchagachia; the question raised in this appeal is whether this grant carried with it the mineral rights in the soil.

In considering the question it is important to avoid giving to words used in connection with legal transactions in India the special and technical meaning that they possess in this country. According to our law, the word "grant" is strictly applicable to the conveyance at common law of remainders, reversions, and incorporeal hereditaments, which do not lie in livery, or of which livery could not be given.

But in connection with the present dispute, the word has no such meaning, and it is important at the outset to bear this in mind.

The grant under which the appellants claim cannot be found, nor is there any copy in existence, nor any record of its literal contents. It is, however, admitted that the grant was a Talabi Brahmattar grant.

Such a grant is defined in Wilson's Glossary as "land granted rent free to Brahmins for their support and that of their descendants, probably as a reward for their sanctity of living or to enable them to devote themselves to religious duties and education."

If after the words "rent free" be added the words "or at a fixed rent," this statement may be accepted as an accurate description of the origin of the grant, but in itself it contains no definition of the characteristics of the tenure. It has, however, been found in the present case that the tenure of the lands in dispute is permanent and heritable, and confers upon the holder for the time being full rights of alienation; but even these findings, though they invest the tenure with attributes of absolute ownership, afford little assistance in determining what it was that the grant passed.

Now, by the Permanent Settlement of 1793, all the mineral rights were confirmed to the *zemindars*, and the first respondent to this appeal represents their interest in the estate. If such rights were already possessed and recognised at the date of the Settlemen , this confirmation would hardly have been needed, and this suggests that up to that date the rights enjoyed and granted in the lands were not considered as including the minerals; if this were so, as the grant in question could have created no rights in the property which the grantor did not possess, no right to the minerals could have been conferred,

(3) 6 Ind. Cas. 785; (1910) M. W. N. 309; 37 I. A. 136; 37 C. 723; 14 C. W. N. 746; 11 C. L. J. 653; 7 A. L. J. 633; 12 Bom. L. R. 495; 8 M. L. T. 51; 20 M. L J. 569 (P. C.).

(4) 15 Ind. Cas. 219; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696; 39 I. A. 133 (P. C.).

(5) 25 Ind. Cas 819; 42 C. 346 at p. 349; 20 C. L. J. 304; 19 C. W. N. 203.

However that may be, there is certainly nothing in the Permanent Settlement to which the appellants can turn in support of their contention. Indeed, apart from the evidence furnished from the Sariskal Jumma, and the facts that have been stated as to the well recognised attributes of a Brahmattar grant, the appellants have been unable to furnish any evidence at all in support of the view that the grant coveyed the minerals; their case really depends upon the assumption that the character of the grant itself is sufficient to establish their claim.

This question has been the subject of much controversy in the Indian Courts, and the appellants can certainly point to some powerful and well-reasoned judgments in support of their view. But in their Loadships' opinion the matter has been set at rest by the decision of the Judicial Committee. In the case of *Hari Narayan Singh* v. *Sriram Chakravarti* (3) a question arose as to the ownership of the minerals underlying a certain village called Petena, which had been granted to an idol of whom the Goswamis were the priests. In that case as in this, the grant was not forthcoming, but it was held in the High Court that the tenure of the Goswamis gave them permanent, heritable and transferable rights and, upon this finding, the High Court decided that the minerals had passed under the original gift. Upon appeal to the Privy Council this judgment was questioned upon two grounds. *First*, that there was no evidence that the tenure carried with it permanent, heritable and transferable rights; and *secondly* that, even if this contention were wrong, in the absence of express evidence that the creation of the tenure was accompanied with the grant of the minerals, the minerals did not pass. The Judicial Committee decided in favour of the appellant's contention, and the material part of the judgment is to be found on page 145* of the report. The two points are there dealt with, and upon the first Lord Collins, in delivering the judgment of the Board, made this statement:—

"On this meagre foundation of fact the two Judges who constituted the High Court, have built up the theory that the Goswamis were tenure-holders having permanent, heritable and transferable rights."

*Page of 37 I. A.—*Ed.*

He then proceeds to deal with the judgment of Mr. Justice Pargiter, who took the view that the creation of such a grant carried with it the mineral rights; and he expresses disagreement with this view of the law, stating that it appeared to ignore the distinction between the mere tenure-holder and the *zemindar;* the judgment concludes by saying that the *zemindar* must be presumed to be the owner of the ground rights in the absence of evidence that he ever parted with them. The Counsel for the appellants has strongly urged that the whole of this judgment depends upon their Lordships' refusing to accept the view that the tenure in that case was permanent, transferable and heritable and that the judgment only applies to an estate lacking those qualities. Their Lordships realise that the judgment, in the absence of the argument, might be open to this construction; but, read in the light of the then appellants' contention, they think that the two passages referred to dealt with the two separate points which were raised by the appellants, and that the latter part of the judgment was really independent of the statement which expressed dissatisfaction with the conclusion drawn as to the character of the tenure. Their Lordships would have felt more uncertainty about this view had it not been for a second judgment in a subsequent case, *Durga Prashad Singh* v. *Brojo Nath Bose* (4).

In that case also the nature of the grant was not identical with that of the grant in the present case. It was the grant to the holders of an office—the office of Digwar, and it was permanent only in the sense that so long as that office continued to be held by members of the same family, the rights created by the grant would be assured to the holders for the time being of the office. In that case the High Court followed the decision of the High Court in the former case, which had not then been reversed, and Lord Macnaghten, in giving the judgment reversing the High Court, referred to that fact in the following terms:—

"The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Sriram Chakravarti* v. *Hari Narain Singh Deo* (6), which was afterwards reversed by this Board, and is reported as *Hari Narayan Singh* v. *Sriram Chakravarti* (3).

(6) 33 C. 54; 10 C. W. N. 425; 3 C. L. J. 59.

There certain persons called Goswanis or Gossains, priests of a Hindu idol to which a certain village had been assiged on a permanent *debuttar* tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this Tribunal that 'it must be presumed that the mineral rights remained in the *zemindar* in the absence of proof that he had parted with them.' "

It is plain from this statement by Lord Macnaghten, who was one of the members of the Board in the former case, that the earlier decision was intended to apply to a permanent *debuttar* tenure. In other words, that the doubt that was thrown in the former case as to the sufficiency of the evidence on which the tenure had been held to be permanent, heritable and transferable, did not affect the main judgment in the case, which was based upon the hypothesis that these attributes of the tenure had been established.

These decisions, therefore, have laid down a principle, which applies to and concludes the present dispute. They established that when a grant is made by a *zemindar* of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

It is admitted in the present instance that the only evidence that can be relied on arises from the characteristics of the tenure and the statement as to the object and purpose for which the grant was made as stated in Wilson's Glossary. For reasons that have already been given, this affords no evidence necessary for this purpose, and their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

In conclusion their Lordships' desire once more to call attention to the tedious protraction of Indian litigation. It can only be a misfortune that a dispute, such as the present, which affects a matter so important as the right of mining—a right of great value for the development and prosperity of any country—should have been in abeyance for a period which, from the commencement of the present dispute until the day of hearing of this appeal, has exceeded twelve years.

*Appeal dismissed.*

Solicitors for the Appellants: Messrs. *Watkins* and *Hunter*.

Solicitors for the Respondents: Mr. *Edward Dalgado*.

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PATNA HIGH COURT.

**SPECIAL BENCH.**

SECOND CIVIL APPEAL NO. 766 OF 1914.

March 29, 1917.

*Present*:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Mullick and Mr. Justice Atkinson.

HARI CHARAN KUAR AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

KAULA RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Specific performance—Agreement to sell by manager—Minor members, contract on behalf and for benefit of.*

No specific performance of an agreement to sell by the manager of a joint Hindu family can be decreed, unless it is shown that it is in the interest of the minor members of the family and is beneficial to them. [p. 145, col. 1.]

Case-law on the subject discussed.

Appeal from a decision of the District Judge, Arrah, dated the 15th December 1913.

Messrs. *Pugh*, *Jayaswal*, *Sailendra Prashad Ghose* and *Ganesh Dutt Singh*, for the Appellant.

Messrs. *P. R. Dass*, *Susil M. Mullick Umacharan Laha* and *Naresh Chandra Sinha*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—The facts of this case as found by the lower Appellate Court are as follows:—

In May 1909 defendants Nos. 1—5, who were at the time the managing members of a joint family consisting of themselves and defendants Nos. 6—13 and 18, agreed to sell to the plaintiffs 13 *bighas* 12 *cottahs* of land in a village called Dumri and 2 *bighas* 5 *cottahs* of land in a village called Chakki for Rs. 3,500, and in pursuance of that agreement executed two deeds of sale on May 28th and 29th, 1909. Defendants Nos. 1—5

were at that time and had been for some years previously in possession of 3 *bighas* 15 *cottahs* of the land in Dumri as mortgagees. On June 20th, 1909, defendants Nos. 1—5 by registered deed sold to defendants Nos. 14 and 15 for Rs. 3,000 9 *bighas* 10 *cottahs* of the land in Dumri including the 3 *bighas* 15 *cottahs* subject to the mortgage. Defendants Nos. 1—5 having refused to register the deeds executed by them, the plaintiffs brought the present suit for specific performance against defendants Nos. 1 – 5 and all the members of their family, many of whom are minors. The plaintiffs alleged that defendants Nos. 14 and 15 had taken their sale-deed with full notice of the previous agreement for sale made in favour of the plaintiffs. The lower Appellate Court dismissed the suit on the ground that defendants Nos. 14 and 15 were *bona fide* purchasers for value without notice of the agreement in favour of the plaintiffs.

The plaintiffs have appealed. On their behalf it is contended that even if defendants Nos. 14 and 15 had not actual notice, they had constructive notice of the agreement in favour of the plaintiffs inasmuch as they (defendants Nos. 14 and 15) were aware that the plaintiffs were in possession of 3 *bighas* 15 *cottahs* of the land and should have made enquiries of them regarding their interest in the land, and if they (defendants Nos. 14 and 15) had made enquiries they would have come to know of the agreement. The defendants contend that a decree should not be made for specific performance, *first*, because some of the members of the vendor's family are minors and, therefore, the contract lacks mutuality, and *secondly*, because it is not for the benefit of the minors that the contract with the plaintiffs should be enforced.

These contentions were not put forward in either of the Courts below but they raise questions of law upon the findings of the lower Appellate Court and we think that they should be considered.

The contention that the contract with the plaintiffs should not be specifically enforced rests on the decisions of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1) and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (2). In the former case it was held that a contract made by an infant is not merely voidable but void. In the latter the manager of the estate of an infant Muhammadan had contracted to buy an estate and it was held that the infant suing by his next friend was not entitled to obtain a decree for specific performance of the contract, inasmuch as the infant was not bound by the contract and, therefore, the contract lacked mutuality. Their Lordships held that it was not within the competence of a manager of a minor's estate or of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. It is sought to apply these to a contract for the sale of property made by the managing members of a joint family consisting of themselves and their minor children. There are cases in which specific performance of such a contract has been decreed against the managing members who made the contract, leaving open the question of the validity of the contract as regards the minor members [see *Kosuri Ramaraju* v. *Ivalury Ramalingam* (3) and *Srinivasa Reddi* v. *Sivarama Reddi* (4)], and there is at least one case in which the contract not being for the benefit of the minors specific performance was decreed against the members who made the contract [see *Ponaka Subba Rani Reddy* v. *Vadamadi Seshachellam Chetty* (5)]. The interest of a member of a joint Hindu family in the family property is not individual property at all [see *Gharib-ullah* v. *Khalak Singh* (6)]. The manager of such a family is not an agent of the other members nor is he a mere manager. He is much more like a trustee for the other members [see *Annamalai Chetty* v. *Murugasa Chetty* (7)]. It is settled law that a father or managing member of a joint Hindu family may under

(1) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar P. C. J. 374 (P. C.).

(2) 13 Ind. Cas. 331; 39 C. 232; 11 M. L. T. 8; 21 M. L. J. 1156; 39 I. A. 1; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. T. 69; 14 Bom. L. R. 5 (P. C.).

(3) 26 M. 74; 12 M. L. J. 400.

(4) 4 Ind. Cas. 506; 32 M. 320.

(5) 5 Ind. Cas. 79; 7 M. L. T. 137; 33 M. 359; 20 M. L. J. 328.

(6) 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.).

(7) 26 M. 544 at p. 553; 7 C. W. N. 754; 30 I. A. 220; 8 Sar. P. C. J. 523; 13 M. L. J. 287; 5 Bom. L. R. 494 (P. C.).

certain circumstances and subject to certain conditions enter into agreements which may be binding on the minor members of the family [*Ganesha Row* v. *Tulja Ram Row* (8)]. I apprehend that the decisions of their Lordships in the cases reported as *Mohori Bibee* v. *Dharmodas Ghose* (1) and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (2), do not apply to contracts made by the managing member of a joint Hindu family for family necessities or for the benefit of the family, *i.e.*, contracts made by the managing members which bind the minor members of the family. Such contracts can be enforced on behalf of the family by the persons who make them, and I find nothing in the decisions of their Lordships which requires us to hold that such contracts cannot be enforced against the family. Contracts made not by minors but by persons who have power to make contracts on behalf of a joint family do not appear to come within those decisions. I am not prepared to dismiss this suit for specific performance on the ground that the contract lacks mutuality having been made by or on behalf of minors who are not competent to contract.

A long series of English cases has established the rule that if a person purchases and takes a conveyance of an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the person in occupation may have in the land, for possession is *prima facie* seisin and the purchaser has, therefore, actual notice of a fact by which the property is affected and he is bound to ascertain the truth; and the rule has been applied in England not only to interests connected with the tenancy of the occupier but to interests which he may have under collateral agreements. Thus in *Daniels* v. *Davison* (9) the tenant in possession of a public house and garden had entered into a contract for the purchase of the property and a subsequent purchaser was held to have constructive notice of the contract, as he was bound to make enquiry from the tenant which would have led him to a knowledge of it. In that case Lord Eldon said: "My opinion, therefore, considering this as depending upon notice, is, that this tenant, being in possession under a lease with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no enquiry as to the nature of his possession." The case of *Daniels* v. *Davison* (9) has been followed in several cases in India [see *Kondiba* v. *Nana* (10) and *Sharfudin* v. *Govind* (11) and the cases cited in those rulings]. Assuming that the rule in *Daniels* v. *Davison* (9) is applicable to Indian cases, I would point out that notice has been defined in more than one Indian Act in terms which do not go so far as the English cases and that both here and in England it has been repeatedly said by Judges that *Daniels* v. *Davison* (9) was an extreme case beyond which the doctrine of notice ought not to be extended, and the case of *Penny* v. *Watts* (12) suggests a doubt whether the mere occupation by a person of property would be notice of an agreement not connected with his occupation, though the case was disposed of on other grounds. There appears to be no case in the books in which the Courts have been asked to apply the doctrine of *Daniels* v. *Davison* (9) to a case like the one before us, in which the person who had the contract to purchase in his pocket was in possession not of the entire property sold to another, but only of a small portion of that property. The plaintiffs and defendants all live in the same village. The plaintiffs for years before the contract now in question was made had been in possession as mortgagees of a few plots of land belonging to the family of defendants Nos. 1—5. The nature and origin of their possession must have been well known to every one in the village and it seems to me that it would be going too far to hold that the possession of the plaintiffs was under the circumstances sufficient to put defendants Nos. 14 and 15 on enquiry. The plaintiffs' possession was admittedly due not to any agreement to buy that

(8) 19 Ind. Cas. 515; 36 M. 295; 40 I. A. 132; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150 (P. C.).

(9) (1809) 16 Ves. (Jun.) 249; 33 E. R. 978; 10 R. R.

(10) 27 B. 408; 5 Bom. L. R. 269.

(11) 27 B. 452; 5 Bom. L. R. 144.

(12) (1849) 1 Mac. & G. 150; 2 De G. & Sm. 501; 12 Jur. 993; 19 L. J. Ch. 212; 1 H. & Tw. 266; 41 E. R. 1220; 84 R. R. 30.

or any other land but to the mortgage held by them. In my opinion it would be a great extension of the doctrine of *Daniels* v. *Davison* (9) to hold that in this case defendants Nos. 14 and 15 had constructive notice of the agreement to sell 9 *bighas* 10 *cottahs* to the plaintiffs.

It is, however, contended that the doctrine of *Daniels* v. *Davison* (9) must be applied at least so far as to fix defendants Nos. 14 and 15 with notice of the agreement with the plaintiffs as regards the 3 *bighas* 15 *cottahs* in their possession. Applied in this way the doctrine will not avail the plaintiffs, for we cannot give a decree for specific performance as regards the 3 *bighas* 15 *cottahs* only. We have no information as to the respective values of the different plots in question, and it would obviously not be in the interest of the minor members of the family of defendants Nos. 1—5 to decree specific performance of the contract with the plaintiffs as regards some of the plots and leave the sale to defendant Nos. 14 and 15 to stand as regards the 3 *bighas* 15 *cottahs*.

Lastly I am of opinion that it is not in the interest of the minor members of the family of defendants Nos. 1—5 that specific performance should be decreed at all. The District Judge has found, and his finding appears to be correct, that the sale to defendants Nos. 14 and 15 is more beneficial to the minor members of the vendors' family than the sale to the plaintiffs would be.

I would, therefore, dismiss this appeal with costs.

MULLICK, J.—I concur.

ATKINSON, J.—I concur in the judgment of this Court delivered by the learned Chief Justice.

IN APPEAL No. 2147 OF 1914.

For the reasons given in our judgment in Second Appeal No. 766 of 1914, this appeal is dismissed with costs.

*Appeals dismissed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 396 OF 1915.

January 19, 1917.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

APPANNA PRASADA PANDA—PLAINTIFF—APPELLANT

*versus*

APPANNA MAHAPATRO AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 44—Joint family—Alienation—Suit by minor member to declare alienation invalid—Limitation.*

Article 44 of Schedule I of the Limitation Act has no application to a suit by a minor member of a joint undivided Hindu family on attainment of majority to declare that an alienation made by his natural guardian is not valid and is not binding upon him.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ganjam at Berhampore, in Appeal Suits Nos. 456 and 467 of 1913, preferred against that of the District Munsif, Sompeta, in Original Suit No. 647 of 1912.

Mr. *P. Nagabhushanam*, for the Appellant.

Mr. *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.—The lower Appellate Court has decided the appeal on the single ground that the suit is barred by Article 44 of Schedule I of the Limitation Act, which runs as follows:—"By a ward who has attained majority, to set aside a transfer of property by his guardian." It has been held by the Privy Council in *Gharib-ullah* v. *Khalak Singh* (1) that there cannot be a guardian of a minor's interest in an undivided Hindu family, for the simple reason that such an interest is not individual property at all. Mr. Narasimham argues that this ruling only applies to the appointment of a guardian by a Court. But the reason applies with equal force to the case of a person claiming guardianship by natural right. Applying this rule we must hold that the sale of the minor plaintiff's property by J. Panda under Exhibit I was not the act of a guardian of property, whatever it purported to be: and following *Kathaperumal Thevan* v. *Ramalinga Thevan* (2),

(1) 25 A 407; 30 I. A. 165; 5 Bom L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.).
(2) 27 Ind. Cas. 695; 17 M. L. T. 138.

that Article 44 has no application to the present suit for a declaration that the sale is not binding. It is not shown that the suit is barred under any other Article. And we must, therefore, set aside the decree of the lower Appellate Court and remand the appeal for disposal on the merits.

Costs will abide and follow the result.

*Appeal allowed; Case sent back.*

V. R. P.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 341 OF 1915.

February 5, 1917.

*Present*:—Pandit Kanhaiya Lal, A. J. C.

SATGUR DAYAL—DEFENDANT No. 1—APPELLANT

*versus*

NAND KUMAR—PLAINTIFF,

GOBIND PRASAD—DEFENDANT No. 2—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 52—Lis pendens—Execution sale pending suit by third party claiming title to property—Auction-purchaser, position of.*

The principle of section 52 of the Transfer of Property Act is applicable as much to involuntary sales in execution proceedings as to sales effected by act of parties during the pendency of a suit relating to the property sold. [p. 148, col. 1.]

Where certain property is sold in execution, pending the result of an appeal which an unsuccessful third party is prosecuting, asserting his title to the property proclaimed for sale, the doctrine of *lis pendens* applies to the execution sale, and the title acquired by the auction-purchaser is subject to the result of the said appeal, although the auction-purchaser is no party to it. [p. 148, col. 2.]

*Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan*, 15 I. A. 12; 10 A. 166; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.); *Shivlal Bhagvan* v. *Shambhuprasad*, 29 B. 435; 7 Bom. L. R. 585; *Nuzhat-ud-Daula Abbas Husain Khan* v. *Dilband Begam*, 21 Ind. Cas. 570; 16 O. C. 225 and *Sohan Lal* v. *Jot Singh*, 20 Ind. Cas. 458; 16 O. C. 148, distinguished.

Second appeal from the decree of the Additional Judge, Fyzabad, dated the 24th June 1915, upholding that of the Additional Munsif, Fyzabad, dated the 10th September 1914.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Basdeo Lal* and Mr. *Muhammad Wasim*, for Respondent No. 2.

### JUDGMENT.

KANHAIYA LAL, A. J. C.—The facts of this case are sufficiently stated in my order of the 1st September 1916, remanding certain issues for decision to the lower Appellate Court.* The finding of that Court on one

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*The order referred to was as follows:—

"The dispute in these appeals arises out of the sales of certain shares in four villages in execution of two different decrees. In execution of a decree held by the Secretary of State for India in Council against Sripat Sahai, the former brought to sale on the 20th November 1909 the right, title and interest of Sripat Sahai in a one-anna share of the villages Gaura and Gopalpur and in an eight-pies share of the villages Mahmudpur and Narainpur, with the reservation of the rights held by Dina Nath and Sankata Prasad, the sons of the judgment-debtor, therein. The purchase was made by Ganga Prasad, the father of the plaintiff-respondent. Subsequently a two-thirds share in the same property was sold in execution of a decree for money, held by Gobind Prasad, against Sripat Sahai which had been declared to be binding on Sankata Prasad and Dina Nath. The latter sale took place on the 20th May 1911. The shares in two of the villages were purchased by Mahesh Prasad and the shares in the other two by Satgur Dayal. Meanwhile a suit was filed by Ganga Prasad, the prior purchaser, against Gobind Prasad, the attaching decree-holder, in which Ganga Prasad sought a declaration that Gobind Prasad had included in his attachment a 2-pies 16-*krants* share in the said villages, which had already been purchased by him in execution of the decree of the Secretary of State for India in Council against Sripat Sahai in 1909. The result of that litigation was that Sripat Sahai was found to be the owner of a 4-pies share by inheritance from one of his collateral relatives name Kanhaiya Lal and of a one-third share of the remainder as a member of a joint Hindu family comprising himself and his two sons, and the sons of Sripat Sahai were declared to be the owners of the remaining two-thirds. In other words, the right of Gobind Prasad to attach and bring to sale the interest of the judgment-debtor was declared to be confined to the latter. The sale took place during the pendency of the above litigation, but the auction-purchasers were not made parties to the same.

"There are two important points, arising for consideration in these appeals. The first is whether Sripat Sahai was the owner of a 4-pies share in each of the 4 villages by inheritance from Kanhaiya Lal to the exclusion of his sons: and the second is whether a *bona fide* transferee for value, such as Mahesh Prasad and Satgur Dayal claim themselves to be, can be bound by the result of the litigation to which they were not made parties. On behalf of the plaintiff-respondent it was denied that Mahesh Prasad and Satgur Dayal were *bona fide* transferees. The finding of the Court of first instance was that they were not *bona fide* transferees, but no opinion was expressed on that point by the lower Appellate Court. That point may also, therefore, have to be considered, in case the

SATGUR DAYAL *v.* NAND KUMAR.

of the issues is that Sankata Prasad and Dina Nath were entitled to a two-thirds share in the property in dispute and that Mahesh Prasad and Satgur Dayal purchased the said two-thirds share in execution of a decree obtained by Gobind Prasad against Sripat Sahai, their father. The decree aforesaid had been declared in a separate suit to be binding on the sons of Sripat Sahai. The one-third share of Sripat Sahai had been previously purchased by Ganga Prasad in execution of a decree, and the lower Appellate Court finds that Mahesh Prasad had notice of that purchase. These findings cannot, however, vary the result of the case, because it is admitted that the purchase of Mahesh Prasad and Satgur Dayal was made during the pendency of the suit instituted by Ganga Prasad, in which he had sought a declaration that Gobind Prasad had no right to bring to sale anything more than the two-thirds share of the sons of Sripat Sahai out of the three-fourths share belonging to the family, his contention being that the remaining one-fourth was the self-acquired property of Sripat Sahai. The suit of Ganga Prasad was dismissed by the Subordinate Judge of Fyzabad on the 21st March 1911. Gobind Prasad thereupon proceeded with the sale of the property attached by him in execution of his decree against Sripat Sahai, and brought a two-thirds share to sale on the 20th May 1911 without excluding the portion which was asserted by Ganga Prasad to have been the self-acquired property of Sripat Sahai. Mahesh Prasad and Satgur Dayal purchased the said property at the above sale. On the 24th May 1911 Ganga Prasad succeeded in his appeal, with the result that only two-thirds of three-fourths was declared to be liable to sale in execution of the decree of Gobind Prasad. The auction-purchasers were not made parties to this appeal and the question for consideration is whether they were bound by the result of that litigation.

In *Sukhdeo Prasad* v. *Jamna* (1), where certain property was sold pending the result of an appeal which a third party was prosecuting, asserting his title to the property proclaimed for sale, it was held that the doctrine of *lis pendens* applied to the execution sale and that the title acquired by the auction-purchaser was subject to the result of the appeal brought by such third person. In *Radhamadhub Holdar* v. *Monohur Mukerji* (2), where certain property was sold in execution of a decree pending a suit brought by another person to enforce his charge against the property, their Lordships of the Privy Council held that if the judgment-debtor had herself remained the owner of the proprietary interest, she would have been clearly excluded by the sale, held in execution of the decree obtained to enforce the charge, from all interest in the property, and if the judgment-debtor could be so excluded it was equally clear that the auction-purchaser who had purchased during the pendency of the suit to enforce the charge would also be bound by the result of that suit. In *Moti Lal* v. *Karrabuldin* (3) a purchase

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determination of the other points renders its decision necessary. None of the Courts below expressed any opinion on the first point above mentioned, and it seems desirable, before the questions of law arising in the case are discussed, that the questions of fact should be definitely determined one way or the other, for a case in which a Court sells something more than the interest of a judgment-debtor may be capable of differentiation from one in which the Court sells what was owned by the judgment-debtor but which was claimed by him for some reason or another to be not saleable.

"The lower Appellate Court is, therefore, directed to determine on the evidence adduced –

"(1) Whether Sripat Sahai was the owner of a 4-pies share in the disputed villages by inheritance from Kanhaiya Lal and was that share his separate property on the date of the auction sale in favour of Ganga Prasad.

"(2) Whether Mahesh Prasad and Satgur Dayal had at the time of their purchases any notice either of the purchase made by Ganga Prasad or of the claim brought by him for a declaration of his title, and if so, whether they can be regarded as *bona fide* transferees for value.

"Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

"1st September 1916. (Sd.) KANHAIYA LAL, 1st Additional Judicial Commissioner."

[Ed.]

(1) 23 A. 60; A. W. N. (1900) 199.

(2) 15 C. 756; 15 I. A. 97; 12 Ind. Jur. 297; 5 Sar. P. C. J. 211; 7 Ind. Dec. (N. S.) 1088 (P. C.).

(3) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.).

similarly made during the pendency of another suit was held subject to the result of that suit.

The principle of section 52 of the Transfer of Property Act is applicable as much to involuntary sales in execution proceedings as to sales effected by the act of parties during the pendency of a suit relating to that property. The learned Counsel for the defendant-appellant relies on the decisions in *Rewa Mahton* v. *Ram Kishen Singh* (4) and *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (5). But in those cases the judgment-debtor was objecting to the sale of the property on certain grounds which did not affect his saleable interest therein, and the view taken by their Lordships of the Privy Council was that a sale effected in execution of a decree was binding on the judgment-debtor, even though the execution may have afterwards been found to have been improper, because the rights of an auction-purchaser cannot be prejudicially affected if the decree in execution of which the sale was ordered was on the date of the sale a good and subsisting decree.

This rule is not, however, applicable where the person affected was not the judgment-debtor himself but was a third party, who was setting up his own right to the property and was proceeding against the decree-holder by a suit to assert that right. *Qua* the judgment-debtor, the Court has jurisdiction to sell the property, because the decree, so long as it subsists, gives it the authority to do so; but as against third parties, the Court has no jurisdiction to sell the property, if it is found that it does not belong to the judgment-debtor. The circumstances in which the case of *Shivlal Bhagvan* v. *Shambhuprasad* (6) was decided were also different. There certain minors, who were parties to the decree of the Court of first instance but were contesting its validity in appeal, were held bound by a sale effected during the pendency of the appeal, because the appeal in which they were contesting the validity of the decree arose out of the very suit in which the sale was held. The sale was accordingly held to be a good sale as against the parties to the decree on the date on which it was effected so as not to affect the rights of a *bona fide* purchaser for value. In *Nuzhat-ud-Daula Abbas Husain Khan* v. *Dilband Begam* (7), the objection similarly related to the saleable character of the property and was raised by the judgment debtor herself. The circumstances of the present case are somewhat similar to those of *Sohan Lal* v. *Jot Singh* (8), where it was held that the rule of *lis pendens* applied to purchasers at execution sales in the same way as other transferees, and it was not open to such auction-purchasers to question decrees passed in a litigation which was pending in regard to the property on the date of their purchase, though they were no parties to the decree.

The appeal is, therefore, dismissed with costs.

*Appeal dismissed.*

(4) 13 I. A. 106; 14 C. 18; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.),

(5) 15 I. A. 12; 10 A. 166; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(6) 29 B. 435; 7 Bom. L. R. 585.

(7) 21 Ind. Cas. 570; 16 O. C. 225.

(8) 20 Ind. Cas. 458; 16 O. C. 148.

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BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 3 OF 1916.

November 9, 1916.

*Present*:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

LAKHAMSEY LADHA AND CO.—PLAINTIFF—APPELLANT

*versus*

LAKMICHAND PADAMSEY—DEFENDANT—RESPONDENTS.

*Contract Act (IX of 1872), ss. 178, 179—Bailment—Pledgor and pledgee, rights of—Pledge by person in possession of goods having limited authority—Principal, knowledge of.*

Section 179 of the Contract Act does not limit the scope of section 178, but saves a pledge to the extent of the pledgor's own interest, notwithstanding the presence of invalidating conditions falling under one of the provisos to section 178. In other words, whenever he has an interest the person in possession of the goods or documents has unconditional authority to charge at least that interest. [p. 149, col. 2.]

Plaintiffs, up-country cotton merchants, used to consign their cotton for sale to *A* and frequently called upon the latter to remit large sums of money,

the security being the cotton in *A*'s hands *A* used to raise this money by pledge of the cotton to *B*. Subsequently *A* became an insolvent, and the accounts between the parties showed a balance of Rs. 50,000 owing to *A* from the plaintiffs and Rs. 83,000 borrowed by *A* from *B* on the security of 757 bales of cotton. In a suit by plaintiffs to recover the cotton from *B*:

*Held*, that the plaintiffs were liable to pay *B* the money advanced by him to *A* on the security of the cotton, inasmuch as the plaintiffs knew the manner in which their cotton was being dealt with by *A* and consequently approved of the pledging and had urged *A* to pledge the cotton, when necessary. [p. 149, col. 2.]

Mr. *Strangman* (with him Mr. *Kanga*), for the Appellant.

Mr. *Desai* (with him Mr. *Setalvad*), for the Respondent.

JUDGMENT.—The plaintiffs are up-country cotton merchants who consign cotton to Bombay for sale. Damji Hirji & Co. were, until the 29th of September 1913, their usual consignees and agents for sale in Bombay.

The plaintiffs, as the correspondence shows, frequently called upon Damji Hirji & Co. to remit money to them in large sums, the security being the plaintiffs' cotton in their hands.

Damji Hirji & Co. used to raise money by pledge of this cotton to the 3rd defendants' firm.

On the 29th of September 1913, the 3rd defendants or persons claiming under them held 757 bales of the plaintiffs' cotton against which advances had been made to Damji Hirji & Co.

The accounts between the plaintiffs and Damji Hirji & Co. at that time showed a balance of Rs. 50,000 owing to Damji Hirji & Co., but on the other hand Damji Hirji & Co. had to account to the plaintiffs for the 757 bales.

The 3rd defendants' advance against these bales amounted to Rs. 83,000 or thereabouts.

The contest in this suit is for the amount by which the 3rd defendants' advances exceed the sum due in account by the plaintiffs to Damji Hirji & Co. The learned Judge in the trial Court held that the plaintiffs' representatives knew that the firm of Damji Hirji & Co. were raising money on their goods by pledging them to the defendants who in turn pledged them with the Allahabad Bank, and that the case fell clearly within section 178 of the Indian Contract Act as a valid pledging of goods in the possession of a mercantile agent.

The argument for the appellants is this: section 179 takes the case of a pledgor with an interest in the subject of the pledge out of the operation of section 178 and limits the authority to pledge to the extent of the interest in the goods. Damji Hirji & Co. had a lien on the cotton consigned to them to the exent of Rs. 50,000 or thereabouts in which the accounts showed the plaintiffs to be indebted to them. Therefore, they had no authority to charge the cotton beyond Rs. 50,000. The plaintiffs' Counsel has with this premiss attempted to show that the evidence only shows a recognition by the plaintiffs of Damji Hirji and Company's authority to pledge the cotton to recoup themselves the advances, *ex hypothesi* Rs. 50,000, already made to the plaintiffs.

In my opinion the proposition of law upon which the argument is based cannot be maintained. Section 179 does not limit the scope of section 178 but saves a pledge to the exent of the pledgor's own interest, notwithstanding the presence of invalidating conditions falling under one of the provisos to section 178. In other words, whenever he has an interest the person in possession of the goods or documents has unconditional authority to charge at least that interest.

Upon the evidence the learned Judge was right. It justifies the finding that the plaintiffs' representatives knew the manner in which their cotton was being dealt with by Damji Hirji & Co., and made no objection and that consequently they approved of the pledging. The correspondence further justifies the conclusion that the plaintiffs urged Damji Hirji & Co. to pledge their cotton, when necessary.

In this state of the evidence it is hopeless for the plaintiffs' Counsel to contend that the circumstances raised any presumption that the pledgor was acting improperly, even though his account shows that he knew the plaintiffs to be the owners of the cotton. It is unnecessary in this view of the case to consider the evidence as to the alleged interview between Meghji

the plaintiffs' and Dulabdas the 3rd defendants' representative.

The appeal must be dismissed with costs.

*Appeal dismissed.*

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PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 349 OF 1913.

March 6, 1917.

*Present*:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

SUNDAR PRASAD SINGH—DEFENDANT—APPELLANT

*versus*

*Musammat* RAMBATI KUER—PLAINTIFF—RESPONDENT.

*Hindu Law—Widow, compromise of suit by, whether binding on reversioners—Adoption, suit to set aside, by reversioners in lifetime of widow, whether maintainable.*

A Hindu widow has power to compromise a suit so as to bind all the reversioners, provided the compromise is for the benefit of the whole family. [p. 151, col. 1.]

Where out of collusion or connivance a widow fails to have an adoption set aside, the next reversioners have a right to have it set aside or declared invalid during her lifetime. [p. 155, col. 1.]

Appeal from a decision of the Subordinate Judge, Durbhanga.

Messrs. *P. R. Dass*, *Lachhmi Narain Singh* and *Shivanandan Rai*, for the Appellant.

Mr. *Ganesh Dut Singh*, for the Respondent.

JUDGMENT.

ROE, J.—One Singhesar Prasad Singh died in *Jeth* 1314, leaving him surviving his two daughters the plaintiffs in this case and a nephew Sundar Prasad Singh the principal defendant.

Upon the death of Singhesar Prasad his widow applied for the registration of her name in Register D. The application for registration was resisted by Sundar Prasad Singh upon the ground that he had been adopted by Singhesar Prasad during his lifetime as his son and had been in possession of the property since the death of Singhesar Prasad Singh. The objection was disallowed and the name of *Musammat* Makund Koer was registered. Sundar Prasad Singh thereupon instituted a suit in the Civil Court for a declaration that he was the adopted son of Singhesar Prasad and for possession of the estate of Singhesar Prasad as the adopted son. The case came to a hearing. *Musammat* Makund Kuer made default in the production of witnesses and asked for an adjournment of the case. On the adjournment being refused the Pleader left the Court. The case was then decided against her upon formal evidence of the adoption. The case went in appeal to the High Court, and it was there ordered that inasmuch as the learned Subordinate Judge had failed to take sufficient evidence to prove the adoption before the granting of the *ex parte* decree the case must be remanded to him for a re-hearing, and it was further ordered that at the re-hearing the defendant should be permitted to adduce such evidence as she pleased and to defend the suit generally. On the case returning to the Civil Court for trial a petition of compromise was filed on behalf of Makund Kuer, whereby it was agreed that the adoption should be admitted and that Makund Koer should hold a life-estate in one half of the property, that this half of the property should descend to her daughters upon her death, and that the remaining half should go to Sundar Prasad Singh. In compliance with the decree made upon this petition of compromise Sundar Prasad entered into possession of the half share of the estate. In the meantime the elder girl Rambati Kuer had been married. Her father-in-law Harkhit Singh doubted the binding character of the compromise and suspected the genuine character of the alleged adoption. On his advice a suit was instituted by Rambati Kuer for herself and as next friend of her minor sister for declarations, firstly, that the compromise entered into by Makund Koer is not binding upon the daughters, secondly, that Sundar Prasad was never adopted by Singhesar Prasad Singh.

Upon the pleadings seven issues were framed. They may be briefly summarised as follows:—

Firstly. Can the plaintiffs re-open the question of the adoption in the face of the compromise?

Secondly. If the question can be re-opened at all, can the plaintiffs whose right to succeed was at the time of the death of Singhesar Prasad postponed to the death

of a prior reversioner, maintain a suit of this character, and

Thirdly. If they are entitled to maintain a suit for a declaration that the adoption was never made, are they entitled to that declaration upon the merits of the case?

The power of a widow to compromise a suit for the benefit of the whole family has never been doubted. The latest case upon the subject is that reported as *Khunni Lal* v. *Gobind Krishna Narain* (1). In the arguments of Mr. Cowell and Mr. DeGruyther will be found a full statement of the case-law upon subject. If it were necessary to lay down any broad proposition to be evolved from these cases, I would say that the position must always be regarded from the point of view whether the widow in making the arrangement was in good faith considering the interests of all the members of the family. If she was honestly doing her best for the family, the compromise entered into by her should be accepted as binding. If she was merely considering her own peace for the remainder of her life, the compromise should not be held binding on those whose interests have not been considered.

The first point to which, therefore, I propose to devote my attention is the question whether it would appear from the papers upon the record that the widow was honestly doing her best for the family as a whole. And in considering this question, inasmuch as a *pardanashin* widow is not generally possessed of sound wisdom, we should consider carefully to what extent she had access to capable legal advice and whether that legal advice was given her in good faith for the benefit of the estate.

I entirely agree with Mr. Das that the point to be considered in connection with this issue is not whether in fact there was an adoption. The sole question is whether Sundar Prasad was likely to be able to prove that there was an adoption. If there really had been no adoption, nevertheless if there was at the time a conspiracy among the whole of the *gotias* backed by the neighbouring *mahants* and the family priest, however great may have been falsity of the case, the danger to the estate was not lessened by that falsity.

We have, therefore, three points to consider *firstly*, whether there was a menace to the widows's estate; *secondly*, what was the extent of that menace, and *thirdly*, was she really acting for the benefit of her daughters in avoiding that menace?

Upon the first point we must go back to the evidence of the defendant Sundar Prasad given as objector in the registration case. He gives in this evidence a list of seven names, six of whom are *gotias* and one the family priest, as persons who were present at the time of the adoption. We may take it then that these persons were all on his side. It is to be noted that the name of the *mahant* who now comes forward as a witness is not given among those described originally as having been present at the adoption. It is also to be noted that, if the judgment of the learned Deputy Collector contains an exhaustive review of the evidence, two only of the *gotias* appeared in the witness-box to give evidence. It is further to be noted that those gentlemen (however many they may have been) who appeared in the witness-box to give evidence on behalf of Sundar Prasad, were characterised by the learned Deputy Collector as perjurers, and the plaintiff's case as a whole was characterised in the following language: —

"I cannot conclude my judgment without recording my strong disapproval of the objector's conduct in relation to his case. He has perjured himself shamelessly and has set up others to give false evidence on his behalf."

Now I do not propose to consider these quotations from the judgment as in any degree *res judicata*, or anything indicating what was the real position in regard to the adoption. Whatever the learned Deputy Collector chose to say about those witnesses, it would be still open before us for Sundar Prasad to say that the Deputy Collector was entirely mistaken; that the case was a case brought in absolutely good faith and that the adoption had in fact taken place. But the parties, when considering the expediency of a compromise, would naturally consider the impression which the evidence adduced by Sundar Prasad had upon the Court before

(1) 10 Ind Cas. 477; 33 A. 356; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 55 ; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.).

which it was produced. Had the lady been properly advised she would have been informed that whatever may be the future danger before the learned Subordinate Judge, the evidence given in connection with the adoption had been stigmatised, by the only officer who had yet heard it, as shamelessly false.

We come next to the position in the High Court. Nothing there was said upon the merits of the case. All that had been said was that the evidence on the record in the *ex parte* proceedings was not sufficient to prove the case. That for the time being was without doubt a victory for Makund Kuer. It seems to me improbable that after these victories in the Revenue Court and in the High Court she would have been advised by her legal advisers to make a compromise, unless there was something more to fear than so far had been made visible.

Coming next to the actual advice she received, we find it admitted that she was throughout these proceedings and up to the date of the remand by the High Court advised by four of the leadings Pleaders of the Bar. The compromise was drafted by a *mukhtear*. That *mukhtear* had in many previous revenue cases acted on behalf of Sundar Prasad. He did not take the petition of compromise to any of the Pleaders who had been employed on the lady's behalf but chose as the hand by which the compromise should be laid before the Court Babu Bindeshwari Prasad, a young gentleman of two or three years' practice at the Bar. But it may be said that if the lady herself had sufficient intelligence to estimate the danger to the estate her acceptance of the compromise should bind the estate. Here we have to go into the question as to what was the mental capacity of the lady. The plaintiff now strenuously contends that she is full of mental vigour and quite capable of managing her own affairs. Throughout the *dakhil kharij* case the whole basis of the desire in the mind of Singhesar Prasad to adopt Sundar Prasad was said to be that the lady was practically insane. The *mukhtear*, in addition to being a *mukhtear* generally employed by Sundar Prasad, also appears to have got into serious trouble with a factory, by whom he was employed. He had been threatened with criminal proceedings for criminal misappropriation and the sum which he was accused of taking he refunded on the return from Europe of the Manager. In a case in which he offered himself as security either under section 107 or 109 (the section is not mentioned) for Rs. 200 the Police reported that he was not worth that sum. The position, as I see it, is that the compromise was entered into by a *pardanashin* widow who according to the case of both sides was half-witted; that the compromise was drafted by a *mukhtear* with a tarnished reputation who was a tool of her adversary; that this *mukhtear* deliberately kept the widow away from any legal advice which might have been of benefit to her; and that no responsible lawyer would have advised her that the compromise was a sound compromise. I cannot conceive that a compromise entered into in these circumstances should be accepted as binding upon two children who were not represented. I am of opinion that so far as the two children are concerned, the compromise should be ignored. The children should be allowed now to re-open the question of the adoption in a suit of their own.

The next point for consideration is whether seeing that the adoption alleged is an adoption by Singhesar Prasad and seeing that that adoption bars for the present only the claim of the first reversioner the widow, the second reversioners the daughters can contest the adoption during the widow's lifetime. On consideration of the attitude of the Courts of Bombay and Madras towards suits brought to deny an adoption as exemplified in *Barot Naran* v. *Barot Jesang* (2), *Ratnamasari* v. *Akilandammal* (3) and in particular in regard to the attitude of Moore, J., in the latter case, I feel that parties likely to be injured by the alleged adoption should be allowed to take the earliest opportunity of denying it. Moreover, it is to be noted that the ceremony of adoption is one of which no written record is made. The evidence of it is oral evidence, and will be lost if its production is too long delayed. It may be that this insane woman may live another 30 or 40 years. If the inheritance is not to be opened for 40 years, it would be then absolutely impossible to prove or disprove

(2) 25 B. 56; 2 Bom. L. R. 495.
(3) 26 M. 291; 13 M. L. J. 27.

an adoption. That this view is the view taken in the English Courts is apparent from the Court's attitude in the *Slingsby* case a suit for a declaration that a son had been born to the present owner of the Slingsby Estates. If such a suit is maintaintable I can see no bar to a suit for a declaration that a son has not been born, or for a declaration that no son has been adopted. The plaintiffs should not be debarred from bringing that suit by the fact that their mother is still alive. That lady has placed herself, either through her own stupidity or through the fraud of Sundar Prasad, in a position from which she would find it difficult to maintain a suit of her own. I hold that it is open to the plaintiffs to go into the question whether there was or was not an actual adoption of Sundar Prasad by Singhesar Prasad.

On this question the learned Subordinate Judge heard the evidence and decided in very forcible language that there was nothing whatever in the case of Sundar Prasad. His judgment is perhaps to some extent vitiated by the extremely minute criticisms on small discrepancies in the evidence. but in view of certain broad facts I am of opinion that his opinion of the value of the evidence given should be accepted. One of the most important things to consider is the motive which might have actuated Singhesar Prasad to adopt at all.

Before the Land Registration Court and before the lower Court Sundar Prasad's case was that Singhesar Prasad was 55 years of age at the time of the adoption and his wife 35 and that her eldest child was born when she was 28. But from the evidence given in the present case, it appears clear that Singhesar Prasad was in the prime of life at the time of his death. There was no reason to fear that his wife would not continue to bear children. In these circumstances the adoption itself seems to be an improbability. Next we have to consider what happened at the moment of Singhesar's death. If Sundar Prasad was indeed the adopted son, adopted with the consent of Singhesar's wife, there could be no reason why he should not forthwith assert that title. Yet when in order to defray the expenses of the *sradh* of Singhesar Prasad he needed money, Sundar Prasad executed a hand note in which he described himself not as the adopted son of Singhesar Prasad but as his nephew. It does not appear that he took possession of the property, but the evidence upon that point is hopelessly meagre. The only witness called on Sundar Prasad's behalf is Pariag Choudhury, who says that he paid rent to Sundar Prasad from the date of the adoption but is unable to produce any receipts to show that he did so. It seems to me clear that the adoption was not set up until after the lady had applied for registration and if indeed there had been an adoption recognised by all the members of the family, I think we should have found that the first in the field to claim registration would have been the adopted son and not the widow.

Upon all these considerations the learned Subordinate Judge was clearly right in regarding the evidence in support of the adoption with some suspicion. Upon examining that evidence we find that in the *dakhil kharij* case Sundar Prasad gave the names of seven persons as having been present at the adoption. The only one of these persons now called is Bhatu Misser. Ambica Pershad, *Mahant* Ganesh Das and the *gotia* Nemoo Narayan Singh, who claim now to have been witnesses to the adoption, were not mentioned as witnesses in the registration case. The three witnesses who were called in the registration case and also in the present case are the plaintiff himself, his priest Bhatu Misser and his *p twari* Ramdhani Lal. This Ramdhani borrowed money on Sundar Prasad's behalf at the time of the *sradh* and described him as Singhesar's nephew. In the midst of the litigation with the widow this Ramdhani wrote out another hand-note upon which Sundar Prasad, now described as the adopted son, pretended to borrow money for the marriage ceremony of the plaintiff Rambati Kuer. This document was obviously created for use as evidence in Sundar Prasad's favour. It was Ramdhani also who wrote up accounts of the property. These accounts appear to me to be fabricated evidence of possession from the year 1314. The evidence of all the witnesses is upon one

point absolutely inconsistent with the story told in the former case. In the former case. it was alleged that the lady Makund Kuer was not present at any stage of the adoption. The explanation given of her absence was that she was too feeble in intellect to attend the ceremony. In the present case it is alleged that she is perfectly sane and that she was present at the adoption and that the defendant after being adopted made *pranam* to her. Witnesses capable of changing the story in this manner were also capable of inventing the story in its entirety. I agree with the learned Subordinate Judge that the evidence on the record not only does not show that there was ever any adoption but also leads to the certain conclusion that there was none. The plaintiffs are, therefore, entitled to the decree made by the learned Subordinate Judge, namely, that it be declared that the compromise entered into by Makund Koer is not binding upon them and that it be declared that the allegations made by Sundar Prasad Singh that he is the adopted son of Singhesar Prasad Singh are false allegations. This decision will not affect the position of the co-defendants Makund Kuer and Sundar Prasad. There has been no contest as between them upon this question. Makund Kuer has not herself contested the compromise into which she entered and subject to any other proceedings that may be brought, she will remain in possession of the half share of the estate during her lifetime and Sundar Prasad Singh will remain in possession of the other half share until her death.

The appellants will pay the costs of this appeal.

JWALA PRASAD, J.—This is an appeal by defendant No. 1 Sundar Singh. He is a distant nephew of one Singhesar Prasad Singh. The plaintiffs are daughters of Singhesar Prasad Singh, and defendant No. 2 is his widow. Singhesar died in *Jeth* 1314. Upon his death a dispute arose between defendant No. 2 his widow and defendant No. 1 as to the succession to the property left by Singhesar.

The appellant asserted that he was adopted by Singhesar as his son about a year before his death. His claim was refused by the Land Registration Deputy Collector and the defendant No. 1 was registered in the Collectorate in respect of the property left by her husband Singhesar. The appellant thereupon brought a suit in the Civil Court against defendant No. 1 for declaration that he was the adopted son of Singhesar and for recovery of possession. That suit was finally settled between defendant No. 1 and defendant No. 2. A compromise petition was filed by the widow which was assented to by the appellant. By this compromise the widow admitted that the appellant was the adopted son of Singhesar and gave half the property left by Singhesar to him and retained to herself the other half which after her death would pass to her daughters the plaintiffs. On November 30th, 1910, the suit was decreed in terms of the aforesaid compromise petition.

The plaintiffs as reversioners of the estate of Singhesar have brought this action for a declaration that the appellant is not the adopted son of Singhesar Singh and that the compromise entered into by her is fraudulent, collusive and without any right, and that it is not operative and binding upon the plaintiffs after the death of defendant No. 2. The Subordinate Judge, who tried the suit, has decreed the suit and has awarded to the plaintiffs the above declarations sought by them. It is contended in appeal before us that the plaintiffs as remote reversioners have no tangible right in the estate during the lifetime of the widow and hence are not entitled under section 42 of the Specific Relief Act, so long as the widow is alive, to a declaration that the adoption did not take place.

The adoption is alleged to have been made by the husband of the widow and in case it were true, the widow will lose her right to retain possession of the estate as heir to her husband. She has *prima facie* the best right to contest the adoption in her own interests as well as those of the reversioners. But the plaintiffs have been able to show that she in collusion with the appellant entered into a fraudulent compromise admitting his adoption and so failed in her duty to protect the interests of the reversioners. The plaintiffs, therefore, are entitled to seek in Court the protection of their reversionary interest

which is so seriously menaced by the false adoption set up by the appellant and acquiesced in and acknowledged by the widow. It is settled law that in case of collusion and connivance by the widow as well as her failure to have an adoption set aside, the next reversioners have a right to have it set aside or declared invalid during the lifetime of the widow: *Gurulingaswami* v. *Ramlakshmamma* (4), *Govinda Pillai* v. *Thayammal* (5), *Ramabai* v. *Rangrav* (6), *Abinash Chandra Mazumdar* v. *Harinath Shaha* (7) and *Jhula* v. *Kanta Prasad* (8). Besides, if the plaintiffs are compelled to defer their action to have the adoption set aside till the death of the widow which might be definitely prolonged, the lapse of the time might obliterate the evidence available to prove that the adoption did not take place. This difficulty is recognised by Article 118, Schedule I of the Limitation Act which requires that a suit to set aside an adoption should be brought within six years from the date of the knowledge of the adoption, although the right to the possession of the property has not accrued.

The plaintiffs, therefore, in the circumstances are entitled to have a declaration during the lifetime of the widow that the adoption set up by the appellant did not take place and that he is not the adopted son of Singhesar, the father of the plaintiffs. Upon evidence the learned Subordinate Judge has held that Singhesar did not adopt the appellant. The near *gotias* of Singhesar named in the appellant's deposition in the Land Registration case to be present at the adoption have not been examined in this case. The account book showing the expenses of the adoption has not been filed and there is no deed of adoption executed by Singhesar during his lifetime. It is remarkable that in a hand-note executed after the death of Singhesar the appellant described him as his uncle, and not as his father. It is highly improbable that Singhesar would adopt a son when he and his wife were comparatively young. There is nothing to show that no son would have been born to him. He had already two daughters by his wife. I have not the least doubt that the Subordinate Judge was perfectly right in finding as a fact that the adoption did not take place.

It is next contended by the appellant that the claim set up by the appellant soon after the death of Singhesar and the litigation launched by him in the Civil Court to have himself declared as an adopted son of Singhesar was in itself a serious danger to the estate; that if the appellant had succeeded in that suit the estate would have been lost both to the widow and to the plaintiffs' reversioners; that the widow as the holder of the entire estate, though having only a life-interest, was entitled to enter into a compromise by way of a settlement of the dispute as to the title to the estate; and that the settlement by her was made in the interest of the estate itself and is binding upon the reversioners. I do not accept these contentions as sound in the circumstances of the case.

It must be shown that the arrangement embodied in the compromise petition was a *bona fide* settlement of dispute in the interest of the estate. If the settlement was not *bona fide*, the plaintiffs, not being parties to the litigation and the compromise, would not be bound by it. This leads to a consideration of whether the adoption was likely to be established and to what extent it caused a menace to the estate. The claim based upon the adoption set up by the appellant was refused by the Land Registration Deputy Collector, so that at the time of the litigation in the Civil Court in the course of which the compromise was effected, the adoption had been rejected by a public officer, and no tangible material has been placed before us to show that there was any possibility of the claim being successful in the Civil Court. The mere laying of the claim would not justify a prudent widow to accept adoption and thus to prejudice the interest of the remote reversioners. The widow seems to have been duped and deceived into recognising the adoption and compromising the suit. The

(4) 18 M. 53; 4 M. L. J. 237; 6 Ind. Dec. (N. S.) 387.
(5) 28 M. 57; 14 M. L. J. 209.
(6) 19 B. 614; 10 Ind. Dec. (N. S.) 410.
(7) 32 C. 62; 9 C. W. N. 25.
(8) 9 A. 441; A. W. N. (1887) 91; 5 Ind. Dec. (N. S.) 730.

widow was a *pardanashin* lady. She was admittedly suffering occasionally from insanity and was actually insane at the time the adoption is said to have taken place. She had no advice in the matter of the compromise from the lawyers who were acting on her behalf in the conduct of the suit. The compromise petition was drafted by a *mukhtear* of the appellant himself and was filed by a Junior Pleader who was engaged the very day the petition was filed in Court. There is evidence that this *mukhtear* bore questionable reputation and was accused of misappropriation of money which he had to deposit.

It appears that the appellant took advantage of the weak intellect and the occasional insanity of the *musummat*, and got this petition of compromise filed through an agent employed by himself. In the circumstances there is little room for doubt that the compromise was fraudulent and is not a voluntary act of the widow. The widow may have been actuated to enter into the compromise by a motive to secure to herself a personal advantage of enjoying half the property peacefully and free from the troubles of litigation. Such a compromise cannot be said to be a *bona fide* settlement of dispute in the interest of the estate and cannot bind the reversioners.

For the above reasons I entirely agree that the plaintiffs are entitled to both the declarations sought by them, *viz*, that the appellant was not the adopted son of Singhesar and that the compromise entered into by the widow is fraudulent and not binding upon them.

The appeal shonld be dismissed with costs.

*Appeal dismissed.*

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 147 OF 1915.

March 7, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

CHANDAN LAL—APPLICANT

*versus*

KHEMRAJ AND OTHERS—OPPOSITE PARTY.

*Provincial Insolvency Act (III of 1907), s. 27—Composition—Debt, proof of—Schedule of creditors, settling of—Creditors, right of vote of.*

In insolvency cases the proof of debts means that the creditor shall have proved his debt in some of the ways prescribed by the Provincial Insolvency Act and that his name shall have been put by the Court on the schedule of creditors. [p. 157, col. 1.]

In insolvency matters the schedule of creditors should be settled at as early a date as possible and where an application under section 27 of the Provincial Insolvency Act is made before a proposal for composition is finally accepted, no creditor is entitled to vote whose debt has not been proved and whose name has not been admitted on to the schedule by the Judge. [p. 157, col. 1.]

Civil revision against the order of the District Judge, Agra, dated the 27th March 1915.

Mr. *J. Nehru*, for the Applicant.

The Hon'ble Dr. *Sundar Lal*, Messrs. *Lalit Mohan Banerji*, *Mangal Prasad Bhargava* and *Baleshwari Prasad*, for the Opposite Party.

JUDGMENT.—This application arises out of an insolvency matter. Chandan Lal is the debtor. A petition for a declaration of insolvency was presented by one of his creditors. The debtor appears to have submitted a proposal for composition under section 27 of the Provincial Insolvency Act. This proposal was in the first instance accepted by the Judge of the Small Cause Court before whom the insolvency matter was pending. On an appeal, however, the matter was remanded with certain directions. As the result the Small Cause Court Judge refused to accept the composition. On appeal to the District Judge the order of the Small Cause Court was affirmed. The insolvent comes to this Court in an application by way of revision with various grounds of objection. The first ground was that the District Judge had erred in holding that certain debts, which were paid up subsequent to the application, should not be taken into account when considering the proposal for composition. *Secondly* because the debts had been legally proved

and the petitioner was not bound to prove them in any particular way; *thirdly*, because under the circumstances the composition proposed by the applicant should have been accepted, and *lastly*, because the order of the District Judge was not in accordance with law.

We may point out that section 27, clause (2), expressly provides that the proposal for composition to be accepted must be accepted by a majority in number and three-fourths in value of all the creditors *whose debts are proved* and who are present in person or by a Pleader. We think that the proof of debts means that the creditor shall have proved his debt in some of the ways prescribed by the Act and that his name shall have been put by the Court on the schedule of creditors. In the present case some of the creditors had given no proof whatever of their debts—others had filed affidavits of their debts, but we do not know whether the Court even considered whether or not they were creditors and certainly they were not put on the schedule of creditors. Under these circumstances we do not see our way to interfere with the order of the Court below. We think, however, that all that has happened up to the present should not prevent the debtor from submitting a further proposal for composition, and we think that those creditors whom the Court finds to have been really creditors should be admitted on to the schedule upon proof of their debts (with a note, of course, to the effect that they had received part payment if such be the fact) and we think that these creditors might reasonably be included in the majority required by the section. But we think that no creditor should be entitled to vote whose debts have not been "proved as stated" above, that is to say, they must have proved their debts and their names admitted on to the schedule by the Judge. We think that in all these insolvency matters the schedule of creditors should be settled at as early a date as possible and before a proposal for composition is finally accepted. It is only by this means that the interests of all parties can be properly considered. We are asked to put some stay on the sale of the debtor's property or the distribution of the money that may have been realised by such sale. We do not think that we ought to do this. Such an application ought to be made to the Judge before whom the insolvency matter is pending. No doubt if an application is made to him and he comes to the conclusion that a *bona fide* proposal for composition is about to be made by the judgment-debtor which is likely to be accepted by a majority of the creditors, such consideration will influence him in granting the application. We dismiss the application with costs, including in this Court fees on the higher scale.

*Application dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1528 OF 1915.

April 3, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Smither.

BASIRUDDI SHEIKH—PLAINTIFF—APPELLANT

*versus*

MOBARAK MUNSHI—DEFENDANT—RESPONDENT.

*Ejectment—Co-sharer in possession of whole property dispossessed by trespasser—Adverse possession against co-sharer, effect of*—Jus tertii, *plea of.*

One of two brothers, who had an undivided 8-annas share in a holding, assuming to himself the sole ownership of the holding leased it to the plaintiff intending to exclude his co-sharer, who had disappeared and was considered as dead or having abandoned the property. The plaintiff, having been ousted by the defendant (a trespasser), brought a suit for his ejectment:

*Held*, that as the title of the plaintiff's lessor had become adverse to his co-sharer, the plaintiff obtained title to the whole by adverse possession and that, therefore, he was entitled to recover the whole property from the defendant whose plea of *jus tertii* could not be of any avail. [p. 159, col. 1.]

*Quære.*—Whether an undivided co-sharer who is in exclusive possession of the whole property is entitled to recover the whole from a trespasser who dispossessed him, or is liable to be put in joint possession with the trespasser.

BASIRUDDI SHEIKH *v.* MOBARAK MUNSHI.

Appeal against the decree of the Additional Subordinate Judge, Zilla Khulna, dated the 24th March 1915, modifying that of the Munsif, 2nd Court at that place, dated the 30th June 1914.

FACTS of the case appear from the judgment.

Babu *Jadunath Kanjilal*, (with him Bubu *Karunamoy Ghose*), for the Appellant.—Abdul is an 8-annas co-sharer. He was in exclusive possession. Gafur's whereabouts are not known. Defendant here comes as a trespasser so he cannot claim to be in joint possession with the plaintiff. Refers to Salmond's 'Jurisprudence' and *Shama Charan Roy* v. *Surja Kanta* (1). Plaintiff is entitled to possession against all except the actual owners. The plaintiff-appellant has proved his antecedent possession. Refers to *Manik Borai* v. *Bani Charan Mandal* (2). If two brothers are tenants of the same property, and one brother goes away, the remaining brother has to pay the whole rent. The landlord cannot claim *khas* possession if one tenant is there Abdul's possession was not illegal. The appellant is the holder of a *bona fide* lease, and he is entitled to be maintained in possession in each and every portion of the land. Abdul acted as an implied trustee of Gafur. In *Shama Charan Roy* v. *Surja Kanta* (1), the plaintiff was not in actual possession. A trespasser cannot plead *jus tertii*.

Babu *Furna Chandra Roy*, for the Respondent.—The defendant is not a trespasser. If the plaintiff had sued for confirmation of his possession, it would have been otherwise. The plaintiff's remedy is a suit for partition with the defendant. The plaintiff cannot succeed in a suit for ejectment against the defendant as regards the 8 annas. It has not been found that the plaintiff is the true owner, in which case the defendant could not be maintained in his possession.

Babu *Jadunath Kanjilal*, in reply.—There is a difference between right of possession and right to possession. The plaintiff has a right to possession of 16 annas as against a trespasser. If I am in possession of 16 annas, I have a right to be maintained in possession against the whole world except the real owner. As a lessee I have a good title.

[FLETCHER, J.—You cannot suggest that it is a suit for confirmation of possession when at the time of the institution of the suit, the plaintiff was out of possession.]

No, My Lord. The co-owner here is to be regarded as the full owner.

(1) 6 Ind. Cas. 806; 15 C. W. N. 163.
(2) 10 Ind. Cas. 469; 13 C. L. J. 649.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Khulna, modifying the decision of the Munsif of the same place. The suit was brought by the plaintiff to recover possession of certain property of which he had a lease. The first Court decreed the suit. The second Court modified the decree, giving the plaintiff possession of one-half. The plaintiff's case was that one Abdul was the original owner of the property who sold it to Meajan, who leased it out to the plaintiff as owner of the property in 1899. The plaintiff was in exclusive possession of the property until ousted by the defendant. The defendant alleged that Abdul had a brother named Gafur; and Gafur and Abdul granted a lease to the defendant's mother Pati Bewa. The Court held that the existence of Gafur and his interest in the property was not proved. The first Court held that the alleged lease to the defendant's mother had not been proved. The Court of first instance found that the plaintiff was in exclusive possession. The lower Appellate Court found that Gafur had an 8 annas share and that Gafur had obtained his interest in the holding. On that the plaintiff obtained possession of 8-annas share along with the defendant. The present appeal is preferred against that decision. First of all, it is quite clear that the plaintiff has been found to be an 8-annas co-sharer of an undivided share in the property and he is entitled to each and every part of it, and the defendant who is found to be a mere trespasser is obviously not entitled to be in joint possession along with the plaintiff in the 8-annas share. It might be that the suit being a suit for ejectment, the defendant's possession cannot be disturbed. It is quite clear that the plaintiff was put in possession and his possession will be the possession of Gafur or his heir, unless some act is done to exclude Gafur. The finding that has been made as

to the possession of the plaintiff's lessor Abdul is not in very clear terms in the judgment of the lower Appellate Court. But it is quite clear that what the Judge means to find is that Abdul had been in exclusive possession from the time that Gafur went away and that Gafur had left the village for many years and had not been heard of. It is argued on that basis that the possession of Abdul would not be adverse to Gafur, unless there is some act to exclude Gafur. The act seems to be inconsistent with anything else except that the lessor of the plaintiff did mean to exclude his co-sharer and brother Gafur, who disappeared. There cannot be any doubt as regards the fact that Gafur was considered as dead or that he abandoned or left this small property and the plaintiff's lessor assumed to himself the sole ownership of the property and dealt with it without any reference to Gafur. I think, on the whole, that the facts warrant the finding that the title of Abdul had become adverse as against Gafur. If that is so, the case does not present any difficulty; because the plaintiff had his 8 annas plus the 8 annas of Gafur which he intended to have as his own and, as regards that, the plaintiff as representing Abdul is entitled to recover possession of the whole of the property. A case has been pointed out as regards the wider view involved and continually arising in this Court as to the value of the possessory title in a suit for ejectment where the plaintiff is unable to prove that he has got a title to the property. The case that has been pointed out in the judgment in *Manik Borai* v. *Bani Charan Mandal* (2) is a matter of considerable difficulty. That difficulty is not lessened by the fact that a contrary rule has been observed in this Court for a considerable number of years. It may be that in some cases, *e. g.*, in *Shama Charan Roy* v. *Surja Kanta* (1), on the facts Chief Justice Jenkins came to the conclusion that the suit was, in fact, a suit for confirmation of possession. I doubt whether the present suit could, in any view, be treated as a suit for confirmation of possession. I think that the evidence in the case is sufficient to show that the plaintiff obtained a title by adverse possession against Gafur. That gets rid of the plea of *jus tertii* set up by the defendant by showing that the interest of Gafur had ceased to exist by virtue of the Statute of Limitation. In that view, I set aside the judgment of the learned Subordinate Judge and restore that of the Munsif.

SMITHER, J.—I agree.

*Appeal accepted.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1723 TO 1729, 1731 TO 1773 AND 1775 TO 1793 OF 1915.

December 20, 1916.

*Present*:—Mr. Justice Oldfield and Mr. Justice Spencer.

SUNDARAM IYER—PLAINTIFF—APPELLANT

*versus*

THEETHARAPPA MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Madras Estates Land Act (I of* 1908), *ss.* 3 (11), 143—*Landlord and tenant*—Varam *tenure—Cesses claimable as rent, levy of, conditions of*—Kanganam, *levy of, legality of—Recognition of rights by Court—Subsequent non-enforcement—Abandonment, presumption of —Estoppel—Judgments not* inter parties, *admissibility of—Evidence Act (I of* 1872), *ss.* 13, 115.

In considering whether the levy of particular cesses in a *varam* tenure must be disallowed under section 143 of the Madras Estates Land Act, a distinction must be made between fees which form part of the consideration for the *ryot's* holding and are leviable as incidental to the tenure and fees which by law or usage are payable in addition to the rent. For the former class of payments, the occupation of the land is the consideration, and, therefore, *prima facie* they are lawfully made. [p. 161, col. 1.]

Section 143 only applies to cesses which are additions to the rent. But if the fees claimed, instead of being cesses, are component parts of the rent by means of which the equality of *varam* is arrived at, the section will not apply. [p. 163, col. 1.]

A payment of fees claimed as rent for a series of years will not make them enforceable if they are not legally leviable. They will be payable if there is a valid, express or implied contract to pay. A contract cannot be implied where the payment is without consideration and is a voluntary one. [p. 163, col. 1.]

If a cess is shown to have been levied for a special purpose, there can be no implied contract to pay it after the purpose has ceased to exist, and payment of it will not thereafter be enforceable unless there is a fresh contract founded on a fresh consideration to continue the payment. [p. 163, col. 1.]

SUNDARAM IYER *v.* THEETHARAPPA MUDALIAR.

If a cess is otherwise valid, a contract to pay it can be implied from payments for a series of years or where it is the established usage or *mamool* of the estate to pay it. [p 163, col. 1.]

The *kanganam* fee is a proper charge in addition to the rent and is legally leviable. [p. 164, col. 1.]

*Arunachallam Chettiar* v. *Mangalam*, 35 Ind. Cas. 329; 20 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168; *Lakshman Govind* v. *Amrit Gopal*, 24 B. 591, 2 Bom. L. R. 386; 12 Ind. Dec. (N. S.) 924, followed.

Judgments not *inter partes* are admissible in evidence where they are relevant under section 13 of the Evidence Act. They are evidence of usage as instances where the right in question was claimed or denied or recognized. Their evidentiary value, however, must depend on the facts of the particular case. [p. 160, col 2; p. 162, col. 1.]

*Lakshman Govind* v. *Amrit Gopal*, 24 B. 591; 2 Bom. L. R. 386; 12 Ind. Dec. (N. S ) 924; and *Easwara Doss* v. *Pungavanachari*, 13 M. 361; 4 Ind. Dec. (N. S.) 964, followed.

Per *Krishnan, J.*—Rent proper does not include payments made merely in connection with the use of land and under a liability only incidental to such use. Every payment by a tenant as such to the andlord will ordinarily have reference to the use and occupation of the land, as that is the foundation of the relationship between the parties. But, unless a payment is directly in consideration for such use, it cannot fall under the first paragraph of clause 11 of section 3 of the Act. [p. 162, col. 2.]

Where rights which have been recognized by Courts are not enforced by the landlord for some years, that fact alone cannot affect the rights themselves or lead to an inference of the abandonment of his rights by the owner. [p. 163, col. 2; p. 164, col. 1.]

Second appeals against the decrees of the District Court, Tinnevelly, in Appeals Suits Nos. 581 to 587, 589, 590, 592 to 632, 634 to 644, 646 to 653 of 1914, preferred against those of the Sub-Collector of Shermadevi, in Summary Suits Nos. 4 to 9, 11, 13, 14, 18, 19, 22, 24, 25, 27 to 32, 34 to 40, 42 to 44, 46, 108 to 118, 120 to 127, 129, 130, 132 to 137, 139, 140, 143, 145, 146, 148, 149, 152, 153, 155 and 156 of 1913.

Messrs. *M. D. Devadoss* and *S. Ramaswami Aiyar*, for the Appellant.

Messrs. *T. Narasimha Aiyangar*, *V. Raghavachariar*, *T. Nallasivam Pillai*, *K. R. Guruswami Aiyar* and *A. Swaminatha Aiyar*, for the Respondents.

These second appeals and the memorandum ofobjections filed in Second Appeals Nos. 1723 to 1729, 1731 to 1746, 1748 to 1751, 1754 to 1757, 1759, 1760, 1762 to 1765, 1767 to 1773, 1775, 1777 to 1793 of 1915 coming on for hearing on the 24th, 25th and 26th July 1916, and having stood over for consideration till the 31st July 1916, the Court (Spencer and Krishnan, JJ.) delivered the following

JUDGMENT.

SPENCER, J.—On the issue whether the *pattas* for *Fasli* 1312 are proper *pattas*, both the lower Courts, in consideration of the evidence afforded by previous decisions, some of which were between the same landlord and the predecessors-in-title of some of the tenants in these appeals, and by *pattas* and *muchilikas* of previous *faslis*, have come to the conclusion that the tenants of the *Inam* Vagailkulam village hold on a *varam* tenure, the proportion being half *varam* for the landlord and half for the tenant.

The lower Courts are also agreed in finding on the 9th and 10th issues that the *inamdar* is entitled to charge 2/5th *varam* for second crop cultivation on single crop lands, and to make the tenants contribute half *faslijasti* in addition to the *varam* when Government water is taken for a second crop on single crop lands.

These findings appear to be just and based on legal evidence of usage. It is contended on this and other issues that the judgments in previous suits are not admissible on the ground that they were not between the same parties and were not given effect to.

Under section 13 of the Indian Evidence Act, they afford instances of a local custom or usage being recognised and as such they are evidence, even though the tenants in the present cases were not parties to them [vide *Easwara Doss* v. *Pungavanachari* (1)].

This disposes of the memoranda of objections on these points.

Issue 7 is whether the plaintiff is legally entitled to the cesses claimed by him. On this head, the liability of the tenants to pay the following charges has been considered (1), Kanganam, (2) Porkattu, (3) Yavanai, (4) Kalavi Nazar, (5) Urai, (6) Vasi, (7) Kaval, (8) Alavu, (9) Attakottu.

The Sub-Collector allowed them all. The District Judge allowed (1), (2), (8) and (9) and disallowed (3), (4), (5), (6) and (7). The lessee appeals against all the

(1) 13 M. 361; 4 Ind. Dec. (N. S.) 964.

items which have been disallowed. The tenants have raised objections to all those which have been allowed. In treating of these, a distinction must be made between fees, which form part of the consideration for the *ryot's* holding and are leviable as incidental to the tenure [*vide* the definition of 'rent' in section 3, clause (11) of the Madras Estates Land Act], and fees which by law or usage are payable in addition to the rent [*vide* sub-clause (*a*) of the same section]. See *Devanai* v. *Ragunatha Row* (2). For the former class of payments, the occupation of the land is the consideration and, therefore, *prima facie* they are lawfully made.

The Sub-Collector in deciding this issue did not keep this distinction in mind. He was satisfied with the conclusion that "the payment of cesses appears always to have been a recognised feature of the tenure under which lands were held in the estate."

The District Judge rightly observed that payment for a series of years would not make these sums enforceable if they are not legally leviable. That is the effect which section 143 of the Act has on cesses. This section only applies to cesses which are additions to the rent. But if these sums, instead of being cesses, are component parts of the rent by means of which the equality of *varam* is arrived at, then section 143 will not apply.

The District Judge treating all as cesses, but excluding Kanganam and Porkattu on account of a judgment of this Court dismissing an appeal against a decision of the District Court which once allowed these items, proceeded upon conjecture as to the purpose that these payments were intended to serve and upon some slight oral evidence as to their meaning, to decide whether they were legally leviable. For instance, in dealing with Yavanai, the Judge states that its meaning and object are not clear but he disallows it because it was disallowed in Second Appeal No. 1673 of 1888 and because he thinks it is not a legitimate charge.

In Second Appeal No. 1673 of 1888, the plaintiff failed to prove an unbroken custom for the charge. It has not been shown that the circumstances of these cases are the same.

Again, the Judge states that Kalvai Nazar is described as a cess for the maintenance of channels. He does not mention where this description occurs. The appellant's pleader maintains that it is for keeping channels clear of silt, a duty that is declared in section 137 of the Act to fall on the *ryots*. Urai is stated to be connected with the measurement of the crops. Judge allowed Alavu and Attakottu which were found to be connected with the same process, but disallowed Urai, Kaval and Vasi, are shown in the *pattas* as divided between the landlord and the tenant There is so much uncertainty as to the significance of each of these charges that I doubt with reference to the frame of the issue if the parties at the trial were alive to the necessity of producing such evidence as might have been available to prove (1) whether they form part of the consideration for the occupation of the land or whether they are additions to the rent, (2) if they are additions, whether they are not legally leviable as (1) having been originally levied for a purpose which has since failed, (2) being voluntary payments, (3) being illegal as being forbidden by law or against public policy.

With the exception of Kanganam, the meaning of which is well known and which has been held in a similar case in *Arunachallam Chettiar* v. *Mangalam* (3), to be a proper charge in addition to the rent, I am of opinion that a finding is necessary on both these points and that the parties should be allowed to adduce fresh evidence on them. The present District Judge will be asked to return findings within eight weeks. Ten days will be allowed for filing objections.

KRISHNAN, J.—The questions that arise for decision in this batch of appeals are whether the *patta* tendered by the plaintiff was a proper *patta* and if not what is the proper *patta*. The tenant-defendants have objected to the *patta* as being a *varam patta* whereas their tenure, they say, is a Pattam one, and also as containing nine cesses and half *fasli justi* improperly claimed by the landlord's lessee, the plaintiff.

(2) 18 Ind. Cas. 298; 13 M. L. T. 351; (1913) M. W. N. 886.

(3) 35 Ind. Cas. 329; 20 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168.

SUNDARAM IYER *v.* THEETHARAPPA MUDALIAR.

The cesses objected to are Yavanai, Kalvai Nazar, Urai, Vasi, Kaval fees, Kanganam, Porkattu, Attakottu and Alavu. The first Court held that the tenure was a *varam* tenure and that the cesses were all rightly claimable. On appeal, the learned District Judge, while upholding the finding as to the tenure, disallowed the first five of the above mentioned items as improper ones and allowed the rest. Both Courts allowed the half *fasli justi* claimed. Plaintiff has appealed against that decree in so far as it was against him and the defendants have filed memorandum of objections.

The nature of the tenure is the first point for decision. Both the lower Courts have found that it is *varam* tenure on this estate. It is objected for the tenants that the Courts have wrongly relied too much on judgment *exter parties* as they are inadmissible in evidence and even if admitted are of very little evidentiary value. It is now settled law that judgment not *inter parties* are still admissible in evidence where they are relevant under section 13 of the Evidence Act. They are evidence of usages as instances where the right in question was claimed or denied or recognised. See *Lakshman Govind* v. *Amrit Gopal* (4), *Easwara Doss* v. *Pungavanachari* (1). Their evidentiary value must depend upon the facts of the particular case. Where, as in this case, the *varam* right was claimed on several previous occasions and every time successfully, the value of the previous judgments is not so negligible as the defendants try to make out. They were more than once followed up by the acceptance of *pattas*. See Exhibits J series, T and U and execution of *muchilikas* Exhibit A series by the tenants wherein the *varam* tenure was expressly recognised by them. There is also other evidence to support the finding. I accept the finding that the tenure in this estate is a *varam* tenure.

The next question for decision is which of the charges claimed should be allowed or disallowed. This question must now be decided under section 143 of the Estates Land Act. The word 'rent' in that section is defined in section 3, clause 11 (*a*), as including "any local tax, cess, fee or sum payable in addition to the rent according to law or usage having the force of law." Cesses which do not fall under this definition must be disallowed under section 143. It is urged for the appellant that all the charges claimed by the landholder are payable by the tenants according to the usage or *mamool* of the estate. This must, no doubt, be established by the landholder.

Before considering this question, an argument adduced for the appellant that the different payments claimed by him though called by different names are all part and parcel of the *varam* or "rent" as defined in the 1st paragraph of clause (11) section 3 and that as half *varam* is lawfully payable by the tenants for their holdings, no question about the legality of each of these payments arises, has to be dealt with. "Rent" as defined in that paragraph is "what is lawfully payable in money or in kind or both to a landholder for the use or occupation of land in the estate for the purpose of agriculture." It is what may be called the rent proper to distinguish it from the payments included in "rent" by the rest of the clause. Rent proper clearly does not include payments made merely in connection with the use of land and under a liability only incidental to such use. Of course, every payment by a tenant as such to the landlord will ordinarily have reference to the use and occupation of the land, as that is the foundation of the relationship between the parties. But, unless a payment is directly in consideration for such use, it cannot fall under the *first* paragraph of clause 11, section 3 of the Act. It is not clear if the payments in question here satisfy this test as their nature and the object of their levy have not been elucidated by evidence. They are all apparently payments for purposes in connection with the tenancy but it is not clear if they are part of the *varam* as argued. They have been treated as cesses by the plaintiff in the plaint and the issue as to them has been framed on that footing. But that is not conclusive; there must be a finding on this point on fresh evidence.

It was argued that at any rate "Yavanai" which is stated to mean collection charges

(4) 24 B. 591; 2 Bom. L. R. 386; 12 Ind. Dec. (N. S.) 924.

by plaintiff's Counsel should be treated as part of the *varam* and the case in *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose* (5) is cited as an authority for it. Collection charges may in certain cases be part of the rent proper as held in the case cited; but that depends on the facts of the particular case. Here, it is not clear what the nature or object of Yavanai is, to decide the question. Even if the payments claimed in this case are all cesses by virtue of the second paragraph and sub-clause (*a*) of clause (11) they will still be included in the term 'rent' under section 143 if they are payable according to law or usage having the force of law.

The question thus arises for decision, whether all or any of them are payable according to law? They will be so payable if there is a valid, express or implied contract to pay. A contract cannot be implied where the payment is without consideration and is a voluntary one as for example temple fees. See *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu* (6); or in the case where the payment is of a cess illegal in its very nature. If the cess was shown to have been levied for a special purpose, then also there can be no implied contract to pay it after the purpose has ceased to exist; and payment of it will no longer be enforceable unless there was a fresh contract founded on a fresh consideration to continue the payment. See *Ramaswami Aiyar* v. *Sundaram Aiyar* (7). If a cess is otherwise valid, a contract to pay it can be implied from payments for a series of years or where it is the established usage or *mamool* of the estate to pay it.

The Sub-Collector in the first Court found on the evidence that the payment of these "cesses" was always a recognised feature of the tenure of this estate. The Appellate Court has not given a finding on the point but has disallowed some of the 'cesses' as not being necessary or legitimate charges and allowed others as legitimate ones excluding from consideration Kanganam and Porkattu "in view of the High Court's decision allowing them". As all the evidence on this point is now on record and we have been taken through that evidence at considerable length it seems to me it is not necessary to call for a finding on this question, namely, whether these charges are leviable according to usage, from the lower Court as we can ourselves come to a finding on the point under section 103, Civil Procedure Code, and as the finding is one of mixed law and fact.

The Sub-Collector has set out the evidence on the point; it is not necessary to do so again; on that evidence, I am of opinion that his finding that the payment of these charges and the half *fasli justi* was recognised feature of the tenure is correct. As Exhibit JJ proceeded on a manifest mistake and Exhibit P merely followed it on this question, no great value can be attached to them as showing the terms of the tenure on this estate. Neither they nor the subsequent conduct of the lessee is binding on the owner. It was strenuously argued on this issue also that the previous judgments should not be relied on to find the usage on this estate (1) as they were not *inter parties* and (2) as they were not acted upon. I have already held the judgments though *exter parties* are relevant evidence and in the circumstances of this case, I think they are very material evidence. *Pattas* and *muchilikas* were exchanged in accordance with them. See Exhibit A series, Q, S, T, U, U1. As the tenants were refractory and were raising disputes necessitating litigation more than once and as they would not pay rent as they were bound to do the then lessees apparently found it convenient to take from them what they could collect without trouble. It is in evidence that from 1890-91 these charges were not separately collected but were consolidated with the *varam* and a lump amount taken dividing the crop in the ratio of 10 to 11. That was during the time of a lessee; but when the agent of the owner came in, he seems to have collected them for some time according to the *pattas*. The earlier judgments in evidence really shew what the rights of parties were as recognised by the Courts; the fact that those rights were not enforced in full by the lessees from the owner for some

(5) 31 C. 834; 8 C. W. N. 529.
(6) 17 M. 43; 3 M. L. J. 207; 6 Ind. Dec. (N. S.) 29.
(7) 30 Ind. Cas. 166.

years cannot affect the rights themselves or lead to an inference of abandonment of his rights by the owner. As regards Kanganam and Porkattu, even Exhibit P allowed them and Exhibit V series expressly recognises them as payable. Taking then that the charges claimed were payable by the tenants according to the usage of the estate, the question still remains whether any of them should be disallowed as being illegal, voluntary or for a purpose which has now ceased to exist. These cases have not been tried from this point of view as they were apparently not presented in that light in the first Court. The lower Appellate Court has acted mainly on its own opinion as to what may be considered unnecessary or illegitimate charges, evidence on the point and as to the nature of the payments claimed being very meagre. It is not satisfactory to dispose of these cases without the parties being given a fresh opportunity to adduce evidence on these points.

1. The Kanganam fee should, however, be excluded from any fresh enquiry as this High Court has already considered its character and held that it is a cess that is legally leviable. See *Arunachallam Chettiar* v. *Mangalam* (3) and as the *varam* system is still in force on this estate, its purpose cannot be said to have ceased. I agree with the ruling above cited and allow this fee in the landlord's favour.

The Yavanai fee has been held to be not a legitimate charge by the learned District Judge on the strength of a ruling of this Court in Second Appeal No. 1673 of 1888. But a reference to that ruling shows that the cess in question was then disallowed on the ground that it was not proved and not on the ground that it was an illegal cess. The ruling, therefore, is no authority to support the view of the lower Court. The item in question must be included, therefore, in the fresh enquiry proposed.

As to half *fasli justi*, it was allowed by the earlier judgments referred to above. It was only disallowed by Exhibits JJ and P by a mistake as already explained. It seems to me to be fair to both sides to make each party pay half the *fasli justi* particularly as the tenant pays only 2/5th *varam* for the 2nd crop. I will allow this.

2. It remains to notice an argument by plaintiff's Counsel that, by Exhibit C, the question of the liability to pay these charges is made *res judicata* between his client and the tenants who were parties to that judgment. There is no force in this argument as the liability of the parties has now to be judged with reference to a new enactment, the Madras Estates Land Act, which has come into force since the date of Exhibit C. The payment of rent in the suit *fasli* cannot depend upon what was decided to be the proper rent before this Act came into force. It is also pointed out that the identity of the subject-matter is not established.

I, therefore, agree that before finally disposing of these appeals, the learned District Judge be asked to submit a finding after giving an opportunity to the parties to adduce fresh evidence on the two issues framed by my learned brother excluding Kanganam fee therefrom.

This order applies to all cases except Second Appeals Nos. 1730 and 1774 where the respondents have died and no legal representatives have been brought on the record yet.

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In compliance with the order contained in the above judgments, the District Judge of Tinnevelly submitted the following

FINDING * * * * * * * * * I think they must have considered these various items as necessary items, connected with the division of produce, and must have collected the same as part of the rent, the landlord being responsible for payment to persons doing the work for which charges have been shown as payable to him and *vice versa*. Even if they are looked upon as cesses, additions, there is absolutely nothing from which one could infer that such payments were either voluntary or illegal.

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These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial the Court delivered the following

JUDGMENT.—We accept the findings and allowing the appeals we restore the decrees of the Sub Collector. The respondents will pay appellant's costs in this Court.

We allow a lump sum of Rs. 600 for

fees which as well as printing charges will be divided evenly among all the appeals. The memoranda of objections are dismissed.

*Appeals allowed.*

V. R. P.

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 404 OF 1915.

May 2, 1917.

*Present*:—Justice Sir P. C. Banerji, KT. and Mr. Justice Ryves.

SIDDHAN LAL AND OTHERS—DEFENDANTS —APPELLANTS

*versus*

GAURI SHANKAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Trust, creation of—Revocation—Author of trust, power of, to revoke—Civil Procedure Code (Act V of 1908), s. 92, applicability of—Trustee,* de son tort.

The position of a person who creates a trust of his property and declares himself to be the first manager becomes merely that of a manager and he is not competent subsequently to revoke the trust or to alter it or to appoint new managers. [p. 166, col. 1.]

Section 92 of the Civil Procedure Code, 1908, applies to the case of persons who are trustees *de son tort*. [p. 166, col. 1.]

*Jugalkishore* v. *Lakshmandas*, 23 B. 659; 1 Bom. L. R. 118; 12 Ind Dec. (N S) 440 and *Budree Das Mukim* v. *Chooni Lal Johurry*, 33 C. 789; 10 C. W. N. 581, followed.

First appeal from the decision of the Additional Judge, Farrukhabad, dated the 6th September 1915.

The Hon'ble Dr. *Surendra Nath Sen*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Gulzari Lal* and *Lakshmi Narayan*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought under section 92 of the Code of Civil Procedure. The facts are these. One Ganga Din executed a document on the 2nd of June 1909 purporting to be a deed of gift of certain property belonging to himself in favour of the idol Sri Rangji Maharaj. By that document he clearly made an endowment of his property for the maintenance of the temple of Thakurji and also for the establishment of a Sanskrit *patshala*. He also provided in the document for other matters which the trustees nominated by him would have to carry out in connection with the endowment and declared what expenditure should be incurred in relation thereto. There can be no doubt that under this document an express trust was created for religious and charitable purposes. In this deed of trust he nominated himself as the first manager of the trust and named three persons, namely, Siddhan Lal, Raghubar Dayal and Jhamman Lal as his successor in the office of manager after his death. On the 2nd of February 1911 he executed another document under which he nominated Siddhan Lal, Jugal Kishore and Maiku Lal to be managers in the place of the three persons named above for the management of the endowment after his death. He also provided in that document that instead of a *patshala* being established the money provided for the *patshala* should be spent in *sadabart*, that is, charity. The present suit was brought with the permission of the Legal Remembrancer by two members of the Hindu community for the removal of the defendants from the management of the property, on the ground that they had obtained the document of 1911 by undue influence from Ganga Din and that they were mismanaging the trust property and had committed a breach of trust by omitting to perform the duties imposed upon the trustees by the maker of the trust. We may mention that Ganga Din died in 1912. The Court below has decreed the claim and made an order removing the defendants from the management of the trust. It refused to appoint Raghubar Dayal and Jhamman Lal as trustee but made a reference to the Collector for the nomination of trustees and reserved to itself the power of appointing new trustees for the management of the trust. This appeal has been preferred by the defendants, and the first contention on their behalf is that this case could not be instituted under section 92 of the Code of Civil Procedure. They urge that if the plaintiff's contention is correct that the appointment of the defendants was not legally valid, they are trespassers and could not be sued under section 92 as trustees. In our opinion this contention is untenable. No doubt Ganga Din, the maker of the trust, was entitled at the time of creating the trust to nominate the persons who were to be managers of the trust after the date of the creation of the trust and to provide for the

appointment of further trustees. As has been already stated he declared that he himself would be the first manager (*sarbarakar*) and that after his death Jhamman Lal, Raghubar Dayal and Siddhan Lal should be the managers. It was not open to him after the trust had been created to nominate new managers who were to take his place after his death. Subsequently to the creation of the trust his position was merely that of manager and he was not competent to revoke the trust or alter it, or appoint new managers. Therefore, with the exception of Siddhan Lal, who is one of the trustees mentioned in the original deed of trust, the other two defendants are not men who have been validly appointed trustees or could be so appointed. They by their own admission have taken charge of the trust property not as trespassers but as managers of the trust, and, therefore, they must be deemed to be trustees *de son tort*. In our opinion section 92 applies to the case of persons who are trustees *de son tort*. This was held by the Bombay High Court in *Jugalkishore* v. *Lakshmandas* (1) and by the Calcutta High Court in *Budree Das Mukim* v. *Chooni Lal Johurry* (2).

It is next urged that it has not been proved that the defendants have committed a breach of trust. It has been found by the Court below that the temple erected by Ganga Din in which the Thakurji was installed has not been repaired by the defendants and that it is in a hopelessly bad state of repair. According to the defendants' own allegations they have not spent even Rs. 2 in repairing the temple. Under the terms of the document of the 12th of June 1909 Rs. 25 a year were allotted for repairs of the temple but no part of this money has been spent for that purpose, and the result has been that the temple is in such a condition that after a short time, unless properly repaired, it will cease to exist. Again under the terms of the trust a Sanskrit *patshala* had to be established. There is some evidence that in the lifetime of Ganga Din a small *patshala* was started with a small number of students, but by reason of his illness it was not continued. It was the duty of the trustees in the performance of what was incumbent on them under the terms of the deed of trust to establish a Sanskrit *patshala* and to carry it on with the means at their disposal. This has not been done and this is another breach of the duties which the managers had to perform.

The defendants produced certain account books the genuineness of which the Court below has doubted. We have seen the account books and we are not prepared to say that the suspicions of the Court below as regards their genuineness are unfounded. The learned Judge has dealt with the matter at length and he has given other reasons for coming to the conclusion that the defendants have not carried out the objects of the trust and have not defrayed all the expenses which they were bound to do under the terms of the trust deed of 1909. We do not deem it necessary to go at length into those matters. We have considered the evidence on the point and agree with the findings of the Court below. We do not consider it necessary to decide in this case whether the document of the 2nd of February 1911 was obtained by undue influence. In our opinion Ganga Din was not competent to execute that document after having created a trust under the prior document of the 12th of June 1909. We think that the learned Judge came to a right conclusion in this case and this appeal must fail some objections have been preferred on behalf of the plaintiffs. One of them is to the effect that the learned Judge ought to have ordered the defendants to render accounts. We think that having regard to the circumstances the learned Judge exercised a wise discretion in leaving the matter open and directing that it would be for the new trustees to sue the defendants separately for accounts or for recovery of ornaments if they thought fit to do so.

Another objection taken on behalf of the plaintffs was that one Rup Lal should not have been appointed a trustee by the Court below. We have nothing on the record to show that Rup Lal has been appointed and there are no materials before us to enable us to consider whether that appointment is a proper one or not, if in fact Rup Lal has been appointed. The objections taken on behalf of the plaintiffs are without force.

(1) 23 B. 659; 1 Bom. L. R. 118; 12 Ind Dec. (N. S.) 440.

(2) 33 C. 789; 10 C. W. N. 581.

The result is that we dismiss the appeal and also the objections with costs, including fees on the higher scale.

*Appeal dismissed.*

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BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 24 OF 1916.

November 9, 1916.

*Present*:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

BIRDICHAND JIVRAJ—

DEFENDANT NO. 1—APPELLANT

*versus*

THE STANDARD BANK, LIMITED—

PLAINTIFF—RESPONDENT.

*Mortgage of shares—Company—Liquidation—Payment of calls by mortgagee—Mortgagee, whether can recover amount from mortgagor.*

Plaintiff advanced a sum of money to the defendant on the security of certain shares in the *S.* Bank in February 1913. In October 1913 defendant wished to overdraw his account with the plaintiff Bank, and this was allowed on a deposit of some more shares in terms of a formal overdraft agreement. All the shares deposited were transferred to the plaintiff Bank's name on the share register of the *S.* Bank, and dividends when received were credited by the plaintiff Bank to the loan account of the defendant. In September 1913, the *S.* Bank shares bagan to fall, and the plaintiff Bank sold some of the mortgaged shares before a winding up order was made for the compulsory liquidation of the *S.* Bank. In the liquidation the plaintiff Bank was placed on the A list of contributories for the shares held by them, and on the B list for the shares sold by them, and were forced to pay calls:

*Held*, (1) that the plaintiff Bank could recover the amount of principal and interest advanced by it to the defendant, but that it was not entitled to the amount paid by it as calls or to any declaration of indemnity as to its liability in respect of the shares sold by it; [p 169, col. 2]

(2) that the plaintiff did not occupy the position of trustee for the mortgagors at the time of paying the calls and was, therefore, not entitled to an indemnity as trustee. [p. 170, col. 1.]

*Phene* v. *Gillan*, (1845) 5 Hare 1; 15 L. J. Ch. 65; 9 Jur. 1086; 67 E. R. 803; 71 R R. 1, relied upon.

It is not an implied condition of a contract of mortgage that the mortgagor should indemnify the mortgagee against the consequences of holding property which he holds for his own security and not for the benefit of the mortgagor. [p. 169, col. 2.]

A forced payment of a call by the registered holder of shares upon a compulsory liquidation cannot be regarded as an expenditure for the preservation of the security. [p. 170, col. 1.]

FACTS of the case appear from the following judgment of

SCOTT, C. J.—The question in this appeal is as to the liability of the defendant in respect of certain loans granted by the respondents on a security of shares of the Indian Specie Bank which were not fully paid and upon which on liquidation of that Bank a large liability in respect of the calls has resulted. It is conceded on behalf of the appellant that no question was raised in the lower Court either in the issues or the argument disputing the liability of the first defendant to indemnify the plaintiffs against the liability incurred by them as contributories in respect of the said shares in the winding up. And it is stated that it was not realized in the lower Court that the liability of the first defendant can be successfully disputed upon legal grounds.

The question is one of great importance as may be seen from the decree which provides for a sum aggregating Rs. 1,72,200 in respect of calls already paid in the liquidation and there is a further decree against the first defendant to indemnify the plaintiff Bank against further calls.

The plaintiffs allege that the question is not merely one of law but will turn largely on the question of fact, because they say that there was or were a conversation or conversations in which the first defendant or his agent undertook to indemnify the plaintiff Bank in respect of any calls which might be made upon the shares.

We think that if the legal issue is allowed to be tried, the issue of fact must also be tried, and having regard to the importance of the case, we do not think that we can rightly dispose of the suit without a decision on the issues. Therefore, under Order XLI, rule 25, we frame the following issues:—

( ) Whether the first defendant by his agent did not agree to indemnify the plaintiff Bank with regard to any unpaid calls on these shares?

(2) Whether in any event the first defendant is not liable to indemnify the Bank with regard to such calls?

We refer these issues for trial to the lower Court and direct it to take such

additional evidence as may be required and return the evidence and the findings and the reasons therefor, in due course to this Appeal Court.

With regard to the first question argued as to the election of the plaintiffs, we are of opinion that there can be no election in a case where the principal, who is now the first defendant, has deceived the plaintiffs.

Costs costs in the appeal.

The issues were tried by Macleod, J., who found both issues in the negative.

Mr. *Kanga* (with him Mr. *Jardine*), for the Appellant.

Mr. *Strangman* (with him Messrs. *Setalvad* and *Desai*), for the Respondent.

JUDGMENT.

SCOTT, C. J.—The plaintiffs are the Standard Bank.

In February 1913, a broker named Hemchand asked the Managing Director of the Bank to advance money on the security of shares in the Indian Specie Bank with the result that a transaction was recorded by him in the following terms.

"*Bombay, 26th February* 1913.

I have arranged by your order and on your account a loan for twelve months on 2,000 to 2,500 shares of the Indian Specie Bank, Limited, at Rs. 50 per share; the loan to be given to Bansidhar Mangtulal at 7 per cent., and a margin of Rs. 15 per share to be maintained by the borrower; the shares to be transferred to the Bank's name. Money payable on or before the 10th March 1913."

On the 10th March, 1913, Bansidhar Mangtulal acting on behalf of an undisclosed principal the 1st defendant Birdichand Jivraj executed a demand promissory note in favour of the Bank for Rs. 1,25,000 and that sum was carried to a suspense account to be at the disposal of Bansidhar. Shares aggregating 2,500 were afterwards brought to the Bank with blank transfers.

On the 4th of April 1913, it was arranged through the same broker that the plaintiff Bank should advance a further sum of Rs. 45,000 on 1000 shares of the Indian Specie Bank.

The note of the transaction was as follows:

"*Bombay, 4th April* 1913.

"I have this day arranged by your order and on your account a loan for Rs. 45,000 fixed for 12 months on 1000 Indian Specie Bank Limited, shares.

A margin of Rs. 15 to be maintained at $7\frac{1}{2}$ per cent. Payable on or about 9th April 1913."

On the 9th April, a demand promissory note for Rs. 45,000 was passed to the plaintiff Bank by Bansidhar and the amount was carried partly to suspense account and partly to Bansidhar's account.

The amount provided by these loans having been fully utilized Bansidhar wanted in October 1913 to overdraw his current account. This was allowed to the extent of Rs. 4,200 on a deposit of 105 more shares in terms of a formal printed overdraft agreement of which paragraphs 4 and 5 were as follows:—

" 4. I agree and undertake that the value of the shares deposited with you as security as aforesaid shall at all time exceed in value at the market price of the day the amount due by me to you so that the security may at the value aforesaid exceed the amount of my indebtedness to you by a margin of rupees 15 per share and in the event of the said shares at any time becoming of less value at the market price of the day so as not to provide the margin agreed on as aforesaid I agree and undertake to forthwith make up such deficiency on demand by you either by depositing further security approved of by you sufficient to make up the security to the agreed amount or by making part payment of the moneys due by me so that my indebtedness may be reduced to an amount for which the security so deposited amounts to Rs. 15 per share in excess of the amount due by me. So that you may always be secured by shares or other security approved by you which at the market value thereof of the day shall at least exceed in value by Rs. 15 per share the amount of my indebtedness from time to time to you.

"5. That you or your Managing Director shall be at liberty in default of my paying the moneys for the time being due to you by me on demand, or in default of my keeping up the full margin of security of the value as aforesaid and without any consent or

concurrence on my part to sell the said shares or other security deposited from time to time by me or any of them by public auction or private contract and in such manner in all respects as you may think fit and out of the proceeds thereof to pay—

"(*a*) All expenses of and incidental to such sale and also all costs and expenses which may have been incurred by you in consequence of such default in payment of the said loan or in maintaining the full margin of value of the said shares as aforesiad.

"(*b*). The debt then due to you with interest. You shall be at liberty in the event of any default on my part in payment of such moneys on demand or in maintaining the full margin of value, to purchase yourselves the said shares or any of them at the market price of the day on which such default shall have been made."

All the shares deposited by Bansidhar were transferred to the plaintiff Bank's name on the share register of the Specie Bank. Dividends when received were credited to the loan account.

In September 1913, the Indian Specie Bank shares began to fall and on the 7th October, Bansidhar provided further securities as margin which realised about Rs. 20,000 but thereafter he failed to provide any further margin and eventually 181 shares were sold by the plaintiff Bank of which 161 had been transferred before a winding up was made for the compulsory liquidation of the Specie Bank. In the liquidation the plaintiff Bank has been placed on the A list of contributories for 3444 shares and on the B list for 161 of the shares deposited by Bansidhar. A call of Rs. 50 per share has been paid by the plaintiff Bank in respect of the 3444 shares.

Decrees have been passed at the suit of the plaintiff Bank against both Bansidhar the ostensible borrower and Birdichand his undisclosed principal for debt and interest aggregating Rs. 3,50,500 which includes both the amount due for advances and interest and the amount paid by the plaintiff Bank on the call made on the Specie Bank shares. The decree also declares that the plaintiff Bank are entitled to be indemnified for any claim which may be made against them in respect of the 161 shares for which the plaintiffs are entered as contributories on the B list in the liquidation proceedings of the Specie Bank.

The only question now in dispute in this appeal is whether the plaintiffs can recover from the defendants as a debt the amount paid in respect of the call and whether they are entitled to an indemnity in respect of the 161 shares as declared by the decree.

It is not now contended that there was any special agreement to indemnify the plaintiffs in respect of the uncalled liability on the Specie Bank shares at the time of the deposit. It has been held by the lower Court that the evidence adduced fails to establish any such agreement and no exception is now taken to that finding.

Substantially the argument for the plaintiffs was confined to the suggestion of an implied agreement by the borrower to indemnify the lender in respect of a security which might be onerous. It was said this must have been the business understanding between the parties and that no lender would lend except upon such an agreement to indemnify.

It is pretty certain, however, that the possibility of the Indian Specie Bank going into compulsory liquidation during the continuance of the loan transaction never entered into the contemplation of the parties and even in October 1913 after the share had begun to fall in value the plaintiffs were still willing to allow an overdraft on a deposit of some of the same shares carrying the same uncalled liability.

Had the possibility of calls on the shares been considered the plaintiffs would either have left them in the name of the then registered owner, or, if they wished to take a transfer, would have refrained from doing so except upon an express indemnity. It is not unreasonable to suppose having regard to the magnitude of the transactions that the plaintiffs, had they realised the risk attaching to such shares, would have taken the ordinary precautions suggested by business experience: See Davidson's Conveyancing Volume II, part 11, page 1203. So much for the suggested implication of fact.

Nor can it be successfully contended that as a matter of law it is part of the contract that the mortgagor should indemnify the mortgagees against the consequences of

holding property which they held for their own security and not for the benefit of the mortgagor. The mortgagees received the dividends on the shares in excess of the interest on the loan, and credited such excess in reduction of their debt and they must be supposed to have contemplated all the liabilities to which the holding of such shares might subject them. It was held in *Phene* v. *Gillan* (1) that there is not at law any such implied contract of indemnity. It is impossible to contemplate the mortgagors in such a case as the present attempting to redeem the Specie Bank shares and I doubt if a forced payment of a call by the registered holder of shares upon a compulsory liquidation could be regarded as an expenditure for the preservation of the security or expenditure contemplated in clause 5 of the overdraft agreement. The mortgagees in the present case did not, in my opinion, occupy the position of trustees for the mortgagors at the time of paying the calls and cannot, therefore, be entitled to an indemnity as trustees.

The decree of the lower Court must, therefore, be varied by limiting the sum decreed to the amount of the advances, interest and costs and by deleting the declaration as to indemnity.

Defendants must pay the costs of the appeal up to and including the 20th of July. The plaintiffs must pay the subsequent costs of the appeal but the parties must bear their own costs of the remand and findings thereon since they were rendered necessary by the defendant's oversight at the original hearing. The order as to costs in the original Court will stand.

*Decree varied.*

(1) (1845) 5 Hare 1; 15 L. J. Ch. 65; 9 Jur. 1086; 7 E. R. 803; 71 R. R. 1.

## MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2243 OF 1916.

January 16, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar.

THE FIRM OF S. R. V. S V. S. V. RAMAKRISHNA IYER,

REPRESENTED BY ITS TWO PARTNERS (1) RAMAYYAR AND (2) VYTHIANATHA SASTRIAR—RESPONDENTS - PETITIONERS

*versus*

THE OFFICIAL RECEIVER, TINNEVELLY—APPELLANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXII, rr.* 10, 11—*Official Receiver, appeal by—Continuation of proceedings by successor without amendment of cause—Title, validity of—Intimation of change to Court—Decision on merits, effect of—Provincial Insolvency Act (III of 1907), ss.* 61, 67—*Presidency Towns Insolvency Act (III of 1909), ss.* 17, 83.

The position of an Official Assignee in Madras differs from that of an Official Receiver in the *muffasil*. The Official Assignee may sue and be sued by the name of the Official Assignee of the property of the insolvent without mentioning his own name under section 83 of the Presidency Towns Insolvency Act, whereas there is no corresponding provision in the Provincial Insolvency Act. [p 172, col. 1.]

*Quære.*—Whether, on the resignation of his office by an Official Receiver maintaining a suit or appeal his successor can continue the proceedings without his name being brought on the record. [p. 172, col. 1.]

Where, however, the change of *personnel* was intimated to the Court, which proceeded notwithstanding to pronounce a decision on the merits, the record must be deemed to have been amended by substitution of the name of the new officer in place of the one who had vacated office. [p. 172, col. 2.]

Application, under Order XLVII, rule 1 of the Civil Procedure Code, for review of the judgment of the High Court, dated the 4th February 1916, in Appeal against Order No. 407 of 1914, presented against the order, dated the 5th September 1914 of the District Court, Tinnevelly, in Original Petition No. 755 of 1913.

Mr. *T. R. Venkatarama Sastri* (with him Messrs. *E. S. Chidambaram Pillai* and S. *Anantarama Aiyar*), for the Petitioners.

Mr. *M. D. Devadoss*, for the Respondent.

JUDGMENT.—This is a petition for review of the judgment pronounced by myself and Moore, J., on the 4th February 1916 in Appeal against Order No. 407 of 1914.

That appeal was preferred by one Mr. Gopaliah (then Official Receiver of Tinnevelly) against the order passed by the District Judge of Tinnevelly refusing the Receiver's application made under section 37 of the Provincial Insolvency Act III of 1907 to annul certain alienations made by an adjudicated insolvent in favour of one of his creditors (namely, the firm represented by the respondents Nos. 1 and 2) within three months before the adjudication.

Pending Appeal against Order No. 407 of 1914 in this Court, Mr. Gopaliah the Official Receiver resigned his post and a new Receiver was appointed by the Local Government for the Tinnevelly District. The appeal came on for hearing before myself and Moore, J., on the 4th Febuary 1916. Mr. Deva Doss had filed the appeal for Mr. Gopaliah, the then Official Receiver. I accept Mr. Deva Doss's statement that on 4th February 1916 he represented to us that Mr. Gopaliah had resigned his post of Official Receiver and that another gentleman (Mr. Subramania Iyer) had been appointed as Official Receiver that a doubt was suggested before us by the learned Counsel whether it was necessary to have the name of the new Official Receiver substituted for that of Mr. Gopaliah in the appeal records before the appeal could be heard and that we intimated that all that was necessary was that instead of the appellant being described as Mr. P. A. Gopaliah, Official Receiver of Tinnevelly, thereafter, he might be described simply as the Official Receiver of Tinnevelly. I also accept Mr. Deva Doss's statement that he represented to us that he had instructions to continue the appeal on behalf of the Official Receiver.

After hearing both sides fully, we allowed the appeal and declared the alienations made by the insolvent to the firm of the respondents Nos. 1 and 2 void as against the Official Receiver.

In drawing up the fair copies of our judgment and order, the office has repeated the name of Gopaliah before the description of the appellant as the Official Receiver of Tinnevelly. That is a clerical error which must be corrected.

This petition of review is filed by the firm of S. R. M. V. S. S. V. Ramakrishna Aiyar who are the respondents Nos. 1 and 2 in the appeal. The Official Receiver of Tinnevelly is the respondent in this review petition which does not mention the officer's individual name. The only arguable ground on which this review petition is sought to be supported is the 1st ground which is as follows:—

"The decision of the learned Judges is vitiated in law in that the appellant had resigned and so had no *locus standi* to appear and the new Receiver was not brought on record before the case was heard."

It is argued in support of this ground, that the decision in *Akula Paradesi* v. *Dhelli Jagannadha Row* (1) constrains me to hold that the appeal was heard in the absence of the proper party as appellant and that the devolution of interest to the next Receiver was of such a kind that the old Receiver could not continue to represent the interests involved in the appeal even for the purpose of the further conduct of the appeal. The Calcutta case reported as *Rai Charan Mandal* v. *Biswanath Mandal* (2) considers devolutions of interest through transfers of the interests of private parties and so far as such litigation is concerned, the original parties can continue the litigation effectively. The decision in *Akula Paradesi* v. *Dhelli Jagannadha Row* (1), however, draws a distinction between the continuation of litigation by a private person whose interest has ceased through assignment or devolution and the continuation of litigation by one whose right to conduct the litigation was based solely on his character of a Receiver or Trustee appointed by the Court and whose character as such ceased during the pendency of the litigation. The learned Judges say that in the latter case "the law necessarily implies the absence of all interest in the subject of litigation," when the official capacity of the party litigant whose name is on the record terminates and that his continuance of the litigation after such termination would be futile save in very exceptional cases as "where the right of action accrued by virtue of mere possession or by virtue of their being contracting parties themselves" and so on.

Mr. Deva Doss argued contra that the case of *Akula Paradesi* v. *Dhelli Jagannadha Row* (1) related to a Receiver appointed under section 503 of the old Civil Procedure Code for a

(1) 28 M. 157.
(2) 26 Ind. Cas. 410; 20 C. L. J. 107.

particular suit or particular suits and that the ratio of that decision could not apply to an Official Receiver in whom *ex officio* all the properties of the insolvent become vested and who by reason of the office becomes entitled to institute and continue suits. Mr. Deva Doss relied upon the analogy of the Official Assignee on the Original Side of the High Court, of the Advocate General, the Administrator General and so on who bring and defend suits in their official designations and whose successors are entitled to continue the conduct of the litigation (according to what Mr. Deva Doss alleged was the uniform practice) without their successors names being brought on the record.

I am not well acquainted with the practice as regards suits brought by or against the Official Assignee of Madras or the Advocate General or the Administrator General where there has been a change of officers pending the litigation and I shall not express any opinion as regards the legality of the practice alleged by Mr. Deva Doss assuming it to exist. It seems, however, that a distinction might be fairly drawn between the position of the Official Assignee in Madras and the position of an Official Receiver in the Moffusil. Whereas under section 17 of the Presidency Towns Insolvency Act III of 1909 the effect of the order of adjudication is at once to vest in the Official Assignee all the properties of the insolvent, under the Provincial Insolvency Act of 1907 (section 19, clause 2 read with sections 16 and 18), the properties of an adjudicated insolvent vest in the Official Receiver in the Moffusil only when the Court appoints a Receiver for the property of the Insolvent under section 18, clause 1 [*Official Receiver of Trichinopoly v. Somasundaram Chettiar* (3). Section 18, clause 1 is as follows: "The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a Receiver for the property of the insolvent, and such property shall *thereupon* vest in such Receiver." It is also to be noted that under section 83 of the Presidency Towns Insolvency Act, the Official Assignee may sue and be sued by the name of "the Official Assignee of the property of the insolvent" without mentioning his own name.

Under section 61, again, of the Presidency Towns Insolvency Act, "the property of the insolvent shall pass from Official Assignee to Official Assignee...for the time being during his continuance in office, without any transfer whatever." There seem to be no provisions in the Provincial Insolvency Act corresponding to sections 83 and 61 of the Presidency Towns Insolvency Act (at least none was pointed out to me). It is, however, open to argument that section 61 of the Presidency Towns Insolvency Act was enacted merely through abundant caution and that the provision which makes the property of the insolvent vest in the Official Receiver implies that on the change of the *personnel* of the Official Receiver the property vests *ipso facto* in the new Official Receiver. I think it is unnecessary for me to pursue the matter further as I think that this review petition might be disposed of on another ground which I shall at once proceed to state.

At the hearing of the appeal before myself and Moore, J., it is admitted (see ground No. 2 of the Review Petition itself), that the resignation of the Receiver Mr. Gopaliah was brought to our notice and also the fact that a new Receiver had been appointed. Supposing an amendment of the records became, in consequence, necessary, I think it must be taken that myself and Moore, J., treated the record as amended by striking out the name of Mr. Gopaliah from the record and by retaining only the words "Official Receiver, Tinnevelly" and that we held further that such a description represented the new Receiver sufficiently. The respondents Nos. 1 and 2 in the appeal (who are the petitioners in review) did not object to the hearing of the appeal on the footing, as if the appellant on the record was the new Receiver who was continuing the conduct of the appeal filed by the old Receiver and did not object that the new Receiver's name should be formally and expressly entered on the record or that his description as Official Receiver was not legally sufficient. I think that under these circumstances it must be taken that our decision was given in favour of the new Official Receiver and must be held to accrue for the benefit of the Official Reciever for the time being. I, therefore, dismiss this petition for review with costs.

*Petition dismissed.*

V.R.P.

(3) 34 Ind. Cas. 60; 30 M. L. J. 415.

BINODE LAL *v.* PREO NATH.

CALCUTTA HIGH COURT.
LETTERS PATENT APPEAL No. 38 OF 1915.
March 30, 1917.
*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
BINODE LAL CHAKRABURTTI AND OTHERS—PLAINTIFFS—APPELLANTS
*versus*
PREO NATH CHAKRABURTTI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 62, applicability of—Suit for rent—Alternative claim for money-decree against plaintiff's co-sharers, maintainability of.*

Article 62 of Schedule I to the Limitation Act applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, even where the defendant at the time when he received the money did not intend to pay it to the plaintiff. [p. 174, col. 1.]

The operation of the Article is attracted, if it is established that the money received by the defendant is money which belongs to the plaintiff, and is repayable to him in justice, equity and good conscience. [p. 174, col. 1.]

A suit is maintainable in the form in which a decree for arrears of rent is claimed against the tenant-defendants, with an alternative prayer at the same time for a money-decree against the other set of defendants—the co-sharers of the plaintiff—in case it is held that they have realised the entire rent from the tenant-defendants. [p. 174, col. 1.]

Appeal against the decree of Mr. Justice Newbould, dated the 12th January 1916.

FACTS.—This appeal is preferred by the plaintiff, and it arises out of a suit for recovery of arrears of rent, brought by the plaintiff against the tenants. The co-sharer landlords were made parties to the suit; and the plaintiff among other things, prayed that a decree be passed against a co-sharer landlord, if the Court found that he had received the rents from the tenants-defendants.

In the Court of first instance, the tenants appeared, but the co-sharer landlords did not appear; and the Court found that the tenants-defendants had paid rent to defendant No. 4, agent or manager of the co-sharer landlords; and that they (the tenants), were thereby absolved from their liability to pay rent, and it passed a decree against defendant No. 4.

Against this decision, the defendant No. 4 preferred an appeal, and the Appellate Court held that the suit against defendant No. 4 was barred by limitation under Article 62. Against this decision the plaintiff preferred an appeal to the High Court, and Mr. Justice Walmsely, holding that Article 62 applied, confirmed the judgment of the lower Appellate Court.

Against this decision of the High Court, the plaintiff preferred the present appeal under section 15 of the Letters Patent.

Babu *Satish Chandra Ghosh*, for the Appellants.—Defendant No. 4 did not appear in the Court of first instance. In that Court, he ought to have appeared and objected that the suit as against him was barred. He ought to have filed a written statement submitting that if it were found by the Court, that he had received rents from the tenants, then the suit against him was barred under Article 62. I submit that Article 62 is not applicable to the facts of this case, unless it is found as a fact that the defendant No. 4 received the money for the plaintiff's use. Refers to *Mahomed Wahib* v. *Mahomed Ameer* (1). It cannot be said without any evidence that the money was received by defendant No. 4 for the plaintiff's use. The defendant No. 4 was the manager of the family, and the money received by him as rent, might not be for the plaintiff's use. Before Article 62 was applied some questions of facts ought to have been gone into in order to arrive at the conclusion that the defendant No. 4 took the money for the plaintiff's use. But this was not done. The defendant No. 4 did not file any written statement and did not contest the suit. There was a suit for accounts pending against him, in which he filed a written statement alleging that he did not receive any rent for the plaintiff's use. The lower Court was not justified in applying Article 62 without finding on evidence taken for the purpose, that the rent received by defendant No. 4 was for the plaintiff's use. At any rate the case should be remanded to the lower Court for a finding as to whether the rent was received for the plaintiff's use or not.

Dr. *Sarat Chandra Basak* (with him Babu *Amullya Kumar Guha*), for the Respondent, was not called upon.

(1) 32 C. 527; 1 C. L. J. 167.

SATYA NARAYAN CHAKRAVARTY *v.* DWARKA NATH SADHU.

JUDGMENT.—In our opinion, there can be no room for controversy that the view taken by Mr. Justice Walmsley is amply supported by the authorities. The plaintiff instituted this suit for recovery of money in the alternative from two sets of defendants. He claimed arrears of rent from the tenant-defendants, and, alleged, at the same time, that if the entire rent had already been realised from them by his co-sharers, he was entitled to a decree as against the latter. This form of action is well known [*Sham Singh* v. *Kishun Sahai* (2), *Aiyathurai Ravuthan* v. *Santha Meera Ravuthan* (3), *Yerukola* v. *Mudiya Kamudu*(4)]. The Court of first instance found that the entire rent had been collected on the 4th November 1907 by the fourth defendant who was apparently the managing member of the family composed of the plaintiff and his co-sharers. The trial Court accordingly dismissed the suit against the tenant-defendants and made a decree against the fourth defendant. Thereupon the fourth defendant appealed and argued that the claim, as against him, was barred by limitation, inasmuch as the rent had been collected by him on the 4th November 1907 and the suit had not been instituted till the 18th April 1911. The Subordinate Judge gave effect to this contention and dismissed the suit. That decree has been affirmed by Mr. Justice Walmsley on second appeal to this Court.

It is plain that the case is governed by Article 62 of the first Schedule to the Indian Limitation Act. That Article applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. It is now well settled that this Article is applicable even though the defendant at the time when he received the money did not intend to pay it to the plaintiff; the operation of the Article is attracted if it is established that the money received by the defendant is money which belongs to the plaintiff and is re-payable to him in justice, equity and good conscience. In support of this proposition reference may be made to the case of *Mahomed Wahib* v. *Mahomed Ameer* (1). The same view has been subsequently adopted in a long series of decisions and the rule embodied in Article 62 has been applied in a variety of cases more or less analogous in their circumstances to those of the case before us We may mention the decisions in *Subbanna Bhatta* v. *Kunhanna Banta* (5), *Shanmuga Pillai* v. *Minor Govindasami* (6), *Sankunni Menon* v. *Govinda Menon* (7), *Baiznath Lala* v. *Ramadoss* (8) and *Niader Singh* v. *Ganga Dei* (9). In our opinion, Article 62 is applicable to this case, and as the plaintiff has not sought the protection of section 18 of the Indian Limitation Act on the allegation of fraud the suit has been rightly dismissed as barred by limitation. The appeal is consequently dismissed with costs.

*Appeal dismissed.*

(2) 6 C. L. J. 190.
(3) 31 M. 252; 18 M. L. J. 238.
(4) 4 Ind. Cas. 34; 19 M. L. J. 399; 5 M. L. T. 282; 6 M. L. T. 139.
(5) 30 M. 298; 17 M. L. J. 224; 2 M. L. T. 332.
(6) 30 M. 459; 17 M. L. J. 452.
(7) 14 Ind. Cas. 254; 37 M. 381; 22 M. L. J. 485; 11 M. L. T. 325; (1912) M. W. N. 516.
(8) 26 Ind. Cas. 219; 27 M. L. J. 640; 1 L. W. 952; 16 M. L. T. 509; 39 M. 62.
(9) 35 Ind. Cas. 86; 38 A. 676; 14 A. L. J. 728.

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## PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 25 OF 1916.

March 16, 1917.

*Present*:—Mr. Justice Mullick and Mr. Justice Atkinson.

*Kumar* SATYA NARAYAN CHAKRAVARTY AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

DWARKA NATH SADHU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Specific Relief Act (I of* 1877), *applicability of, to Sonthal Parganas—Specific performance, prayer for—Scheduled Districts Act (XIV of* 1874*)—Appeal—Pleadings, amendment of, in appeal.*

The Sonthal Parganas being a Scheduled District within the meaning of Act XIV of 1874, the Specific Relief Act does not *proprio vigors* extend to that area. [p. 175, col. 2.]

Although the Act is not applicable to the Sonthal Parganas, a prayer for specific performance of a contract can be granted upon the principles of justice, equity and good conscience. [p. 175, col. 2.]

*Janardan Mahato* v. *Bhairab Chandra Mondal*, 30 Ind. Cas. 365, followed.

The Specific Relief Act has given the Courts a new power, but the exercise of that power which is specially declared by the Statute to be discretionary ought to be jealously watched. [p. 176, col. 1.]

When a plaintiff desires to amend his plaint so as to convert his declaratory suit into a suit for recovery

of possession and for an injunction at a time when the case is being decided on appeal, he ought not to be permitted to do so if substantial injustice will not be done by directing him to bring a fresh suit, or if the change sought to be made in the plaint is of an unprecedented description. [p. 176, col. 1.]

Appeal from the decision of the Deputy Magistrate, exercising the power of Subordinate Judge, Sub-Division Jamtara, District, Sonthal Pargana, dated the 10th January, 1916, in Title Suit No. 3 of 1916.

Messrs. *Bipin Behari Ghose* and *Lalmohan Ganguli*, for the Appellants.

Messrs. *Naresh Chandra Sinha* and *Sisir Kumar Mittra*, for the Respondents.

JUDGMENT.

MULLICK, J.—The plaintiffs are proprietors of certain *mouzas* of which the principal defendants are lessees or *mukarraridars* under the plaintiffs, and the present suit is brought for the following reliefs:—

(1) That it may be adjudicated that the plaintiffs have a *zemindari* interest to the extent of 14 annas, 12 *gandas* in the *mouzas* mentioned in the Schedule appertaining to *Taluks* Jam Juri, Nagari and Chota Bara Asna and that the plaintiffs are in possession of the same.

(2) That it may be declared that the plaintiffs are entitled and are in possession of the sub soil of the said *taluk*s and that the principal defendants have no right thereto.

In their written statement the defendants denied the rights of the plaintiffs to the sub-soil. They further contended that they were put in possession of the land by an order under section 145 of the Code of Criminal Procedure made by the Sub-Divisional Magistrate of Jamtara on the 9th of May 1909.

The present suit was instituted before a Deputy Magistrate exercising the powers of a Subordinate Judge in that Sub-Division, but the plaint was returned to the plaintiffs on the ground that the suit was not maintainable because it had been laid under section 42 of the Specific Relief Act, which was not in force in the Sub-Division. Thereupon the plaintiffs preferred the present second appeal on the ground that the order of the learned Subordinate Judge directing the plaint to be returned was wrong.

It is admitted by the plaintiffs that the suit is one for a mere declaration and that it falls within the four corners of section 42 of the Specific Relief Act of 1877. It is also admitted that the Act is one of those Acts which, by the terms of the Scheduled Districts Act of 1874, has been excluded from the District of Sonthal Parganas, of which the Sub-Division of Jamtara is a part. Therefore, it would seem that by section 3, clause 3, of Regulation III of 1872, rights created by the Specific Relief Act cannot be enforced in the Sub-Division of Jamtara. But then the learned Vakil for the appellants turns to Act XXXVII of 1855, section 2, of which enacts that for the trial and determination of suits exceeding Rs. 1,000 in value the General Laws and Regulations shall apply. He contends that the Specific Relief Act, being one of the general laws, applicable to India, and the present suit being valued at Rs. 8,000 he is by virtue of section 2 of Act XXXVII of 1855, read with section 3 of Regulation III of 1872, entitled to ask the Court to hold that section 42 of the Specific Relief Act does apply to the suit in question. The argument is a very ingenious one, but I am satisfied that it has no foundation. All that Regulation III of 1872 read with Act XXXVII of 1855 means is that in suits exceeding Rs. 1,000 in value those laws will apply which are *proprio vigors* in force in the whole of the British India. But on turning to the Specific Relief Act we find that it extends to the whole of the British India except to the Scheduled Districts as defined in Act XIV of 1874. The Sonthal Parganas being a Scheduled District within the meaning of Act XIV of 1874, it is clear that the Specific Relief Act does not *proprio vigors* extend to the Sonthal Parganas. I am of opinion, therefore, that the Specific Relief Act does not apply to the case before us.

Then the learned Vakil for the appellant falls back upon justice, equity and good conscience, and he relies upon a decision by a Divisional Bench of the Calcutta High Court in *Janardan Mahato* v. *Bhairab Chandra Mondal* (1), where their Lordships Chitty and Richardson, JJ., held that although the Specific Relief Act was not applicable to the Sonthal Parganas a prayer for specific performance of a contract could be granted upon the principles of justice, equity

(1) 30 Ind. Cas. 365.

and good conscience Whatever the merits of the case before their Lordships may have been, I am clearly of opinion that the principles of justice, equity and good conscience cannot require the declaration which the plaintiffs want here. The relief contemplated by section 42 of the Specific Relief Act is a highly technical form of relief which was introduced into this country in 1877. Previous to that declaratory reliefs could only be granted under the provisions of the Procedure Code of 1859 subject to a condition precedent that there were circumstances which might justify the grant of consequential relief. The law of 1877 has certainly given the Courts a new power but in my opinion the exercise of that power which is specially declared by the Statute to be discretionary ought to be jealously watched. It cannot, in my opinion, be in accordance with justice, equity and good conscience that we should apply principles which are the basis of a highly technical part of the Act to a locality which the Government of the country has expressly declared to be unfit for the operation of the Act. In my opinion the principles of justice, equity and good conscience do not require that we should make the declaration which the plaintiffs seek.

The learned Vakil for the appellants finally asks us for leave to amend the plaint so as to make it a suit for consequential relief. In other words he desires to convert the present suit into a suit for recovery of possession and for injunction. I think that this case is one covered by the decision in *Jhari Singh* v. *Pirthi Nath Sahu* (2), and that we ought not, at this stage, to allow an amendment of the plaint, *firstly*, on the ground that no substantial injustice will be done by directing the plaintiffs to bring a fresh suit and, *secondly*, on the ground that having regard to the pleadings in this particular case the change sought to be made is a change of an unprecedented description within the rule in *Newby* v. *Sharpe* (3). The appeal accordingly fails and is dismissed with costs.

*Appeal dismissed.*

(2) 38 Ind. Cas. 191; 1 P. L. W. 85; 2 P. L. J. 69.
(3) (1878) 8 Ch. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 26 W. R. 685.

## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1401 OF 1914.

February 23, 1917.

*Present*:—Mr. Justice Shah Din.

NIAZ ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

SHER AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Finding of fact—Burden of proof, wrong view of allocation of—Punjab Courts Act (III of 1914), s. 41.*

A wrong view of the allocation of the burden of proof is a good ground for setting aside a finding of fact in second appeal.

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 27th March 1914, reversing that of the Subordinate Judge, 1st Class, Jhelum, dated the 8th August 1913, decreeing the claim.

Mr. *Nand Lal*, for the Appellants.

Khwaja *Zia-ud-Din*, for the Respondents.

JUDGMENT.—The Pleader for the defendants-respondents frankly admits that the Divisional Judge was in error in holding that in this case the initial burden of proof was shifted on to the plaintiffs to prove want of legal necessity; but he urges that great weight must be attached to the general considerations set forth in the judgment of the Divisional Judge from which the only reasonable inference that can be drawn is that legal necessity existed for the alienation in dispute. In my opinion it cannot properly be held, on the strength of the general considerations mentioned by the learned Judge, that the alienor was justified in making the alienation in question in 1911, though they may well be taken into account in deciding whether the burden of proof as to legal necessity regarding the alienation in dispute was not a light one.

As the learned Divisional Judge has decided the case upon a wrong view of the allocation of the burden of proof, I set aside his judgment and decree and remand the case to the District Judge for re-decision. Costs in this Court will be costs in the cause. Counsel's fee Rs. 16.

*Case remanded.*

DHARAM DASS *v.* SADHO PRAKASH.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 222 OF 1915.
(CONNECTED WITH FIRST APPEAL No. 249 OF 1915.*)
April 3, 1917.
*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.
*Mahant* DHARAM DASS—DEFENDANT—APPELLANT
*versus*
SADHO PRAKASH AND OTHERS—DEFENDANTS AND PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 92—Management of trust—Court, discretion of—Custom—*Sangat *of Nank Shahi* Udasis—Mahant, *appointment of.*

In a suit under section 92 of the Civil Procedure Code, 1908, a Court has complete discretion in arranging for the management of a trust to which the section applies, although it is the duty of the Court to take into consideration such matters as the wishes of the founder (where these can be ascertained) and also the past history of the institution and the way in which the management has been carried on theretofore. [p. 180, col. 2.]

In the *sangat* of Nanak Shahi *Udasi Sadhus* at Benares the custom as to the appointment of a new Mahant is that the Mahant for the time being has the right to appoint a chosen disciple, or *chela*, to succeed him on his death. [p. 181, cols. 1 & 2.]

**First appeal from the decision of the Subordinate Judge, Benares, dated the 16th March 1915.**

Mr. *Hari Bans Sahai*, for the Appellant.

The Hon'ble Dr. *Sundar Lal* and Messrs. *Harendra Krishna Mukerji* and *Harnandan Prasad*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—These are two connected appeals arising out of two suits brought in the Court of the District Judge of Benares with regard to the administration of a public trust. There is in the city of Benares a *sangat*, or monastery, of Nanak Shahi *Udasi Sadhus*, which has appertaining to it certain immoveable property in the shape of land, houses and trees. The manager of the trust is the Mahant, or religious head of the society, and it is not denied that the office ordinarily descends to the chosen disciple, or *chela*, of the deceased Mahant. In the year 1910 certain persons interested in the management of the trust obtained the permission of the Legal Remembrancer to institute a suit under the provisions of section 92 of the Code of Civil Procedure for the removal of the trustee and the preparation of a scheme of management. The trust property was then in the possession of Sadho Prakash as Mahant, and with him were associated two persons named Makund Prakash and Sewa Das. By a decree dated March 1st, 1911, the District Judge of Benares removed these persons from the management and appointed one Baba Bichittar Singh as trustee. There was an unsuccessful appeal against this decree, and finally Baba Bichittar Singh died in September 1913 without having obtained effective possession of the trust property. Two persons named Mahant Makund Singh and Baba Hari Das appear to have asserted independently some sort of claim to succeed as of right to the office conferred by order of the Court on Baba Bichittar Singh; but nothing effective was done, and the management of the trust remained in confusion. Under these circumstances two distinct applications were made to the Legal Remembrancer for permission to institute suits under the provisions of section 92 of the Civil Procedure Code, in order to obtain fresh directions from the District Court regarding the management of the trust. The Legal Remembrancer probably found it difficult, on the materials before him, to draw any distinction between the two sets of applicants; and on March 17th, 1914, he passed two separate orders, one in favour of each of them.

Two suits were accordingly instituted in the Court of the District Judge of Benares. In Suit No. 2 of 1914, instituted in April 1915 of that year, the plaintiffs were Govinda Nand, Daya Nand and Atma Nand, all described as "Nanak Shahi Udasis", residents of Benares city. In Suit No. 3 of 1914, instituted on the 21st April 1914, the plaintiffs were Mahant Dharam Das and Saran Das, also described as "Udasis" and residents of Benares city. In each suit the defendants originally impleaded were Sadho Prakash, Makund Prakash and Sewa Das, the trustees removed from office under the decree of March 1st, 1911, the allegation being that they had continued in effective possession and management of the trust property, in consequence of Baba Bichittar Singh's failure to secure the benefits of the decree in his favour. In

*See 40 Ind. Cas. 182.—*Ed.*

each suit the plaintiffs at a later stage impleaded Mahant Makund Singh and Baba Hari Das as persons claiming an interest in the matter through Baba Bichittar Singh deceased. The plaintiffs in Suit No. 3 of 1914 went a step further. It appears that, after the two suits had been instituted, a question was raised by Sadho Prakash and the original defendants as to whether this *sangat* at Benares was not to be regarded as dependent in some way on what has been described as a "parent institution" in the city of Amritsar. One Lachhman Prakash, as Mahant of a monastery at Amritsar, came forward to assert a right of interference in the affairs of the trust now in suit. He purported to make over the management to a body known as the *Panchaiti Akhara* of *Udasi Sadhus*. Documents were executed by Sadho Prakash on the 15th April 1914, and by Lachhman Prakash on 28th April 1914, purporting to give some sort of legal colour to these arrangements. The plaintiffs in Suit No. 3 of 1914 proceeded accordingly to implead, *first*, Lachhman Prakash of Amritsar, and *secondly*, a group of defendants understood to represent the *Panchaiti Akhara*. The plaintiffs in Suit No. 2 of 1914 refused to implead these persons, and resisted a contention that they were in any way necessary parties to their suit.

The District Judge has tried the two suits together, in the sense that they were regularly set down for hearing on the same dates. He has written identical judgments and passed practically identical decrees in the two suits. At the same time he has kept the suits distinct and separate in important respects. He has not impleaded the plaintiffs in Suit No. 3 as defendants in Suit No. 2, or *vice versa*. He has not merely repelled the contention that Lachhman Prakash of Amritsar and the representatives of the *Panchaiti Akhara* were necessary parties to Suit No. 2 of 1914, but he has not apparently even considered the question whether it might not be advisable for him to bring them on the record as persons "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit," under the very wide powers conferred on the Court by the provisions of Order I, rule 10, of the Code of Civil Procedure. Finally, we have failed to discover on the record of either suit any formal order to the effect that evidence taken in the one suit may be treated as evidence in the other.

The identical decrees passed in two suits are to the following effect:—

(*a*) Govinda Nand, one of the plaintiffs in Suit No. 2 of 1914, is appointed trustee of the disputed trust in succession to Baba Bichittar Singh deceased, and the entire trust property has been declared vested in him.

(*b*) It is declared that all the other parties to both the litigations, including, therefore, the plaintiffs in Suit No. 3 of 1914 and those defendants to that suit who were not impleaded at all in Suit No. 2 of 1914, "be divested of any right or interest" in the trust property.

(*c*) Govinda Nand is directed to take possession of the *sangat* and of the trust property, with a declaration that this right will descend to "his successors" after him; and there is a brief declaration as to the objects of the trust.

The effect of the procedure adopted in the Court below has been to land us in a perfect quagmire of legal technicalities. I may say at once that these could all have been avoided if the learned District Judge had made a free and intelligent use of his powers under Order I, rule 10, of the Code of Civil Procedure. I have no doubt that those powers ought to have been exercised in order to make the plaintiffs in Suit No. 2 of 1914 defendants in Suit No. 3 of 1914, and *vice versa*. It would also have been advisable for all the defendants finally brought upon the record of Suit No. 3 of 1914 to have been formally impleaded also in the connected suit.

In this connection I would add a further remark which may be found useful as a direction to District Courts in dealing with other suits of this nature. There can be no doubt that, in appointing a trustee in a suit brought under section 92 of the Code of Civil Procedure, the choice of the Court is not limited to the array of parties in the suit before it. The duty of the Court is to appoint the most suitable persons available, whether originally impleaded in the litigation or not. Nevertheless, I think that the person whom the Court proposes to appoint should always be formally impleaded as a defendant before the final decree is passed. The terms of Order I, rule 10,

of the Civil Procedure Code are obviously wide enough to justify such an order. Indeed I am of opinion that the trial of the suit will always be simplified if the Trial Court, as soon as it has evidence before it suggesting a particular person as a suitable trustee, should call upon that person to file a written statement, expressing his willingness to accept the office and putting forward his own qualifications. All the parties concerned will then have timely notice of what is proposed to be done, and will not be able to contend in appeal that they were taken by surprise, or prevented from proving that the person eventually appointed to the trusteeship was not really qualified for the post. Moreover, the Appellate Court will not then be faced by the anomaly of having before it an appeal by an unsuccessful litigant against a decree in favour of a person who was not formally a party to the suit in the Court before.

In the two appeals now in question we were faced at the very outset by technical difficulties regarding the array of parties. First Appeal No. 222 of 1915 was filed by Mahant Dharam Das, the principal plaintiff in Suit No. 3 of 1914. He impleaded as respondents all the persons who had been on the record of that suit as defendants; but he did not implead Govinda Nand, the newly appointed trustee, though the whole object of his appeal was to obtain the reversal of that gentleman's appointment. He was naturally met at the outset by the objection that no order passed in an appeal to which Govinda Nand was no party could possibly have the effect of reversing the decree in Govinda Nand's favour. On the other hand, the connected First Appeal No. 249 of 1915 was filed by the representatives of the *Panchaiti Akhara*. The objection was at once taken that this appeal was technically an appeal against the decree in Suit No. 2 of 1914, to which suit these appellants had not been made parties at all.

We endeavoured to meet these difficulties in the first instance by formally adding as respondents to each of the appeals all the parties to the connected appeal not already impleaded in each case; but this did not altogether obviate further controversy as to the validity and legal effect of our order.

In considering the legal position of the parties, as the two records now stand before us for disposal, I do not think it necessary to invoke the principles laid down in *Sir Dinshaw* v. *Sir Jamsetji* (1) as to the general effect of decrees passed in suits under section 92 of the Code of Civil Procedure, though I believe those principles to be sound. As regards the representatives of the *Panchaiti Akhara* I take it that they have appealed against the decree appointing Govinda Nand trustee of the property in suit. A decree to this effect was passed in Suit No. 3 of 1914, to which these persons were parties, as well as in Suit No. 2 of 1914, to which they were not parties. I am not at all sure that these appellants are themselves responsible for the fact that their appeal has been treated, in the preparation of the record, as one solely against the decree in Suit No. 2 of 1914. I put my point in this way: the appellants in First Appeal No. 249 of 1915 either have appealed against the decree in Suit No. 3 of 1914, or they have not. If they have not, they remain bound by its terms; for it was a decree passed in a litigation to which they were parties, and within the competence of the Court to pass, even if Suit No. 3 of 1914 had been the only litigation before it. I am content to take it that these representatives of the *Panchaiti Akhara* are in substance appealing against both decrees, or at any rate are undoubtedly appealing against the decree which they could not afford to ignore, namely, the decree in Suit No. 3 of 1914. The difficulty as to Govinda Nand's not having been formally impleaded in Suit No. 3 of 1914 I would lay aside as a mere technicality. I think there ought to have been an order formally adding him as a defendant in that suit; but I hold that when the Court below passed a decree appointing him trustee of the endowment, a decree which, I must repeat and insist upon the point, the Court was just as competent to pass in Suit No. 3 of 1914 as in Suit No. 2 of 1914, it did in effect make him a party to the former of these suits as well, to this extent at any rate that he ought to have been impleaded as a respondent in any appeal

(1) 2 Ind. Cas. 701; 33 B. 509 11 Bom. L. R. 85 5 M. L. T; 301

against the decree in Suit No. 3 of 1914. I, therefore, regard the order of this Court adding Govinda Nand as respondent to First Appeal No. 222 of 1915 as one which it was within the competence of this Court to pass, and which removes any formal defect which there might otherwise be about the array of parties in this appeal.

I now proceed to deal with both these appeals on the merits, treating them, in the first instance, as if they were both of them appeals against the decree passed in Suit No. 3 of 1914. I propose to pass a separate order on First Appeal No. 249 of 1915, dealing with that appeal on the assumption that it can be regarded as an appeal against the decree in Suit No. 2 of 1914.

In the memorandum of appeal filed by Mahant Dharam Das there are nine paragraphs. The seventh contains an allegation as to the improper exclusion of evidence, which was not pressed in argument. The eighth attacks the declaration in the decree as to the objects of the trust in one small matter of detail; the point is of little importance, but it has not been shown to us that the decision of the Court below was wrong. In the ninth there is a suggestion that that the wording of the decree is defective and that it is not clear what the Court below meant by vesting the trusteeship in Govinda Nand and his successors. I have no doubt the District Judge meant that Govinda Nand would have the right to nominate a suitable disciple or *chela* to succeed him, just as the Mahant had always done during the previous history of the foundation.

The remaining pleas amount to nothing more than this, that Govinda Nand is not a fit and proper person to be trustee of this endowment, and that the appellant Dharam Das is. This question is complicated by somewhat vaguely worded pleas asserting the right of the appellant to be appointed, and suggesting that there has been no proper inquiry into "the custom and practice" of this monastery. In this connection it seems necessary to lay stress on the fact that there is no plea to the effect that the property in suit does not appertain to a "trust created for public purposes of a charitable or religious nature", within the meaning of section 92 of the Code of Civil Procedure. Of course the appellant Dharam Das could not possibly take this point; he was himself suing under that section. The pleadings of Lachhman Prakash of Amritsar and of the defendants representing the *Panchaiti Akhara* are perhaps a little ambiguous, but I do not find that the right of the Court to deal with all the property in suit under section 92 of the Code of Civil Procedure was ever definitely challenged. These suits must, therefore, be distinguished from all suits in which the position of the Mahant of a monastery, or similar association, has been claimed to be that of a "corporation sole," or in which the litigation has been between persons claiming as of right that the office of Mahant had vested in them and in which none of the parties concerned had invoked the provisions of section 92 of the Civil Procedure Code. The law applicable to suits under this section is laid down in the case of *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (2). The Court has "complete discretion" in arranging for the management of a trust to which this section applies. No doubt it is the duty of the Court to take into consideration such matters as the "wishes of the founder" (where these can be ascertained), and "also the past history of the institution and the way in which the management has been carried on heretofore;" but the question which we have to determine is merely whether there has been a proper exercise of discretion on the part of the Court below. That the said Court was within its jurisdiction in appointing Govinda Nand is simply beyond question.

Nor can any party be heard to plead any right purporting to be derived by any transfer or devolution from Mahant Sadho Prakash of a date subsequent to the decree of March 1st, 1911. The effect of that decree was finally to divest Sadho Prakash and the two defendants impleaded along with him of all title to the office of Mahant of this *sangat*, or to the management of this trust, and of all right to possession in respect of the trust property.

(2) 35 Ind. Cas. 30; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 43 C. 1085.

From the date of that decree nothing remained to Sadho Prakash which he could transfer to anybody else by deed, or which could devolve on any one else by virtue of any supposed relinquishment or surrender. Moreover, the decree of March 1st 1911 appointed a new trustee; it thus extinguished the right of any person to succeed by inheritance or under the custom of the institution, in the event of the death of Sadho Prakash or of his voluntarily vacating the office. There has in fact been no such vacating of the office by Sadho Prakash; he was removed by the decree of a competent Court, and it is sheer contumacy on his part to profess to be able to transfer the trusteeship, or to surrender it in favour of any other person, after the date of the decree.

Once these points are clearly apprehended there remains no force whatever in First Appeal No. 222 of 1915. The reasons given by the District Judge for refusing to appoint Mahant Dharam Das to the trusteeship are perfectly sound. The man was trying to run with the hares and hunt with the hounds. He actually accepted a deed of gift, dated February 1st 1913, from Sadho Prakash, and the learned Judge had, in my opinion, good reason for regarding him as belonging to the "same gang" as Sadho Prakash and his co-defendants. I strongly suspect his suit of having been largely collusive, at any rate to this extent that it was intended as a counterblast to Suit No. 2 of 1914, and was filed in the hope that in any event the management of the trust might be retained by the knot of dishonest trustees whom the decree of March 1st, 1911, was intended to displace. There is no force in the plea that Govinda Nand was disqualified from the office of Mahant by anything in the constitution of established customs of this *sangat*. The learned Judge has, in my opinion, shown due regard to the past history of the institution and the way in which the management had been carried on heretofore," when he decided that the thing most to be desired in the interests of the trust was the complete and final exclusion of Sadho Prakash and his friends from all concern with the management. As regards the "custom and practice" of the institution, the only custom established by reliable evidence is that the Mahant for the time being has the right to appoint a chosen disciple, or *chela*, to succeed him on his death. This custom could not be pleaded by any person claiming as heir to Sadho Prakash, for reasons already stated. If any party to the litigation could set up any arguable plea on the basis of this custom, it would be those defendants who claimed some sort of devolution from Baba Bichittar Singh, the trustee appointed by the decree of March 1st, 1911. These defendants have not appealed against the decree of the Court below, so that their case is not before us and need not be discussed.

I now pass on to consider the pleas taken by the appellants in First Appeal No. 249 of 1915, the representatives of the *Panchaiti Akhara*.

The one plea in their memorandum of appeal about which I have felt a certain amount of difficulty is the plea that their case was prejudiced by the procedure followed in the Court below. The suggestion is that, if they had been made defendants in Suit No. 2 of 1914, they could have produced evidence against the fitness of Govinda Nand for appointment as trustee, which they were precluded from producing by the procedure actually followed. I have come to the conclusion that there is no real substance in this plea. It seems to me that these appellants, as defendants in Suit No. 3 of 1914, had every opportunity of supporting the case set up by them, and that this case has been rightly decided against them on the merits. In view of the manner in which the two suits were conducted in the Court below, it is absurd to suggest that these appellants did not know that Govinda Nand was a candidate for appointment as trustee, or that a decree so appointing him could lawfully be passed in Suit No. 3 of 1914 as well as in Suit No. 2 of 1914. They never took up the position that the Mahantship was in fact vacant, and that they were prepared to put forward one of their own body as a preferential candidate for the office of Mahant, with claims superior to those of Govinda Nand.

They came into the litigation under the wing of Lachhman Prakash, the Mahant from Amritsar, and their written statement requires to be considered along with him. It is interesting to notice that Lachhman Prakash endeavoured to conceal the fact

that he had taken a deed of transfer from Sadho Prakash. He certainly had no arguable case on the basis of that deed of transfer, but it does not seem to me that he even attempted to set up such a case. What he said was that he himself, as Mahant of an institution known as the *Chitta Akhara* of Amritsar, was the true head of the *sangat* at Benares and manager of the trust in suit. He represented the local Mahant at Benares as a mere agent of his own, appointed by him and removable at his pleasure. He alleged that he had, in the exercise of his lawful authority, removed Sadho Prakash from the management and made over the same to the *Panchaiti Akhara*. The present appellants, as representatives of this institution, simply associated themselves with the above pleas. They have been decided against the appellants by the learned District Judge, and the case against them is, in my opinion, overwhelming. There is no evidence worthy of consideration of the alleged subordination of the Mahants of the Benares *Sangat* to the so called "parent institution" at Amritsar. In the suit decided in March 1911 Lachhman Prakash, though cognizant of the proceedings, never set up any such plea, but on the contrary came forward as a candidate for appointment by the Court, in the event of its removing Sadho Prakash. If it were necessary, I should even be prepared to hold that the point is concluded against Lachhman Praksh by the decree of March 1st, 1911.

I think the learned District Judge has taken a substantially correct view of the effect of this previous litigation on the present suits. I have said enough to dispose of all the points taken in the memorandum of appeal now under consideration. The plea that the Court below was mistaken in holding that the office of Mahant became vacant on the death of Baba Bichittar Singh might have required consideration, if it had been put forward by persons claiming to be his heirs and successors under the custom of the institution. In the mouth of the present appellants it does not mean that the office has vested *de jure* in any such heir or successor, but that Bichittar Singh (in spite of the decree in his favour) was never the Mahant of this institution, and that Lachhman Prakash was all along the true Mahant. The objections taken by the present appellants to the appointment of Govinda Nand are substantially those taken in the other appeal. If the plea had been taken that the learned District Judge had acted irregularly in basing his decree (appointing Govinda Nand) in Suit No. 3 of 1914 partly on the strength of evidence recorded in Suit No. 2 of 1914, it would have required consideration. It could never, in my opinion, have been more than a question of form; but it has not been taken at all in appeal, and we are under no obligation to discuss it.

I would, therefore, dismiss First Appeal No. 222 of 1915 with costs, including fees on the higher scale. I would add to the same decree a direction that, if First Appeal No. 249 of 1915 be regarded as an appeal against the decree in Suit Nos 3 of 1914, and in so far as it is susceptible of being so regarded, it do also stand dismissed, the question of the costs of that appeal being reserved for a separate order and a further decree which I propose to pass on the record of that appeal itself.

WALSH. J.—See my judgment delivered today in the connected First Appeal No. 249 of 1915.*

BY THE COURT.—This appeal is dismissed with costs including fees on the higher scale. It is also directed that if the connected First Appeal Nos. 249 of 1915 be regarded as an appeal against the decree in Suit No. 3 of 1914, and in so far as it is susceptible of being so regarded, it do also stand dismissed.

*Appeal dismissed.*

* See 40 Ind. Cas. 182.

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 249 OF 1915.
(CONNECTED WITH FIRST APPEAL NO. 222 OF 1915.*)

April 3, 1917.

*Present*—Mr. Justice Piggott and Mr. Justice Walsh.

*Mahant Baba* DHARAM DAS, SECRETARY, PANCHAITI AKHARA, AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Mahant* DHARAM DAS AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 92*—"Such

*See 40 Ind. Cas. 177—*Ed.*

*further or other relief as the nature of the case may require", meaning of—Separate suits for same trust, consolidation of—Judge, power of—Jurisdiction.*

The words "such further or other relief as the nature of the case may require" in section 92 of the Civil Procedure Code cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. [p. 184, col. 1.]

*Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*, 24 C. 418; 12 Ind.Dec. (N.S.) 946, relied upon.

Where more than two suits in the matter of the same trust have been sanctioned and are brought to trial, although with different parties, in the same Court, at the same time, on the same subject-matter, under the same circumstances and for the same kind of relief, a Judge has power under the Civil Procedure Code to consolidate the suits, that is to say, for the purpose of the hearing to merge them into one and treat them as one for all practical purposes. [p. 184, col. 1.]

A Judge making an express order consolidating such suits even without the consent of the parties acts within his jurisdiction. [p. 184, col. 1.]

First appeal from the decision of the District Judge of Benares, dated the 16th March 1915.

Mr. *Harendra Krishna Mukerji* and Hon'ble Dr. *Sundar Lal*, for the Appellant.

Messrs. *B. E. O'Conor*, *Gokul Prasad* and *Harbans Sahai*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This appeal is in substance covered by the orders passed in First Appeal No. 222 of 1915*. I think these appellants were placed in a difficulty by the procedure followed in the Court below, and that it is not easy to say whether the present appeal is to be treated as one against the decree in Suit No. 2 of 1914 or against the decree in Suit No. 3 of 1914, or both. I have made it clear that these appellants are bound, and must remain bound, by the decree in Suit No. 3 of 1914, as confirmed by this Court in appeal. In view of this fact it is of little practical importance what orders are passed in respect of the decree in Suit No. 2 of 1914. In my opinion that decree is open to formal objection in that it contains a direction that the parties to Suit No. 3, including those not impleaded at all in Suit No. 2, "be divested of any right or interest" in the property in suit. I have stated that the procedure followed in the Court below was, in my opinion, faulty; but having adopted that procedure, the learned District Judge should have been consistent. My order would be that the words "as well as in Suit No. 3" be removed from the decree passed in Suit No. 2 of 1914; but to avoid all possibility of misunderstanding, I would add to the decree of this Court a declaration that nothing in this decree must be deemed to affect or to modify in any way the decree passed in First Appeal No. 222 of 1915, or the rights or liabilities of any of the parties concerned under the decree of the Court below in Suit No. 3 of 1914.

I am quite aware that in modifying in any way the decree passed in Suit No. 2 of 1914 we must necessarily disregard the objection that the present appellants, not having been made parties to that suit, have technically no right of appeal against that decree. A sufficient answer to this would be that the modification may be treated as made in the exercise of the revisional jurisdiction of this Court.

As regards costs, I would leave the appellants in this appeal to bear their own costs in this Court and in the Court below, permit Swami Govinda Nand to recover his costs from the trust property, and affirm the order of the Court below leaving all other parties to bear thir own costs.

WALSH, J.—I agree. There are no merits in this appeal nor for that matter in the other. I think the view contended for by the *Panchayati Akhara* in this Court is inconsistent with the attitude adopted by them at the hearing of the suit. The Judge below has come to a reasonable conclusion on the facts and I see no reason for differing from him. He seems to have taken great pains to find out what is best for the trust and to have given every one concerned a full hearing. The orders now proposed are sufficient to correct any defect in the form of the proceedings in the Court below. I should have been prepared to go further and to add a direction that those in possession be ordered to hand over possession of all trust property in their possession to the successful plaintiff, even though no appeal was before us on this point. It is not so much a question of the rights of the parties as giving effect to the real decision of the Court in a matter of serious public concern. It seems to me anomalous, to say the least of it, that a fresh suit should have to be

*See 40 Ind. Cas. 177—*Ed.*

brought to enforce the order of the Court in a matter of this kind. In such cases the provisions of the law ought to be, and, in my opinion, are strong enough to compel actual physical compliance with the decision arrived at. As a matter of interpretation and by analogy to the established practice of the Chancery Court in England administering trusts, the words "such further or other relief as the nature of the case may require", which are expressly inserted in section 92 of the Code of Civil Procedure, cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. This has been clearly recognised in Bengal where the High Court with original jurisdiction has necessarily to consider this matter more frequently than in the High Court in this Province. *Vide Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1).

Further, where more than two suits in a matter of this kind have been sanctioned by the Legal Remembrancer and are brought to trial, although with different parties, in the same Court, at the same time, on the same subject-matter, under the same circumstances and for the same kind of relief, a Judge has clearly power under the Code to consolidate the suits, that is to say, for the purpose of the hearing to merge them into one and treat them as one for all practical purposes. That is in substance what this learned Judge did with the tacit consent of those who appeared before him, representing the different parties. In my opinion if he had made an express order to the same effect even without the consent of the parties, he would have been acting clearly within his jurisdiction and would have been taking what is obviously a convenient course. This view is supported by two very careful judgments, one by Mr. Justice Woodroffe in *Hukum Chand Boid* v. *Kamalanand Singh* (2) and the other by Mr. Justice Mookerjee in *Nand Kishore Singh* v. *Ram Golam Sahu* (3), with every word of which I agree.

BY THE COURT.—The decree of the Court below passed in Suit No. 2 of 1914 is modified to the extent that the words "as well as in Suit No. 2" appearing in the said decree are directed to be removed, with a declaration added thereto to the effect that nothing in the said decree must be deemed to affect or modify in any way the decree passed in First Appeal No. 22 of 1915, or the rights or liabilities of any of the parties concerned under the decree of the Court below in Suit No. 3 of 1914.

The appellants do bear their own costs in this Court and in the Court below. Swami Govinda Nand is permitted to recover his costs from the trust property, and the order of the Court below leaving all other parties to bear their own costs is affirmed.

*Decree modified.*

(1) 24 C. 418; 12 Ind. Dec. (N. S.) 946.
(2) 33 C. 927; 3 C. L. J. 67.
(3) 18 Ind. Case. 207; 40 C. 955 at p. 959; 16 C. L. J. 508.

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1102 OF 1914.

March 29, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

NANDA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

JAI CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 4, applicability of—Appeal, second—Person joined in appeal without consent—Issue, objection to, whether can be taken.*

The provisions of Order XLI, rule 4, of the Civil Procedure Code, do not apply to a case where the grounds of appeal are not common to all the appellants. [p. 185, col. 1.]

A person who is joined in an appeal without his authority cannot be regarded as an appellant. [p. 185, col. 1.]

No objection to the frame of an issue can be entertained for the first time in second appeal, where the issue is wide enough to cover all the grounds of attack and defence and all the available evidence has been produced before the Court. [p. 185, col. 2.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 8th January 1914, varying that of the District Judge, Kangra, dated the 21st July 1913, decreeing part of plaintiffs' claim.

The Hon'ble Bakhshi *Sohan Lal*, R. B., for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiffs-appellants against the defendants-respondents in which they sought to obtain a declaration to the effect that they were entitled to

"graze and rest their cattle in, and to take wood from Rakh Majheran of village Sagur," and an injunction directing the defendants-respondents not to obstruct them in the exercise of the said rights. The Primary Court framed the following issue: "Does the right of easement, as alleged by plaintiffs, exist in respect of the area in dispute"? and after a consideration of all the evidence produced by the parties and an examination of the *wajib-ul-arz* of the village came to the conclusion that the plaintiffs had established their rights and decreed the claim with certain reservations. Both the parties were dissatisfied with the decree as passed and preferred appeals to the learned Divisional Judge, who held that out of the plaintiffs appellants only those, five in number, who were residents of Tika Majheran, were entitled to the rights claimed. He accordingly dismissed the suit in so far as the other plaintiffs-appellants were concerned and granted a modified decree in favour of the aforesaid five persons. In the decree so granted he made certain provisions with regard to the exercise of those rights with which we are not now concerned. Against the decree of the lower Appellate Court the plaintiffs-appellants have preferred this second appeal through Mr. Sohan Lal and we have heard Mr. Tek Chand on behalf of the respondents.

An objection has been taken to the appeal as it stands on the ground that the appellants, Ghebru and Jai Kishen, had no authority to prefer an appeal on behalf of the five persons who reside in Tika Majheran and that inasmuch as the grounds of appeal are not common, Order XLI, rule 4, Civil Procedure Code, cannot be applied. Mr. Sohan Lal admitted that he had received instructions only from Ghebru and Jai Kishen and not from the five residents of Tika Majheran. In these circumstances we must hold that the said five persons had not authorised this appeal and cannot, therefore, be regarded as appellants.

With regard to the remaining plaintiffs-appellants Mr. Sohan Lal urged that the Courts below have wholly misunderstood the case and that the issue framed and tried did not cover all the claim. He alleged that his clients did not claim an easement over the land within the meaning of section 26 of the Indian Limitation Act but that they based their claim on custom. As a matter of fact no objection was taken to the issue either in the primary Court or in the grounds of appeal to the lower Appellate Court, and the issue is clearly wide enough to cover the question of custom. A reference to the judgments of the Courts below also establishes the fact that an enquiry into the custom alleged had been made. Mr. Sohan Lal also admitted that all the available evidence, documentary or oral, had been produced by both sides. It is clear that the parties have in no way been prejudiced by the form in which the issue was settled, and they clearly understood what the point at issue between them was, *viz.*, whether there was a custom by which the plaintiffs-appellants were entitled to graze and rest their cattle in Rakh Majheran and to cut wood therefrom. Mr. Tek Chand then raised the further objection that inasmuch as the question for decision was one relating to the existence of a custom this appeal could not be entertained for want of a certificate. Mr. Sohan Lal was constrained to admit the correctness of this objection. It is clear that the question involved in the case was one of custom and Mr. Tek Chand's objection, therefore, has force.

We accordingly reject this appeal with costs payable by the plaintiffs-appellants other than the five who reside in Rakh Majheran.

*Appeal rejected.*

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MADRAS HIGH COURT.

**FULL BENCH.**

APPEAL AGAINST ORDER NO. 73 OF 1916.

November 15, 1916.

*Present*:—Mr. Justice Abdur Rahim,
Mr. Justice Spencer and
Mr. Justice Srinivasa Aiyangar.

P. L. S. PALANIAPPA CHETTY *alias* SHANMUGAM CHETTY—DEFENDANT NO. 1—APPELLANT

*versus*

P. L. P. P L. PALANIAPPA CHETTY AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 TO 12——RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XL, r. 1, O. XLIII, cl.* (s)—*Receiver, order for appointment of, without naming person, nature of—Appeal.*

Per *Abdur Rahim and Srinivasa Aiyangar, JJ.*—The pronouncement by a Court that a Receiver should be

appointed without naming a specific person is an order under Order XL, rule 1, Civil Procedure Code, and is appealable under Order XLIII, clause (*s*). [p. 189, col. 1.]

*Venkatasami* v. *Stridavamma*, 10 M. 179; 3 Ind. Dec. (N. S.) 876; *Cursetji Dinshaw Bolton* v. *Gangaram Limbaji Gaikwad*, 30 Ind. Cas. 545; 17 Bom. L. R. 680; *Muni Lal* v. *Jagan Nath*, 33 Ind. Cas. 735, followed.

*Mathuria Debi* v. *Shib Dyal Singh Hazari*, 3 Ind. Cas. 430; *Birajan Kooer* v. *Ram Churn Lall Mahata*, 7 C. 719; 9 C. L. R. 203; 3 Ind. Dec. (N. S.) 1011; *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry*, 9 Ind. Cas. 582; 13 C. L. J. 157; *Srinivas Prosad Singh* v. *Kesho Prosad Singh*, 12 Ind. Cas. 745; 14 C. L. J. 489; *Narbadashankar Mugatram* v. *Keraldas Raghunathdas*, 29 Ind. Cas. 504; 17 Bom. L. R. 510, dissented from.

Per *Srinivasa Aiyangar*, J.—An order for the appointment of a Receiver is as much an order 'appointing a Receiver' as an order naming a particular person as Receiver and the right of appeal conferred by clause (*s*) of Order XLIII, Civil Procedure Code, against orders under Order XL, rule 1, is not restricted to any particular kind of order but against all orders under the latter rule. [p. 188, col. 1.]

Per *Spencer*, J, dissenting.—An order that a Receiver should be appointed is merely interlocutory and as it cannot be put into operation until some one is actually appointed, an appeal against the same is premature. [p. 189, col. 2.]

Appeal against the order of the Temporary Subordinate Judge, Sivaganga, dated the 25th February 1916, in Interlocutory Application No. 429 of 1915, in Ordinary Suit No. 46 of 1915.

This appeal coming on for hearing on the 10th and 13th July 1916, upon perusing the petition of appeal, the order of the lower Court and the material papers in the case and upon hearing the arguments of Mr. *S. Srinivasa Aiyangar* (Advocate-General) and Mr. *K. Bashyam Aiyangar*, for the Appellant, and of Mr. *T. Narasimha Aiyangar*, for Respondents Nos. 1 to 4, Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishaaswami Aiyar*, for Respondents Nos. 5 to 9, Mr. *S. E. Sankara Aiyar*, for Respondents Nos. 10 and 11, Mr. *K. Rajah Aiyar*, for 12th and 13th Respondents, Mr. *N. Kunjithapatham Aiyar*, for 14th Respondent, and Mr. *A. V. Viswanadha Sastri*, for 15th Respondent, the Court (Seshagiri Aiyar and Phillips, JJ.) made the following

## ORDER OF REFERENCE TO A FULL BENCH.

In this case the Subordinate Judge passed, what he calls, a judgment on the 25th February 1916 in which he expresses the opinion that a Receiver should be appointed, and which he concludes by saying: "The petition shall stand adjourned....." The same day an order in the terms of the judgment was issued. Against this order an appeal has been preferred to this Court. It is admitted that up to the date of the presentation of the appeal no Receiver was appointed. Mr. T. R. Ramachandrier has taken the preliminary objection that no appeal lies, as under rule 1, clause (1) (*a*) of Order XL, Civil Procedure Code, 1908, the order is not complete until a proper person is appointed Receiver. He is supported in this contention by *Narbadashankar Mugatram* v. *Keraldas Raghunathdas* (1) and *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (2): on the other hand, this view will be to a certain extent inconsistent with the Full Bench decision of this Court in *Venkatasami* v. *Stridavamma* (3), which holds that against the order refusing to appoint a Receiver there is an appeal. If an order refusing is covered by rule 1, clause (1) (*a*) of Order XL, which corresponds to section 503 (*a*) of the old Code, it is difficult to contend that the order which makes a pronouncement that a Receiver should be appointed is not within the rule. The decision in *Venkatasami* v. *Stridavamma* (3) was accepted as good law in *Sangappa* v. *Shivbasawa* (4) and in *Cursetji Dinshaw Bolton* v. *Gangaram Limbaji Gaikwad* (5) and was not dissented from by the other High Courts.

The practice of this Court, to which the learned Advocate-General drew our attention, is in accordance with the view that an appeal lies against the conclusion to appoint a Receiver, though no specific person is appointed.

There is another view which we are inclined to adopt. The pronouncement of the Court that a Receiver should be appointed should be regarded as an interlocutory statement, and until a person is appointed, there is no final order under rule 1 of

(1) 29 Ind. Cas. 504; 17 Bom. L. R. 510.
(2) 9 Ind. Cas. 582; 13 C. L. J. 157.
(3) 10 M. 179; 3 Ind. Dec. (N. S.) 876.
(4) 24 B. 38; 1 Bom. L. R. 502; 12 Ind. Dec. (N. S.) 562.
(5) 30 Ind. Cas. 545; 17 Bom. L. R. 680.

Order XL. If we are right in this opinion, the Subordinate Judge had no jurisdiction to issue an order on his conclusion that a Receiver should be appointed. Our inclination is, if this position is correct, to set aside the order as having been passed without jurisdiction, and to direct the lower Court to pass fresh orders on the petition.

However, as the questions are not free from doubt and as there are pronoucements of the other Courts which are seemingly inconsistent with the view of the Full Bench in this Court, we submit for the opinion of of the Full Bench the following questions: —

(*a*) whether the pronouncement of the Subordinate Judge that a Receiver should be appointed is a final order as contemplated by Order XL, rule 1, Civil Procedure Code;

(*b*) and, if so, whether such an order is appealable?

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This appeal coming on for hearing as per above order, on 30th October 1916, upon perusing the said Order of Reference and the material papers in the suit and upon hearing the arguments of the Counsel on both sides and the question having stood over for consideration till this day, the Court expressed the following

## OPINIONS.

SRINIVASA AIYANGAR, J.—The substantial question referred to us for determination is whether an order determining that it is just and convenient to appoint a Receiver, *i.e.*, an order for the appointment of a Receiver, and before a particular person is selected and appointed as such Receiver, is appealable.

The right of appeal is conferred by clause (*s*) of Order XLIII, which provides *inter alia* that an appeal shall lie from an order under rule 1 of Order XL; and that rule, omitting the portions not material for the present purpose, is in these terms: "where it appears to the Court to be just and convenient, the Court *may* by order (*a*) appoint a Receiver." The question is whether the order referred to above is an order under this rule.

When an application is made for the appointment of a Receiver, the most important question for determination is whether it is just and convenient to appoint a Receiver in the circumstances, and if the Court comes to the conclusion, that it is not shown to be just and convenient to appoint a Receiver, it must dismiss the application. This determination is made under rule 1, and there can be no doubt that that order is appealable. It was so decided in *Venkatasami* v. *Stridavamma* (3) on the construction of the corresponding provision of the old Code and as pointed out in *Cursetji Dinshaw Bolton* v. *Gangaram Limbaji Gaikwad* (5), the same construction must be placed on the similar provision in the new Code. The same view has been adopted in Allahabad in the recent case of *Muni Lal* v. *Jagan Nath* (6). But these decisions do not throw much light on the present question, for it can easily be contended that orders declining to appoint a Receiver and orders appointing a Receiver are exhaustive of the category of orders contemplated by rule 1, as the discretionary power to appoint a Receiver, conferred by that rule, includes the power to reject an application for such appointment, and nothing more. This was apparently the view taken by the learned Judges of the Bombay High Court in *Cursetji Dinshaw Balton* v. *Gangaram Limbaji Gaikwad* (5). The above rulings, however, emphasize the fact that the right of the appeal is not restricted to any particular kind of order under rule 1 and an appeal lies against all orders under that rule.

That an order determining that it is just and convenient to appoint a Receiver is an *order*, can, I think, scarcely admit of doubt; and the practice of the English Courts by which first an order is made for the appointment of a Receiver in Court, leaving the selection of the person to be appointed to be settled in Chambers, is conclusive of the question. The determination is, I think, more than 'a mere interlocutory statement', if that phrase means an expression of opinion, for there can be no doubt that the Court which determined that it was necessary to appoint a Receiver cannot change it of its own accord without a review or other proper proceeding. I also think that the Subordinate Judge in this case, on his determination that a Receiver should be appointed, was entitled to issue an order. In *Nothard* v. *Proctor* (7) the order ap-

(6) 33 Ind. Cas. 735.

(7) (1876) 1 Ch. D. 4; 45 L. J. Ch. 302; 33 L. T. 709; 24 W. R. 34.

pealed against appears to be an order for the appointment of a Receiver and not an order appointing a particular person as Receiver and no question was raised that it was not a judgment or order. If it is an order, the order is certainly one under Order XL, rule 1, as the Court determines the question of the necessity for the appointment of a Receiver under this order. Reference was made to section 94 of the Code as conferring the power to appoint a Receiver, but it is to be observed that that power can be exercised only if rules provide for such exercise and in accordance with those rules.

Even if I am wrong in this, and if the orders under Order XL, rule 1, can only be of two classes, one rejecting applications for Receivers, and the other, orders appointing Receivers. I agree with the contention of the learned Advocate-General that an order for the appointment of a Receiver is as much an order 'appointing a Receiver,' as an order naming a particular person as Receiver. In England an appeal is allowed without leave from an order appointing a Receiver and I can find no restriction of the right, in the decided cases, to cases where a Receiver is named in the order of the Court, or to orders passed in Chambers appointing a particular person. In a majority of cases, the appeal will be directed against the determination that it is necessary to appoint a Receiver rather than against the particular person appointed, as the person to be appointed is very often a matter of agreement between the parties. This construction may, no doubt, lead to a multiplicity of appeals as was pointed out in *Narbadashankar Mugatram* v. *Kevaldas Raghunathdas* (1), but I do not see how that can be avoided in any view; for instance one man may be appointed Receiver, and after appeal filed, he may resign and another appointed. In fact the learned Pleader who argued that the order was not appealable said that if after an appeal, the person appointed as Receiver resigned or ceased to be Receiver, the appeal abated, though the grounds of appeal may have been solely directed to challenging the necessity for the appointment of any Receiver. On the other hand, I do not see any purpose in compelling a party to wait till the Receiver is appointed and if, as held in *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (8) the appointment is not complete till the Receiver has completed the security, till such completion. If the order of appointment is discharged by the Appellate Court all the expense incurred in giving security will be thrown away. In *Perry* v. *Oriental Hotels Company* (9), where there was first an order by the Vice-Chancellor ordering the appointment of a Receiver and an order in Chambers appointing a particular person, L. J. Gifford, in appeal, though he discharged the order appointing the particular person, directed the successful appellant to pay the costs of the recognizances, remarking that the appellant should have come to the Court of Appeal before the recognizances were entered into.

There may again be a difficulty in ascertaining the date of appointment of a Receiver and the date may become important for calculating the period of limitation for appeal. The order appointing a named person as Receiver may appoint him Receiver and direct him to give security within a limited time, or may make the appointment conditional on giving security (Seton, Form No. 5, page 727, No. 1, page 767). In the former case if the person appointed does not give the security he may cease to be Receiver and any appeal presented in the meantime would become useless. In the latter case on security being completed no further order may be passed except the issuing of a warrant of appointment. The English practice appears to be, not to pass or enter the order till the security is completed: *Ridout* v. *Fowler* (10), but under the code procedure in the *mofussil* there is no such practice. In such a case what is the date of the order appointing a Receiver? In some cases and for some purposes on the completion of the security the appointment relates back to the date when it was made. Kerr on Receivers, page 163.

From the Forms printed in Seton, it will be seen that an 'order appointing a Receiver' includes an order directing that a proper

(8) 12 Ind. Cas. 745; 14 C. L. J. 489.

(9) (1870) 5 Ch. App. 420; 23 L. T. 525; 18 W. R. 779.

(10) (1904) 1 Ch. 658 at p. 662; 73 L. J. Ch. 325; 90 L. T. 147.

person be appointed Receiver, as well as an order appointing a named person (*cf.* Forms Nos. 13 and 19 with Nos. 16, 20, 28, section 1, Chapter XXXII). It is not, therefore, improper to speak of an order 'for the appointment of a Receiver' as an order 'appointing a Receiver' within the meaning of Order XL, rule, 1.

It has been the practice of this Court to allow appeals from these orders and I see no sufficient reason to hold that on the construction of the relevant rules and Orders this practice is illegal.

A different view has been taken in Calcutta first by Chitty and Richardson, JJ., in *Mathuria Debi* v. *Shib Dyal Singh Hazari* (11), where the learned Judges purported to follow the decision in *Birajan Kooer* v. *Ram Churn Lall Mahata* (12), which was an appeal against an order or expression of opinion by a Subordinate Judge submitting the name of a person to be appointed as Receiver under section 505 of the old Code. The order appointing a Receiver had to be made under section 503 and under section 588 an appeal was allowed only against orders under section 503.

Section 505 of the old Code is now repealed and with all respect, the order appealed against in *Birajan Kooer* v. *Ram Churn Lall Mahata* (12) has nothing in common with the order in the present case. In *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (2) Mookerjee and Teunon, JJ., held that an order not appointing a named person as Receiver is not appealable and the learned Judges came to that conclusion on the ground that an appeal lies only from a final order appointing a Receiver; and in the later case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (8) Mookerjee, J., delivering the judgment of the Court explained that there is no final or appealable order in cases where security is required from the Receiver, before the completion of the security. With all respect I am unable to accept this interpretation of the rule, for the reasons which I have already given. In Bombay the view of the Calcutta High Court has been adopted in *Narbadashankar Mugatram* v. *Kevaldas Raghunathdas* (1). Though the learned Judges came to the conclusion that an order for the appointment of a Receiver is an *order* and also an order under Order XL, rule, 1, yet for the purpose of appeal, only an order appointing a particular person is an order under rule 1. As an order rejecting an application for Receiver would also be appealable as an order under rule 1, the Bombay High Court, as I have already said, apparently holds that only two kinds of orders fall within the category of orders under Order XL, rule 1. I am not sure this is right and in any event I am not able to adopt the construction placed on the words 'order appointing a Receiver.'

In *Ramji* v. *Koman Das* (3) Chamier and Piggott, JJ., appear to take the same view, though as pointed out in the judgment, the order under appeal there was peculiarly worded.

In the face of such weighty authority against my construction of the section, I venture to express my opinion with great diffidence; but having come to a clear conclusion in the matter, and seeing that the question involved is really a question of practice which can be changed if necessary by the High Courts by rules, I would answer the questions referred to us as follows:—

(*a*) The pronouncement of the Subordinate Judge that a Receiver should be appointed is an order under Order XL, rule 1 and

(*b*) is appealable under Order XLIII, clause (*s*).

ABDUR RAHIM, J.—I agree in the conclusion arrived at by Srinivasa Aiyangar, J.

SPENCER, J.—I am of opinion that an appeal is premature if preferred before a Receiver has been appointed by name, for the reason that until that is done the order is merely interlocutory and does not completely dispose of the petition to appoint. At first sight it would appear impossible to contend that when a Court decides that a Receiver should be appointed but does not appoint, the order of the Court is one appointing a Receiver. It is, however, argued that if an order refusing to appoint which is passed without naming a person is appealable, an order directing a Receiver to be appointed without naming any one for the appointment must also be appealable. I cannot see that this is a logical consequence. The difficulty seems to have arisen out of

(11) 3 Ind. Cas. 430.

(12) 7 C. 719; 9 C. L. R. 203; 3 Ind. Dec. (N. S.) 1011.

(13) 27 Ind. Cas. 646; 13 A. L. J. 79.

he rulings which have decided that a refusal to appoint is appealable as an order made under Order XL (1) (*a*). This declares, "where it appears to the Court to be just and convenient, the Court may by order appoint a Receiver of any property whether before or after decree." When a Court altogether refuses to appoint a Receiver there is no question of the person to be selected as Receiver, and the proceedings have reached a further stage of finality than they have when a pronouncement is made that a Receiver must be appointed without appointing any one. A refusal to appoint necessarily disposes of the application to appoint but the other order does not do so. This may be seen from the instance out of which this reference has arisen. The Subordinate Judge, after recording his opinion that a Receiver should be appointed, adjourned the petition for a week to consider the questions (1) who should be appointed Receiver and (2) what instructions ought to be given him. It is easily conceivable that in certain circumstances there might be no objection to the appointment of a Receiver and yet there might be strong objections to the particular person selected for the office, as when one of the parties to the suit is made a Receiver. In other cases the opposing party may be indifferent to the personality of the nominee and may take his stand entirely on the question whether the occasion is a fit one for taking the control of the property out of the hands of the person in possession. I doubt whether it can have been the intention of the Legislature to allow two appeals, one from the first decision as to the need of a Receiver and another from the final order appointing a definite person by name to the office. It seems to me that such a procedure would involve a multiplicity of proceedings, a result which it is always desirable to avoid where possible. No one who wishes to appeal can complain of having to wait till a Receiver is actually selected, as the interval between the decision to appoint and the selection of an individual is unlikely to be long and in practice the Courts should generally be able to make them both simultaneous. If there is an interval, nobody's interests are prejudiced by waiting, as possession of property cannot be transferred until it is known who is to take it over.

An order that a Receiver should be appointed is in fact not an order that can be put into operation until some one is actually appointed.

I should, therefore, hesitate before attributing to the Legislature an intention to provide rights of appeal against incomplete and ineffective orders, even if the literal wording of the Code were not also against such a construction.

I am not much impressed by the next argument which is based on the tentative character that an order of appointment bears until security is actually furnished by the person appointed.

Whatever may be the practice in English Courts, the practice in India is to appoint a Receiver subject to his giving security to the satisfaction of the Court. Not only is there nothing forbidding this practice but the form of the warrant prescribed in Appendix F, Form 6, of the Code of Civil Procedure shows the practice to be correct. This warrant cannot be issued until an individual has been selected, as it is to be addressed by name to the person appointed in these words:—"you are hereby (subject to your giving security to the satisfaction of the Court) appointed Receiver," etc.

Of necessity the order of appointment must precede the giving of security, for till then it is not known who must give it and what is its extent. But an order is not the less a final order because it is conditional. Of course if a person appointed does not furnish security as directed, it may be necessary for the party applying for a Receivership order to put in a fresh petition nominating another person. The Court will not act in the matter without being moved. On the fresh application being admitted, the Court will consider it and pass orders, and this will naturally give rise to a fresh right of appeal. The costs incurred in giving security will usually be trifling in this country in the *mofussil* and at any rate they are incidental to the proceedings.

I am thus of opinion that the matter of furnishing security has no bearing on the questions before us, and with due respect I consider that the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (8), which decided that the order of appointment of a Receiver must date from the date of the person appointed giving the required security, is not good

law under the present Code of Civil Procedure. If the date of appointing a Receiver by name subject to his giving security be taken as the date from which to calculate the time for preferring an appeal under Order XLIII, rule 1 (*s*), then there will be no difficulty in ascertaining the date, as my learned brother Srinivasa Aiyangar, J., apprehends, for such appointments are made in open Court by the Courts in India and are dated on their pronouncement.

I may also observe that the Code contains another indication that such matters are intended to be subsidiary to the main order, in that no appeal is provided against directions under Order XL, rules 2 and 3, relative to the remuneration to be paid to and the security to be furnished by a Receiver appointed under rule 1 of the same order.

I will now proceed to consider the reported cases. On the point we have to decide, they are all one way. In this High Court alone there is hitherto no reported case directly on the point.

It has been decided in Calcutta in *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (2) and in *Mathuria Debi* v. *Shib Dyal Singh Hazari* (11) that the making of a Receivership order without nominating the Receiver is an interlocutory order and not appealable.

In Bombay and Allahabad the same conclusion has been reached in *Narbadashankar Mugatram* v. *Kevaldas Raghunathdas* (1) and *Ramji* v. *Koman Das* (13).

The cases of *Venkatasami* v. *Stridavamma* (3) which overruled *Subramanya Chetti* v. *Appasami Nayak* (14) and of *Sangappa* v. *Shivbasawa* (4) and of *Cursetji Dinshaw Bolton* v. *Gangaram Limbaji Gaikwad* (5) deal with a different question, *viz.*, whether an order refusing to appoint a Receiver is appealable. The learned Judges considered the effect of a decision come to by a Subordinate Court under section 505 of the old Code, which finds no place in the present Code. So far as they involve the principle that a mere determination to appoint a Receiver is not appealable, these cases support the view taken by me.

As regards the non-appealable nature of interlocutory orders, *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (8) is also to the same effect, but as already observed, it goes too far in treating conditional appointments as inoperative and, therefore, not final orders.

As the practice in England of first making an order in Court for the appointment of a Receiver and afterwards settling in Chambers who is to be appointed, differs from the practice of Indian Courts of appointing Receivers by name in open Court, we cannot get much assistance from English cases or from English books of reference. In India in matters of procedure Courts are governed by the Code. The answer to the reference must, therefore, simply depend on the interpretation to be placed on the language of the Order in the Code of Civil Procedure.

Instances have been cited in which this Court has heard appeals in cases where no Receiver had at the time of appeal been appointed by name; but when no objection was raised to the maintainability of the appeal, these can be no guide as to what the law is on the subject.

I agree with the opinion expressed by the two learned Judges who made the reference and with the decisions of the Calcutta, Allahabad and Bombay High Courts, and I would answer both questions referred to us in the negative.

*Reference answered in the affirmative.*

V.R.P.

(14) 6 M. 355; 2 Ind. Dec. (N. S.) 528.

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 28 OF 1916.

January 4, 1916.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

MAHABIR KASAIMDHAN—DEFENDANT—APPELLANT

*versus*

MAKHDUM BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 59—Mortgage, execution of—Executant, illiterate—Execution, proof of.*

Where a mortgage-deed purports to have been executed by the executant's affixing his mark to the same, it must be proved not merely that the mark is that of the executant, but also that it was affixed to the deed in the presence of witnesses. [p. 192, col. 1.]

GANGADARA MUDALI v. SAMBASIVA MUDALI.

First appeal against the order of the Subordinate Judge, Jaunpur, dated the 15th January 1916.

Dr. *S. M. Sulaiman*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand. The suit was on a mortgage. The contesting defendant, who is a transferee from the original mortgagor, put the plaintiff to proof of the execution and of the validity of the deed in suit, as well as of the passing of the consideration. The first Court held that the execution of the deed was proved, but it was not proved that it was attested by two witnesses as required by section 59 of the Transfer of Property Act The lower Appellate Court has held that the attestation by two witnesses was proved. If this had come before us as a clear finding of fact on the part of the lower Appellate Court, it is doubtful whether we could have interfered with it, but the learned Subordinate Judge arrives at his conclusion by a method of reasoning which is apparent from the judgment itself. He admits that no witness deposed that the mark of the executant Phagu, by which the said Phagu, being illiterate, purports to have executed the deed in suit, was affixed to the document in the presence of the said witness. There is no evidence on the record to that effect. The learned Subordinate Judge says that it is proved, by a witness named Makhdum Bakhsh, that the signature of the executant Phagu was appended to this document by the scribe of the document at Phagu's request, and he refers to the case of *Deo Narain Rai* v. *Kukur Bind* (1) as proving that this is sufficient execution. As a matter of fact the document with which we have to deal in the present case does not purport to have been executed by the scribe's writing the name of Phagu, on behalf of Phagu, at the request of the said executant. It distinctly purports to have been executed by Phagu's affixing his mark to the same. What follows below the mark is merely a statement, certified as being in the handwriting of the scribe, to the effect that the above is the mark of Phagu and that the said Phagu admits having executed the deed in question and received the consideration therefor. In the absence of any evidence that Phagu's mark was affixed to this document in the presence of any witness, the finding of the lower Appellate Court seems to be an impossible one. The decision of the first Court is right. We allow this appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs here and in the Court below. Costs in this Court will include fees on the higher scale.

*Appeal allowed.*

(1) 24 A. 319; A. W. N. (1902) 127.

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## MADRAS HIGH COURT.

LETTERS PATEET APPEAL No. 120 OF 1916.

November 1, 1916.

*Present*:—Mr. Justice Abdur Rahim,
Mr. Justice Spencer and
Mr. Justice Srinivasa Aiyangar.

GANGADARA MUDALI—DEFENDANT—APPELLANT

*versus*

SAMBASIVA MUDALI—PLAINTIFF—RESPONDENT.

*Registration Act (XVI of 1908), s. 77—'Refusal to register', meaning of—Suit to enforce registration—Jurisdiction of Court—Limitation.*

An order of a Registrar refusing to accept a document for registration on the ground that it was time-barred, is a 'refusal to register' within the meaning of section 77 of the Registration Act, and entitles the aggrieved party to sue for the enforcement of registration under the section. [p. 193, col. 2.]

There is no substantial distinction between refusal to accept a document for registration and a refusal to register within the meaning of section 77 read with sections 76 and 72. [p. 193, col. 2.]

*Narasimha Nayanevaru* v. *Ramalingama Rao*, 10 M L. J. 104; *Sivarama Pattar Kariakar* v. *Krishna Iyer*, 23 Ind. Cas. 23; 25 M. L. J. 307; 15 M. L. T. 233, followed.

*Kunhimmu* v. *Vyyathamma*, 7 M. 535; 8 Ind. Jur. 499; 2 Ind Dec (N s) 955, distinguished.

*Gangava* v. *Sayava*, 21 B. 699; 11 Ind. Dec. (N. s.) 470; *Balambal Ammal* v. *Arunachala Chetti*, 18 M. 255; 6 Ind. Dec. (N. s.) 527; *Veeramma* v. *Abbiah*, 18 M. 99; 6 Ind. Dec. (N. s.) 418, not approved.

The time for filing a suit under the section should be computed from the date of the appellate order of the Registrar refusing to register under section 72 or section 76, and not from the date of any prior order refusing to extend time. [p. 193, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Seshagiri Aiyar, reported in 34 Ind. Cas. 769, preferred against the decree of the

Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 113 of 1914 (O. S. No. 71 of 1913 on the file of the Court of the District Munsif, Tiruturaipundi).

FACTS of the case appear from 34 Ind. Cas. 769.

Mr. *A. V. Viswanatha Sastri*, for the Appellant.—The Act clearly draws a distinction between "accepting a document for registration" and "registering."

[ABDUR RAHIM, J.—I cannot conceive what possible difference there could be between "refusal to accept for registration" and a "refusal to register".]

The Act clearly draws such a distinction between accepting a document for registration and registering. Sections 23 to 27 prescribe the time for presentation for registration. Sections 28 to 31 describe the place of registration. Sections 32 to 76 Part VII-Part XI describe merely the preliminary process for registration. It is only after all these preliminaries are complied with that the duties of the Registering Officers commence. The duty of Registering Officers commence only from section 58. It is only when he records a "refusal to register," that an appeal will lie to the District Registrar and against such an order a suit will lie. In this case what happened was that the document was not admitted for registration. It is simply a preliminary act of the Sub-Registrar whether to accept it or not. He refused to accept it. It is only when the procedure prescribed in sections 58 to 63 is complied with that there can be a refusal to register. The following cases clearly support my view. *Gangava* v. *Sayava* (1), *Kunhimmu* v. *Viyyathamma* (2), *Balambal Ammal* v. *Arunachala Chetti* (3) and *Veeramma* v. *Abbiah* (4).

Mr. *K. S. Ramabhadra Aiyar* (*Amicus Curæ*).—The order is in effect one to refuse to register. Though the preliminaries are to be complied with by the Sub-Registrar, it is a part of his duty and his order directing to apply for extension of time is a refusal to register. *Narasimha Nayanevaru* v. *Ramalingama Rao* (5), *Sivarama Pattar Kariakar* v. *Krishna Iyer* (6) and *Kudrathi Begum* v. *Najibunnessa* (7) clearly support my view.

JUDGMENT.—We agree with Seshagiri Aiyar, J., that this case falls within section 77 of the Registration Act. This is in agreement with the interpretation adopted by our Court in *Narasimha Nayanevaru* v. *Ramalingama Rao* (5) and *Sivarama Pattar Kariakar* v. *Krishna Iyer* (6), and we also may point out that the rules framed under the Act are in accordance with this view.

A contrary view, it is true, has prevailed in *Gangava* v. *Sayava* (1), but the fallacy of the reasoning in that case, if we may say so with respect, lies in thinking that there is any substantial distinction between refusal to accept a document for registration and a refusal to register within the meaning of section 77 read with sections 76 and 72. Here the District Registrar did in fact refuse to direct registration of the document and nonetheless so because he made no enquiry as to whether the document was executed or not, proceeding on the ground that the document was in his opinion presented out of time.

We may mention that a ruling referred to at the Bar as *Kunhimmu* v. *Viyyathamma* (2) can be distinguished on the ground that the appeal to the Registrar in that case having been presented after the expiry of the prescribed period, it was considered as if there was no appeal and admittedly where there has been no appeal to the Registrar, no suit will lie under section 77. There are also some observations in *Balambal Ammal* v. *Arunachala Chetti* (3) and *Veeramma* v. *Abbiah* (4) which might be taken to support the interpretation put upon section 77 in *Gangava* v. *Sayava* (1), but they are in the nature of *obiter dicta*.

It is also argued that the suit is barred. But time should be computed from the order of the Registrar dated 1st February 1913, when on appeal he refused to direct the registration, and not from his previous order refusing to extend time.

The appeal is dismissed.

*Appeal dismissed.*

V. R. P.

(1) 21 B. 699; 11 Ind. Dec. (N. S.) 470.
(2) 7 M. 535; 8 Ind. Jur. 499; 2 Ind. Dec. (N. S.) 955.
(3) 18 M. 255; 6 Ind Dec. (N. S.) 527.
(4) 18 M. 99; 6 Ind. Dec. (N. S.) 418.
(5) 10 M. L. J. 104.
(6) 23 Ind. Cas. 23; 26 M. L. J. 307; 15 M. L. T. 233.
(7) 25 C. 93; 13 Ind. Dec. (N. S.) 63.

SHIVLAL MOTILAL *v.* BIRDICHAND JIVRAJ.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1450 OF 1915.

February 3, 1917.

*Present*:—Mr. Justice Macleod.

*Raja Bahadur* SHIVLAL MOTILAL—PLAINTIFF

*versus*

BIRDICHAND JIVRAJ AND ANOTHER—DEFENDANTS.

*Contract Act* (*IX of* 1872), *ss.* 233, 43—*Principal and agent—Agent personally liable—Principal, undisclosed—Suit against agent—Suit, subsequent, against principal, whether maintainable—Interpretation of Statutes—Illustration to section, value of.*

A plaintiff who has a right to sue both an agent and his principal under section 233 of the Contract Act is not competent, after he has sued one of them to judgment, to sue the other in a second suit. [p. 199, col. 2.]

Section 233 of the Contract Act enacts substantive law, laying down who shall be held liable, and not adjective law, defining the procedure by which the liability may be enforced. This section merely creates a joint liability so that judgment may be obtained against both principal and agent. [p. 196, col. 2; p. 197, col. 2.]

The illustration to section 233 shows that the words "hold them both liable" mean that the party dealing with the agent can join both the agent and the principal in one suit, and there is no suggestion that if he does so he is only entitled to a decree against one or the other and not against both. [p. 197, col. 2.]

Section 233 of the Contract Act gives the party dealing with an agent who is personally liable a double form of election. He can choose between suing both principal and agent jointly or electing to sue one of them. So that in any case if he sues one to judgment a suit against the other will be barred. But if he sues both and one consents to judgment that cannot be a bar to his continuing the suit against the other. [p. 199, col. 2.]

The real effect of section 43 of the Contract Act, is to deprive a co-contractor sued alone of his right to have his co-contractor joined with him in the action. It enables the plaintiff to get a decree against the one if he does not wish to or will not join the other; it does not enable him to file separate actions against both. It does not deprive the second co-contractor of his right to plead the previous judgment, or split up one cause of action into as many causes of action as there are joint contractors. [p. 199, col. 2.]

Case-Law discussed.

The proper course in the construction of a Statute is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. [p 196, col. 1.]

*Norendra Nath Sarcar* v. *Kamalbasini Dasi*, 23 I. A. 18 at p. 26; 23 C. 563; 6 M. L. J. 71; 6 Sar. P. C. J. 667; 12 Ind. Dec. (N. S.) 374 (P. C.); *Bank of England* v. *Vagliano*, (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676, relied upon.

The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. [p 196, col. 1.]

*Irrawaddy Flotilla Company* v. *Bugwandas*, 18 I. A. 121; 18 C. 620; 6 Sar. P. C. J. 40; 15 Ind. Jur. 403 & 542; 9 Ind. Dec. (N. S.) 413 (P. C.), relied upon.

An illustration to a section ought never to be allowed to control the plain meaning of the section itself and certainly it ought not to do so when the effect would be to curtail a right which the section in its ordinary sense would confer. [p. 196, col. 1.]

Mr. *Inverarity* (with him Mr. *Strangman*, Advocate-General, and Mr. *Desai*), for the Plaintiff.

Mr. *Kanga* (with him Mr. *Jinnah*), for Defendant No. 1.

JUDGMENT.—The facts of this case are no longer in dispute. In June 1913 the plaintiff advanced a large sum of money to one Bansidhar Mungtumal on the security of 2,000 shares in the Specie Bank. As the market rate for the shares was falling the plaintiff called upon Bansidhar to pay margin. On the 6th October 1913, Rs. 12,000 were paid as margin and in November, 295 shares of the Bank were handed to the plaintiff by way of further margin. These shares were not transferred into the plaintiff's name. The plaintiff sold 185 shares which were transferred into the name of the purchasers. Transfers signed by the Bombay Merchants Bank as vendors and by the plaintiff as purchaser for 100 shares were lodged with the Bank so that the shares might be transferred to the plaintiff's name. Transfers for the remaining 10 shares were not signed by the plaintiff.

On the 29th November 1913, an order was made for the winding-up of the Bank.

On the 6th February 1914, the plaintiff filed a suit against Bansidhar for the amount due on the account between them and for a declaration that the said Bansidhar was bound to indemnify the plaintiff against all liability in respect of the uncalled amount of capital on the shares pledged.

On the 20th February, Bansidhar was adjudicated insolvent.

On the 9th June, a decree was passed in plaintiff's favour for Rs. 82,924-8-7 with costs and further interest and the defendant was ordered to indemnify the plaintiff

against any calls that might be made by the Official Liquidator on the said 2,000 shares.

No dividend has been declared or is likely to be declared by the Official Assignee on the estate of Bansidhar. After this decree had been passed, the plaintiff discovered that Bansidhar had been acting as the agent for the present first defendant.

He had also had to pay to the Official Liquidator the sum of one lakh in respect of a call made on the contributories of the Bank under an order of the Court.

He filed this suit on the 23rd December 1915 against Birdichaud Jivraj and the Official Assignee praying (1) that the first defendant might be ordered to pay the said sum of Rs. 82,924-8-7 with interest from the 9th June 1914 and the costs of the suit filed against Bansidhar.

(2) That the first defendant might be ordered to pay the said sum of one lakh with interest.

(3) That the first defendant might be ordered to indemnify him in respect of all calls he might be required to pay in respect of the 110 shares.

(4) That the first defendant might be ordered to pay the costs of an order made by the Insolvency Court granting leave to join the Official Assignee as a party to the suit.

The first defendant in his written statement denied that Bansidhar was his agent.

However, it was proved, in a similar suit filed by the Standard Bank against Birdichand, that Bansidhar was acting as the first defendant's agent; and the first defendant's Counsel when issues were raised conceded this.

It was also held by the Appeal Court in that case that in the absence of a contract the Standard Bank was not entitled either to an indemnity in respect of calls to be made or to a decree for the amount actually paid in respect of a call.

I must, therefore, hold that the plaintiff is not entitled either to recover from the first defendant the said sum of one lakh or to an indemnity in respect of any amount he may have to pay in respect of the said 110 shares.

The real issue in the case is whether the plaintiff, having sued Bansidhar to judgment in Suit No. 172 of 1914, is entitled to maintain this suit against the first defendant.

The same point was raised in the suit filed by the Standard Bank. But it was proved in that case that the Standard Bank had before obtaining judgment asked Birdichand whether Bansidhar had been acting as his agent and he had replied in the negative. I held that Birdichand, having by a false denial prevented the Standard Bank from making their election, could not then claim that the Bank had made their election and my decision has been confirmed in appeal: *Birdichand Jivraj* v. *Standard Bank* (1).

I also expressed an opinion on the true construction of section 233 of the Indian Contract Act in favour of the Standard Bank but the question has been very much more elaborately argued before me and I shall deal with it without regard to that opinion. Section 233, which comes under the heading 'Effect of Agency on Contracts with Third Persons', says:—

"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

*Illustration.*

*A* enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton."

Under section 230 an agent is not personally liable in the absence of any contract to that effect. Such contract is presumed to exist—

1. Where the contract is made by an agent for the sale, or purchase of goods for a merchant resident abroad.
2. Where the agent does not disclose the name of his principal.
3. Where the principal though disclosed cannot be sued.

Mr. Jinnah has argued that section 233 codified what was the law in England. And in this connection it may be noted that Messrs. Pollock and Mulla in their

(1) 40 Ind. Cas. 167; 19 Bom. L. R. 341.

commentary on the Indian Contract Act do not even suggest that the section enacts anything different from the common law of England, while Messrs. Cunningham and Shephard dismiss the suggestion as improbable.

If the Legislature intended to codify the common law the wording of the section taken together with the illustration is most unhappy, but I am not concerned with what the Legislature intended to do. The question is, what have they done? In *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (2), the following passage from the judgment of Lord Herschell in *Bank of England* v. *Vagliano* (3) was quoted with approval:—

"The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, see if the words of the enactment will bear an interpretation in conformity with this view."

It may also be noted that the Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law: *Irrawaddy Flotilla Co.* v. *Bugwandas* (4). Now the natural meaning of the words "a person dealing with him (the agent personally liable) may hold both of them (agent and principal) liable," is to create a joint liability so that judgment may be obtained against both principal and agent. The illustration only goes so far as to show that the agent and the principal may be joined in one suit, but an illustration ought never to be allowed to control the plain meaning of the section itself and certainly it ought not to do so when the effect would be to curtail a right which the section in its ordinary sense would confer: Ameer Ali, page 100. It must be remembered that it was only under Order XVI, rule 4, of the Supreme Court Rules framed after the passing of the Judicature Act that it became permissible to join defendants alternatively liable in the same suit. That rule was reproduced in section 29 of the Civil Procedure Code of 1882 and is now represented by Order I, rule 3, of the Civil Procedure Code of 1908.

Section 233 enacts substantive law, laying down who shall be held liable, and not adjective law, defining the procedure by which the liability may be enforced. But it has been argued that the section follows the words of Willes, J., in *Calder* v. *Dobell* (5) decided in 1871, which was the leading case on the subject when the Contract Act was passed and must, no doubt, have been before the minds of the framers of the Act.

The plaintiff had entered into a contract with a broker called Cherry whom he knew to be acting as agent for a principal. Under pressure Cherry disclosed the name of his principal Dobell but put his own name to the contract at the plaintiff's request. In a suit on the contract against Dobell it was contended that Cherry having signed the contract parole evidence could not be admitted to show that there was a principal behind him, or in the alternative that the plaintiff had elected to hold Cherry liable by getting him to sign the contract. Both these contentions were overruled. On the second Willes, J, said:—

"I do not agree with Mr. Holker that two persons cannot be severally liable on the same contract. The question is whether there was anything in the circumstances of this case to negative or exclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former...There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantage of knowing the principal's name at the time."

On appeal, Kelly, C. B., said:—

"The contract was made in the name

(2) 23 I. A. 18 at p. 26; 23 C. 563; 6 M. L. J. 71; 6 Sar. P. C. J. 667; 12 Ind. Dec. (N. S.) 374 (P. C.).

(3) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

(4) 18 I. A. 121 at p. 129; 18 C. 620; 6 Sar. P. C. J. 40; 15 Ind. Jur. 403 & 542; 9 Ind. Dec. (N. S.) 413 (P. C.).

(5) (1871) 6 C. P. 483; 40 L. J. C. P. 224; 25 L. T. 129; 19 W. R. 409.

of Cherry, the agent: but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election. No doubt, the election being once determined, there is an end of the matter; as, where the agent has been sued to judgment."

From this it would appear that a suit against Cherry and Dobell would have been bad. A suit against one would have been a bar to a suit against the other and so far an election but until judgment was obtained the election was not determined, it would have been open to the plaintiff to file a suit against the other if the first suit was either dismissed, see *Raman* v. *Vairavan* (6) or discontinued: *Priestly* v. *Fernie* (7). In *Morel Brothers* v. *Earl of Westmoreland* (8) the plaintiffs sued husband and wife for the value of goods supplied to the wife. The wife confessed judgment under Order XIV and the plaintiffs were held to be debarred from proceeding against the husband. Lord Davey said:—

"I am disposed to think that if the proof had established a joint liability, the plaintiffs would not have been prejudiced by signing judgment under Order XIV against one of the joint debtors....But if the proof which they tendered at the trial shows, not a joint debt by the two, but an alternative claim against one or the other, then I think that by signing judgment against one they have, on the principle of *Scarf* v. *Jardine* (9), elected to take their remedy against that one, and cannot afterwards sue the other who is not jointly but alternatively liable."

Lord Halsbury said:—

"The plaintiffs might have sued either the agent or the principal....The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two."

(6) 7 M. 392; 8 Ind. Jur. 186; 2 Ind. Dec. (N. S.) 856.

(7) (1863) 3 H. & C. 977; 11 Jur. (N. S.) 813; 13 W. R. 1089; 34 L. J. Ex. 172; 13 L. T. 208; 159 E. R. 820; 140 R. R. 793.

(8) (1904) A. C. 11 at p. 15; 73 L. J. K. B. 93; 89 L. T. 712; 52 W. R. 353 20 T. L. R. 38.

(9) (1882) 7 A. C. 345; 51 L. J. Q. B. 612; 47 L. T. 258; 30 W. R. 893.

Now the illustration to section 233 shows that the words 'hold them both liable" mean that the party dealing with the agent can join both the agent and the principal in one suit, and there is no suggestion that if he does so he is only entitled to a decree against one or the other and not against both.

There is all the difference between saying that the party dealing with the agent can have the principal liable at the same time so that he can sue either the one or the other, which was the only procedure available in 1872, and saying that he may hold both agent and principal liable and sue both together. Whatever the Legislature may have intended, it appears to me that words "may hold both of them liable" mean that both may be sued to judgment in one suit.

But Mr. Desai wishes me to go further than this: he has argued that the words "may hold both of them liable" place the agent and the principal in the position of joint promisors and, therefore, that under section 43 the party dealing with the agent may sue either the agent or the principal to judgment and if the judgment is unsatisfied proceed against the other.

This brings me to that most debated question whether section 43 did place joint promisors in the same position as joint and several promisors or whether it merely took away the right of a joint debtor to be sued jointly.

In *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (10), it was held that a decree obtained against one of several joint makers of a promissory note was a bar to a subsequent suit against others. This was followed by the High Court of Madras in *Gurusami Chetti* v. *Samurti Chinna Manner Chetty* (11). In *Muhammad Askari* v. *Radhe Ram Singh* (12), however, Strachey, C. J., held that a judgment obtained against some of several mortgagors and remaining unsatisfied was not a bar to a second suit against other joint mortgagors.

(10) 3 C. 353; 1 C. L. R. 488; 2 Ind. Jur. 758; 1 Ind. Dec. (N. S.) 812.

(11) 5 M. 37; 2 Ind. Dec. (N. S.) 27.

(12) 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236.

Previous to that the Bombay High Court had assumed the doctrine in *King* v. *Hoare* (13) to be applicable in *Lukmidas Khimji* v. *Purshotam Haridas* (14) and *Laksmishankar Devshankar* v. *Vishnuram* (15), and in *Dick* v. *Dhunji Jaitha* (16) the decision of Strachey, C. J., was considered by Crowe, J., who came to the conclusion that section 43 merely took away the right of a joint debtor to be sued jointly and to plead in abatement. On the other hand there is an *obiter dictum* of Farran, J., in *Motilal Bechardas* v. *Ghellabhai Hariram* (17) that section 43 appears to make all contracts joint and several.

As a Court, therefore, of first instance, I should not be prepared to differ from previous decisions of this Court. Strachey, C. J., came to the conclusion that the rule in *King* v. *Hoare* (13) and *Kendall* v. *Hamilton* (18) was not applicable to India because its basis was the right of a joint debtor to have all his contractors joined in a suit to enforce the joint obligation, and as that right was excluded by section 43 the basis of the doctrine was absent and the rule became inapplicable. But with due respect that was not the ground given for his decision by Parke, B., in *King* v. *Hoare* (13) for he said at page 503:—

"The matters of form being disposed of, the question is reduced to one of substance, whether a judgment recovered against one of two joint contractors is a bar in an action against another.

"It is remarkable that this question should never have been actually decided in the Courts of this country....

"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of Record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, '*transit in rem judicatum*,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action* whether it be against a single person or many."

And at page 505:—

"If there be a judgment against one of two joint contractors and the other is sued afterwards, can he plead in abatement, or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself, and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself, and his co-contractor, so that he would be twice troubled for the same cause, or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt."

In *Kendall* v. *Hamilton* (18), Wilson & McLay and Hamilton were partners. Kendall had contracted with Wilson unaware of the existence of a third partner and having sued Wilson and McLay to judgment, that judgment was held to be a bar to a suit against Hamilton.

It was certainly the opinion of a marjoity of their Lordships that the question was one of law and not of procedure.

Lord Hatherley said:—

"The remark was quoted as having been made by a very eminent Judge, that this rule which was adopted in *King* v. *Hoare* (13) was entirely a rule of procedure. I do not take that view..."

The basis of the decision in *King* v. *Hoare* (13) was still more forcibly pointed out by Lord Blackburn:—

"But *King* v. *Hoare* (13) proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transit in rem judicatum*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and

(13) (1844) 13 M. & W. 494; 14 J. L. Ex. 29; 8 Jur. 1127; 2 D. & L. 382; 67 R. R. 694; 153 E. R. 206.

(14) 6 B. 700; 3 Ind. Dec. (N. S.) 922.

(15) 24 B. 77; 1 Bom. L. R. 534; 12 Ind. Dec. (N. S.) 588.

(16) 25 B. 378; 3 Bom. L. R. 234.

(17) 17 B. 6; Chitty's S. C. C. R. 336; 9 Ind. Dec. (N. S.) 4.

(18) (1879) 4 A. C. 504; 48 L. J. C. P. 705; 41 L. T. 418; 28 W, R. 97.

that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract."

Lord Selborne said:—

"Upon the legal question, I understand it to be the opinion of all your Lordships, that a second action cannot be maintained upon a cause of action which has once passed *in rem judicatum*; and that this principle is not affected by any of the changes of procedure introduced by the Judicature Acts."

The judgment of Strachey, C. J., appears to be founded on a dictum of Bowen, L. J., in *Hodgson, In re Beckett* v. *Ramsdale* (19):—

"The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King* v. *Hoare* (13). There is in the cases of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action...The rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognized by the law."

With the greatest respect it appears as if this dictum is at variance with the passages I have just cited from the judgments in *Kendall* v. *Hamilton* (18).

It would seem that the occasion for the rule being laid down was the failure of the first joint debtor on being sued to exercise his right to plead in abatement, with the result that the cause of action was merged in the judgment. There was no cause of action left on which the second joint debtor could be sued. How the second joint debtor on being sued could raise the defence of merger would be one of procedure. He might plead in abatement, and as the joint debtor could not be joined owing to the joint creditor having proceeded to judgment this plea would be successful, or as stated by Parke, B., he might plead the previous judgment in bar of judgment against himself.

In my opinion the real effect of section 43 was to deprive a co-contractor sued alone of his right to have his co-contractor joined with him in the action and it enabled the plaintiff to get a decree against the one if he did not wish to or would not join the other; it did not enable him to file separate actions against both. It could not have been intended to deprive the second co-contractor of his right to plead the previous judgment, or to split up one cause of action into as many causes of action as there were joint contractors.

But even assuming it did, I very much doubt whether the same argument could be applied to section 233 which, if my construction is correct, appears to give the party dealing with an agent who is personally liable a double form of election. He can choose between suing both principal and agent jointly or electing to sue one of them. So that in any case if he sued one to judgment a suit against the other would be barred. But if he sued them both and one consented to judgment, that would not be a bar to his continuing the suit against the other: *Dick* v. *Dhunji Jaitha* (16) and *Morel Brothers* v. *Earl of Westmoreland* (8).

Finally it has been argued that the plaintiff, not being aware of the existence of a principal whom he could hold liable, could not be said to have had a chance of making an election. This appears to be conclusively answered by the decision in *Kendall* v. *Hamilton* (18), the only difference in the facts of that case being that Wilson and McLay were agents for the undisclosed principals, namely, themselves and Hamilton and not for Hamilton only.

Lord Cairns said:—

"I think that when the appellants sued Wilson and McLay, and obtained judgment against them, they adopted a course which was clearly within their power, and to which Wilson and McLay could have made no opposition, and that, having taken this

(19) (1886) 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 223; 34 W. R. 127.

course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action...against another person. If Wilson and McLay had been the agents, and Hamilton alone the undisclosed principal, the case could hardly have admitted of a doubt; and I think it makes no difference that Wilson and McLay were the agents and the undisclosed principals were Wilson, McLay and Hamilton."

Adopting Lord Cairns' words, it is only by the fortunate accident of Birdichand being a solvent party that the plaintiff finds that he has a solvent principal of whom he was unaware. He did not contract with Birdichand except as an undisclosed principal, and this undisclosed person, with whom he entered into no agreement that he knew of, turns out afterwards to be liberated in consequence of the plaintiff not having taken steps to ascertain who were the contracting parties when he was bringing the action. The plaintiff having advanced the moneys looked to Bansidhar as the man who should repay, but he has since discovered another person whom he thinks he may sue.

As regards the second defendant I think he should not have been joined. I find all the issues in favour of the first defendant.

The plaintiff must pay the costs of the first defendant, except the costs of the issue whether the first defendant was the principal. The first defendant must pay the costs of the plaintiff on this issue.

*Suit dismissed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 262 OF 1916.

May 1, 1917.

*Present*: - Mr. Stuart, A. J. C, and Pandit Kanhaiya Lal, A. J. C.

*Lala* SHANKAR SAHAI - DEFENDANT—APPELLANT

*versus*

GAJADHAR PRASAD AND ANOTHER—PLAINTIFFS—PESPONDENTS.

*Rent-free under-proprietary holding—Resumption suit, whether maintainable—Oudh Rent Act (XXII of 1886), ss. 107G, H, E, 108, cl. (5A)—Declaratory suit against order passed under Chapter VIIA, maintainability of—Civil Courts, jurisdiction of—State, right of, to produce of soil in place of cash for payment of revenue, scope of—U. P. Land Revenue Act (III of 1901), ss. 79, 234—Determination of amount payable to proprietor—Revenue Board, powers of, to make rules—Rule 1, Cir. No. 63 of 1863.*

An under-proprietary holding, whether rent free or otherwise, being heritable and transferable, is, by its very nature, not capable of resumption. When it is rent free, the remedy of the superior proprietor is to apply to the Settlement Officer to have it assessed to rent under section 79 of the U. P. Land Revenue Act, unless the assessment is barred by a previous judicial decision or otherwise. If it is assessed to rent, and the rent is not regularly paid, the superior proprietor can only bring it to sale in execution of a decree for his arrears but cannot eject the under-proprietor. [p. 203, col. 1.]

The Revenue Board has power under section 234 to frame rules, laying down the manner in which the rent is to be determined, but it has no power to exclude any class of under-proprietors, whether paying rent or not, from the operations of section 79, for section 234 does not permit the Board to frame rules inconsistent with the U. P. Land Revenue Act, and section 79 does not recognize rules other than those relating to the determination of rent. The suggestion made in rule 18 that where no rent is reserved, a superior proprietor can apply to resume the rent-free under-proprietary holding, is not, therefore, justified by the provisions of section 234 or 79 of the U. P. Land Revenue Act; and in so far as it excludes rent-free under-proprietors from the operation of section 79, is devoid of any legal authority. [p. 203, col. 2.]

The propriety of an order of a Revenue Court granting or refusing under-proprietary rights under section 107H of the Oudh Rent Act, according as the conditions laid down there are satisfied or not, cannot be challenged in a Civil Court. But a declaratory suit on the ground of a pre-existing under-proprietary right in the presence of an adverse order of the Revenue Court is maintainable in the Civil Courts. [p. 205, col. 2.]

The conditions contained in rule 1 of Circular No. 63 of 1863 that groves planted by proprietors should, after the village has passed out of their hands, be deemed to be their under-proprietary holdings, if they have remained in possession of them, should be proved in each case, and cannot be inferred from uncertain data. [p. 205, col. 1.]

SHANKAR SAHAI *v.* GAJADHAR PRASAD.

The principle underlying the resumption or assessment is that the State is entitled by the ancient law of the country to a certain amount of the produce of the soil, for which revenue payable in cash has now been substituted, and it cannot be deprived of the same by any action of the owner of the soil, and that the latter is similarly entitled to recoup himself from the occupier or actual cultivator, unless the effect of the recoupment is to stultify his own contracts for valuable consideration. [p. 202, cols. 1 & 2.]

Appeal against the order of the Sub Judge, Unao, dated the 8th May 1916, upholding that of the Munsif, (South) Unao, dated the 9th August 1915.

Messrs. *Bisheshar Nath* and *Ram Bharosey Lal*, for the Appellant.

Mr. *H. N. Misra* and the Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The dispute in this case relates to land, forming part of No. 904, old *khasra*, corresponding with Nos. 1319-2, 1319-3 and 1319-4, new *khasra*. The land was at one time occupied by a grove and was held rent free. The trees were cut from the portion in dispute about 43 years ago, and that portion has since then been in the cultivation of the plaintiffs and their predecessors-in-title without any payment of rent to the defendant, who is the superior proprietor of the village in which the said land is situated.

On the 3rd November 1911, the present defendant instituted a suit against the present plaintiffs in the Revenue Court (Exhibit 13) for the resumption of the land or for the assessment of rent thereon under section 108, clause 5 (*A*), of the Oudh Rent Act (XXII of 1886). The Assistant Collector held that the present plaintiffs had acquired under-proprietary rights therein under section 107H of the said Act (Exhibit 12). His decision was upheld on appeal by the Deputy Commissioner, but reversed by the Commissioner, who came to the conclusion that the said land was held by them as tenants and could be assessed to rent under section 107G of the Act (Exhibit A1). The present plaintiffs then appealed to the Board of Revenue, but were unsuccessful. The Junior Member of the Board was of opinion that they had acquired under-proprietary rights under section 107H, but the Senior Member took the view that section 107H did not apply to a suit for assessment of rent under the last clause of section 107E of the Oudh Rent Act (Exhibit 1).

In the Revenue Court, the present plaintiffs had pleaded that they were the proprietors of the land occupied by the grove and had, at all events, under-proprietary rights therein. In the present suit they similarly pleaded that they were the owners of the land in suit and had also acquired an adverse title thereto by continuous possession from more than 12 years. They sought a declaration that they were the absolute proprietors of the said land, that the judgment and decree of the Board of Revenue, assessing rent on the same, were null and void, and that they had in any case under-proprietary rights in the same. The Courts below found that the plaintiffs had under-proprietary rights in the land in dispute, and repelled the contention of the defendant that an order passed by the Revenue Court under Chapter VII (*A*), assessing rent on the land, could not be challenged in the Civil Court. They accordingly passed a decree, declaring that the plaintiffs were under-proprietors and not mere tenants of the said land, and that the order of the Board of Revenue did not affect their rights.

It is disputed that an order, passed by the Revenue Court, resuming rent-free land or assessing it to rent, can be challenged in the Civil Court, if the person against whom the order was passed claims to be the superior proprietor of the land resumed or assessed, for it is obvious that no question of resumption or assessment can arise, if it is occupied by the superior proprietor himself. In the unreported case of *Ram Ghulam* v. *Gaya Prasad* (1) which was followed in *Matai Singh* v. *Ajudhya Singh* (2), suits by so-called *muafi* holders, claiming full proprietary rights in the land, on which rent had been assessed by the Revenue Court, were entertained and considered. It is also not disputed that a suit for a declaration that a certain person was or was not an under-proprietor was, as held in *Ram Pargash* v. *Raja Partab Singh* (3) and *Mohammad Abul Husan Khan* v. *Prag* (4), ordinarily maintainable in the Civil Court.

(1) Second Civil Appeal No. 283 of 1909.
(2) 24 Ind. Cas. 223; 17 O. C. 86.
(3) 2 Ind. Cas. 269; 12 O. C. 90.
(4) 38 Ind. Cas. 814; 20 O. C. 8; 21 M. L. T. 102; 15 A. L. J. 113; 19 Bom. L. R. 202; (1917) M. W. N. 232 32 M. L. J. 388; 21 C. W. N. 583 (P. C.).

SHANKAR SAHAI *v.* GAJADHAR PRASAD.

The question for consideration in this case is whether a person, claiming to be an under-proprietor, holding the land rent free, can contest the order of a Revenue Court, assessing him to rent as an ordinary tenant under section 107G of the Oudh Rent Act, in the Civil Court. Section 107B declares that all land, held rent free or at a favourable rate of rent, shall be liable to resumption or assessment or enhancement of rent, unless the holder establishes that he held the land under a grant, sanctioned by the Governor-General in Council or Chief Commissioner, or under a Judicial decision, passed prior to the 1st day of January 1902, or acquired it rent free or at a favourable rate of rent for a valuable consideration, previously to the commencement of the Oudh Land Revenue Act (XVII of 1876), and the right to resume which had previous to the commencement of the said Act not been barred by time, provided among other things that nothing in that section shall apply to any grants to which the provisions of section 79 of the North Western Provinces and Oudh Land Revenue Act, 1901, are applicable. Section 79 of the United Provinces Act, III of 1901, lays down that in Oudh, after declaring the assessment of a *mahal*, the Settlement Officer shall, in accordance with the provisions of the Oudh Sub-Settlement Act, 1886, so far as they are applicable and subject to the rules made under section 234, determine the rent to be paid by all under-proprietors in a *mahal*, whether holding a sub-settlement or not, and by all holders of heritable, non-transferable leases, holding under a judicial decision. Section 79 makes no distinction between rent-free under-proprietors and under proprietors paying rent, and it follows that the provisions relating to resumption, assessment or enhancement or rent-free holdings in the Oudh Rent Act do not apply to grants held by under-proprietors, on whom rent can be assessed at the time of the settlement under section 79. The principle underlying the resumption or assessment is that the State is entitled by the ancient law of the country to a certain amount of the produce of the soil, for which revenue payable in cash has now been substituted, and cannot be deprived of the same by any action of the owner of the soil, and that the latter is similarly entitled to recoup himself from the occupier or actual cultivator, unless the effect of the recoupment is to stultify his own contracts for valuable consideration or previous decrees. But the methods provided by the law for the assessment of rents on under-proprietors and on other rent-free holders are different.

The learned Counsel for the defendant-appellant contends that section 79 was not applicable to under-proprietors, holding land rent free, and relies in support of that contention on rule 18 of the rules framed by the Board of Revenue for the guidance of Settlement Officers in Oudh in determining rent under that section, and the decisions of the Board of Revenue in *Ram Datt Tiwari* v. *Court of Wards, Ajodhya Eatate* (5) and *Lachhmi Narain* v. *Special Manager, Nimgaon Estate* (6). The above rules were apparently framed under section 234, clause (*J*) of the United Provinces Land Revenue Act, which authorized the Board to frame rules for the guidance of Collectors and Settlement Officers in fixing rent under that Act. Rule 13 of the said rules provides that the rent of under-proprietary holdings must be determined with reference to the assets and revenue of the holding; and that it was not allowable to enhance the rent in proportion to the increase of revenue in the entire *mahal*, as was sometimes done. Rule 17 states that when a holding consisted at the last settlement of groves or other uncultivated plots, *on which no revenue was assessed or rent imposed, and the holding or a portion of it had since been brought under permanent cultivation* and assessed to revenue, rent should be fixed on the cultivated land at an amount equal to the revenue assessed thereon with an addition of 10 per cent.; and that in no other case, rent was to be imposed on an under-proprietary holding, which was held rent free under a decree. Rule 18 then goes on to say: "In some districts there are numerous holdings, which have been entered in the register of under-proprietary tenures, though they were not created by a decree of Court, but owe

(5) 24 Ind. Cas. 784; 1 O. L. J. 278.
(6) 39 Ind. Cas. 451; 4 O. L. J. 105.

their origin to private arrangements. The ownership of fields has been transferred by sale or deed of gift ; or a proprietor, when parting with his entire share in a village, has reserved the ownership of certain plots as *sir*. Where the agreement was that the possessor of the plot should pay the revenue assessed on them, the possessor should be treated as a proprietor and revenue should be separately assessed on the plots. When the agreement was that the plots should be held rent free, or on payment of rent, the tenure so created is under-proprietary. The custom of carving out an under-proprietary tenure is a very ancient one in Oudh, and is the origin of much of the rent-free under-proprietary *sir* now in existence. In cases when there is an agreement to pay rent, the rent is liable to re-adjustment under the preceding rules. *When no rent was reserved the holding must be treated as a rent-free grant, and like other under-proprietary rentrfree holdings be recorded as rent free. It is for the superior proprietor to apply, if he thinks fit, to resume the rent-free grant.* In the case of rent-free plots, above described, the Settlement Officer will record the amount of revenue payable on account of the plots, so that in the event of default by the superior proprietor, there may be no difficulty in enforcing the joint responsibility of the possessor under section 142 of the Revenue Act." (Board's Circular No. 2).

It does not appear what the Board of Revenue meant when they suggested that where no rent was reserved, it was for the superior proprietor to apply, if he thought fit, to resume the rent-free grant, for an under-proprietary holding, whether rent free or otherwise, being heritable and transferable, is, by its very nature, not capable of resumption. If it is rent free, the remedy of the superior proprietor is to apply to the Settlement Officer to have it assessed to rent, unless the assessment is barred by a previous judicial decision or otherwise. If it is assessed to rent, and the rent is not regularly paid, the superior proprietor can only bring it to sale in execution of a decree for his arrears: A superior proprietor has no right to eject an under-proprietor, and in that respect an under-proprietary holding differs materially from other rent-free holdings. The decisions of the Board of Revenue in *Ram Datt Tiwari* v. *Court of Wards, Ajodhya Estate*(5) and *Lachhmi Narain* v. *Special Manager, Nimgaon Estate* (6) seem to imply that section 79 of the United Provinces Land Revenue Act was not applicable to rent-free under-proprietors, but such an interpretation would be opposed to the express language of the section, which makes no exception and provides that a Settlement Officer shall determine, in accordance with the provisions of the Oudh Sub-Settlement Act, XXVI of 1886, and the rules framed by the Board of Revenue under section 234, the rent payable by *all* under-proprietors. The Board has power under section 234 to frame rules, laying down the manner in which the rent is to be determined, but it has no power to exclude any class of under-proprietors, whether paying rent or not, from the operation of section 79, for section 234 does not permit the Board to frame rules inconsistent with the Act, and section 79 does not recognize rules other than those relating to the determination of rent. The suggestion made in rule 18 that where no rent was reserved, a superior proprietor could apply to resume the rent-free under-proprietary holding was not, therefore, justified by the provisions of section 234 or 79 of the United Provinces Land Revenue Act; and in so far as it excluded rent-free under-proprietors from the operation of section 79, was devoid of any legal authority.

Chapter VII*A* of the Oudh Rent Act was added by the United Provinces Act IV of 1901 in substitution for sections 52—55 of the Oudh Land Revenue Act, 1876, which was repealed by the United Provinces Act III of 1901. Under sections 52—55 of the old Oudh Land Bevenue Act, 1876, suits for the resumption of land used to be filed in the Civil Court, and there was no provision in it, corresponding to section 107H of the existing Oudh Rent Act, authorising the Revenue Courts in resumption proceeding to treat land, held rent free from the 13th February 1856 or for 50 years and by two successors to the original grantee, as land held in under-pro-

prietary right. Section 30, clause (*d*), of the old North Western Provinces Rent Act (XII of 1881) contained a provision, declaring land so held for fifty years prior to the 22nd day of December 1873, by at least two successors to the original grantee, to be land held in under-proprietary right. When Chapter VII (A) was inserted in the Oudh Rent Act by the United Provinces Act IV of 1901, a somewhat similar provision was introduced in Oudh, conferring an under-proprietary right instead of proprietary rights on such rent-free holders under certain conditions. Section 107H does, however, not profess to exhaust the methods, in which under-proprietary rights can be acquired any more than the rules which the Oudh Sub-Settlement Act embodies do so [*Gouri Shunker* v. *Maharaja of Bulrampore* (7), *Murad Bakhsh* v. *Raja Mumtaz Ali Khan* (8) and *Raja Bhagwan Bakhsh Singh* v. *Mazhar Husain* (9)]. Section 107H only provides an extra method in which under-proprietary rights can be adjudged or conferred, and the last proviso to section 107B of the Oudh Rent Act indicated that pre existing under-proprietary rights, governed by section 79 of the United Provinces Land Revenue Act, are not affected by it.

The decision in *Rup Narain* v. *Badri Prasad* (10) is also relied on in support of the contention that the Civil Courts have no power to re open an issue, determined in the resumption proceeding, and grant a declaration of under proprietary rights with respect to land, which the Revenue Court has allowed to be resumed. But all that was held in that case was that a person could ask the Revenue Court to grant him a declaration of under-proprietary rights under section 107H, and whether the Revenue Court granted it or refused it, according as the conditions laid down in that section were satisfied or not, the propriety of that order could not be challenged in the Civil Court. If under-proprietary rights have existed from before either under a settlement decree or under a grant from a superior proprietor or otherwise, it is immaterial to enquire from what date or by how many successors to the original grantee, they were held rent free. Such a question only arises where there is no previous grant or settlement decree, or where the rights have not otherwise been enquired prior to the date of the resumption proceeding. Where they have not been so acquired, it is open to the Revenue Court to determine under section 107H, whether in certain contingencies the person claiming them ought to be treated to be an under-proprietor in future or not.

In the present case there is no satisfactory evidence to show that the plaintiffs or their predecessors-in-interest held the grove in question as under-proprietors at any time prior to the resumption proceeding. The village in which the grove in question is situated belonged at one time to a family of Qanungos, one of whom was Lachhmi Narain, who was the owner of a one-third share therein. He mortgaged his share to Raja Gauri Shankar, the ancestor of the defendant, some time in 1829, and the mortgagee and his successors-in-interest were in possession of his share from that time. The first summary settlement was made with the Qanungos, but after the confiscation of Oudh, the second summary settlement was made with the defendant's predecessor-in-title, and a *sanad* was granted to him conferring on him absolute proprietary rights in the village. The under-proprietors were at that time asked to put forward their claims in the Settlement Court within a certain time (Exhibit A 7) and in pursuance thereof some of the members of the family of Qanungos, inculding Jeorakhan Lal, a kinsman of Sheo Charan Lal, through whom the plaintiffs claim to derive their title, applied for a declaration of their under-proprietary rights in regard to certain plots of land and got a decree. But the grove in dispute was not included by them in their claim. Sheo Charan Lal filed no suit. The grove in dispute was accordingly recorded at the first Regular Settlement in the name of Sheo Charan Lal as a tenant (Exhibit 8 and A 2).

Subsequently a dispute arose between Sheo Charan Lal and the predecessors-in-title of the present defendant about another grove No. 977, old *khasra*, in respect of which Sheo Charan Lal was similarly recorded as a tenant. Sheo Charan Lal had got the grove

(7) 6 I. A. 1; 3 Sar. P. C. J. 873; 4 C. 839; 3 Suth. P. C. J. 567; Rafique and Jackson's P. C. No. 53; 3 Ind. Jur. 124; 2 Shome L. R. 189; 2 Ind. Dec. (N. s) 532 (P. C.).

(8) 4 O. C. 31.

(9) 9 O. C. 167 at p. 168.

(10) 3 Ind. Cas. 667; 12 O. C. 225.

cut and wanted to bring the land under cultivation, but he was ejected by the superior proprietor. He then filed a suit against him to recover possession of the land and got a decree from the Court of Mr. Dyson, the Deputy Commissioner of Unao, on the 17th March 1874. Relying on rule 1 of Circular No. 63 of 1863, Mr. Dyson held that Sheo Charan Lal had under-proprietary rights in the said land (Exhibit 11).

The Courts below, acting on the analogy of that judgment, held that the plaintiffs, who are the successors-in-interest of Sheo Charan Lal, similarly possessed under-proprietary rights in land No. 904, old *khasra*. But Sheo Charan Lal was the son of *Musammat* Rahsa, who was the daughter of Mansa, a member of the family of Qanungos; and there is nothing to show that the grove was originally planted by Mansa, or a member of the family of Qanungos at a time when they were the proprietors of the village. Jeorakhan Lal did not include it in his claim, and all that can be said with certainty is that Sheo Charan Lal held it at the time of the first Regular Settlement in his possession. The instructions contained in rule 1 of Circular No. 63 of 1863 applied to groves, planted by persons who at the time of planting them were proprietors of the village, and had remained in possession of them, though the village, in which they stood, had passed from their hands. The instructions directed that such groves should be dealt with as under-proprietary tenures or vestiges of the proprietary right held by the former proprietors; but those conditions have in each case to be proved and cannot be inferred from uncertain data. In *Umrao Singh* v. *Ali Raza Khan* (11) and *Girdhari Lal* v. *Jaswant Singh* (12), it was, moreover, held by this Court that the above Circular was meant only for departmental guidance and had not the force of law. The position of Sheo Charan Lal does not, therefore, appear to have been different from that of any other grove-holder, and the plaintiffs have no under-proprietary rights in the land in dispute.

(11) 1 O. C. 231 at p. 251.
(12) 15 Ind. Cas. 181; 15 O. C. 33.

Their alleged adverse title was negatived by the Court of First Instance, whose decree on that point has become final. No subsequent grant is alleged, and there being no proof of any pre-existing under-proprietary rights, the question whether as rent-free holders, they had satisfied the conditions laid down in section 107H of the Oudh Rent Act to entitle them to be treated as under-proprietors was one exclusively congnizable by the Revenue Court. The Revenue Court had power to determine whether the conditions laid down in section 107H had been established and to confer or withhold under-proprietary rights accordingly and the propriety of that order in the case of persons, who had no under-proprietary rights from before, cannot be challenged in the Civil Court The decision in *Oudh Behari* v. *Raja Prithipal Singh* (13) does not apply, because the circumstances of that case were entirely different and approximated to the conditions laid down in rule 10 of the Oudh Sub-Settlement Act (XXVI of 1886).

The appeal is, therefore, allowed and the plaintiffs' claim dismissed, but in the circumstances, no order is made as to the costs in any of the Courts.

*Appeal allowed.*

(13) 4 O & A. L. R. 405.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1271 OF 1915.

January 9, 1917.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

AIYAVIER—DEFENDANT No. 1—APPELLANT

*versus*

SUBRAMANIA IYER AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

*Hindu Law—Partition—Father or grandfather, right of, to effect partition—Share of co-parcener, gift of, validity of—Document, execution of—Mistake, nature and effect of, rendering document inoperative—Contract Act (IX of 1872), ss. 20, 21, 22.*

The right of a father to partition family property between himself and his sons and their sons includes the right to make such partition when the

sons are dead and the grandsons are living. A partition at the will of the father or grandfather can only be valid if it is equal and fair. [p. 207, col. 1.]

*Kandasami* v. *Doraisami Ayyar*, 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491 and *Murugayya* v. *Palaniyandi*, 36 Ind. Cas. 507; 31 M. L. J. 147; (1916) 2 M. W. N. 284, followed.

Ordinarily a co-parcener cannot make a gift of his undivided share; but once the co-parcenary is converted into a tenancy in common by means of a partition, there is no bar to a member of the family disposing of his share by gift and it can make no difference in law that both the partition and gift were effected by means of one and the same instrument. [p. 206, col. 2; p. 207, col. 1.]

*Baba* v. *Timma*, 7 M. 357; 8 Ind. Jur. 183; 2 Ind. Dec. (N. S.) 833 and *Ramanna* v. *Venkata*, 11 M. 246; 12 Ind. Jur. 177 & 453; 4 Ind. Dec. (N. S.) 171, followed.

The execution of a document by a person on a mistaken assumption which bears only on the motive which induced the execution, does not amount to 'a mistake as to his rights' which would justify a Court in passing a decree for its cancellation. [p. 206, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 325 of 1914, preferred against that of the District Munsif, Mayavaram, in Orginal Suit No. 23 of 1913.

Messrs. *T. V. Muthukrishna Aiyar* and *K. S. Jayarama Aiyar*, for the Appellant.

The Hon'ble Mr. *T. Rangachariar* and Mr. *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J. – The third defendant, who died since the institution of the suit at the age of about 92, was the grandfather of the plaintiffs, 1st and 2nd respondents, and divided brother of 1st defendant's father. He purported to make a settlement of the family property on 16th May 1911 by Exhibit A, and the question under litigation was how far, if at all, it was valid and binding. Both the Courts have found that the settlement was not brought about by the exercise of fraud or undue influence on the part of the 1st defendant, and I am unable to say that the finding is vitiated in law as contended for the 1st and 2nd respondents by the onus of proof being wrongly laid on them. The finding was arrived at on a consideration of all the circumstances and the evidence bearing on the point, and we are not at liberty to re-open it in second appeal. The Subordinate Judge, however, held that the settlement was validly revoked by the 3rd defendant by Exhibit B, inasmuch as according to him the 3rd defendant had executed Exhibit A under a mistaken notion that the plaintiffs were not of sound mind.

Exhibit B had been executed, not as the Subordinate Judge wrongly imagined after the institution of the suit, but before it, and it was under this mistake as to its date that he raised an additional issue and called for a finding upon the effect of the deed of revocation. It is undoubtedly strange that the plaintiffs should not have relied upon the alleged revocation in the plaint itself and it is also remarkable that the 3rd defendant should not have joined as a plaintiff in getting the deed of settlement set aside, if the allegations of the plaintiffs were well founded. However, that may be, even granting that the plaintiffs were not in fact of unsound mind as stated in Exhibit A, that in itself would not be sufficient in law to invalidate the settlement. Apart from any question as to whether the 3rd defendant, at the time he executed the deed, understood the nature of his act,—which plea so far as it was raised at the trial has been negatived—the mistaken assumption only bears upon the motive which induced the 3rd defendant to execute Exhibit A, and does not amount to a mistake as to his rights which would justify the Court in passing a decree for its cancellation.

It is clear from the provisions of Exhibit A by which the 3rd defendant sought to make a complete partition of the family properties, allotting to himself and the plaintiffs the shares to which they were respectively entitled, that he intended to create a division of status and property. That being so, there can be little doubt that the settlement which he sought to make of his own share was valid in law. It is undoubtedly settled law that a co-parcener cannot make a gift of his undivided share [see *Baba* v. *Timma* (1) and *Ramanna* v. *Venkata* (2)]. But once the co-parcenary is converted

(1) 7 M. 357; 8 Ind. Jur. 183; 2 Ind. Dec. (N. S.) 833.

(2) 11 M. 246; 12 Ind. Jur. 177 & 453; 4 Ind. Dec. (N. S.) 171.

*In re* SHIVLAL RATHI.

into tenancy in common, there is no bar to a member of the family disposing of his share by gift, and it can make no difference in law that both the partition and gift were effected by means of one and the same instrument.

But the settlement under Exhibit A is of specific properties (in Schedule A), which the 3rd defendant reserved to himself for his share. That a Hindu father can partition the family property between himself and his sons is well established in this Presidency. [See *Kandasami* v. *Doraisami Ayyar* (3) and *Murugayya* v. *Palaniyandi* (4).] It is hardly disputed that the fact that there are grandsons can be no bar to the exercise of his rights; for the grandsons' right is to stand in the shoes of their father. The question then arises, should the death of the son make any difference? There is no express decision on this point, but it is difficult to see why it should. The right of a father to partition family property between himself and his sons and their sons would seem to include the right to make such partition when the sons are dead and grandsons alone are living A partition at the will of the father or grandfather can only be valid if it is equal and fair. In this case, there can be no doubt that it was so, as was conceded before the District Munsif and is amply clear from the facts.

The Subordinate Judge's judgment must be set aside and the decree of the District Munsif restored with costs here and in the Court below.

OLDFIELD, J.—I entirely agree, and only wish to add a few words regarding the scheme of the settlement, Exhibit A, and Mr. T. Rangachariar's argument from its terms. It no doubt begins with a statement that the plaintiffs have lost their right to the settlor's properties because they are of unsound mind. But, looking to the fact that it was apparently drafted without legal advice and to the clear statements contained in its later provisions, I find no difficulty in holding that the settlor's intention was to make a partition, the reference to plaintiffs' incapacity having no effect, except that their shares were vested during its continuance in 1st defendant for their benefit. As they were never really incapable, that and the further provisions for 1st defendant's reversionary interest never took and never could have taken effect. Exhibit A being essentially an expression of intention to adopt a divided status, my learned brother's conclusion follows, that the gift of the settlor's share to 1st defendant is valid, notwithstanding that it is contained in the same document.

I, therefore, concur in the decree proposed.

*Appeal allowed.*

V.R.P.

(3) 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.

(4) 36 Ind. Cas. 507; 31 M. L. J. 147; (1916) 2 M. W. N. 284.

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## BOMBAY HIGH COURT.

INSOLVENCY PETITION NO. 46 OF 1917.

February 17, 1917.

*Present*:—Mr. Justice Macleod.

*In re* SHIVLAL RATHI—INSOLVENT.

*Presidency Towns Insolvency Act* (*III of* 1909), *ss.* 21, 13 (6)—*Adjudication order*, ex parte—*Adjustment, subsequent, with creditors—Annulment of adjudication —"Payment in full", meaning of—Creditor, duty of.*

A man who has been adjudicated an insolvent *ex parte* has a right to have the matter argued in Court.

A creditor has no right to get an insolvent adjudicated insolvent and then to receive from him a sum in adjustment of his claim. He is not entitled to use his petition as a lever to secure preferential treatment for himself. [p. 208, col. 2.]

It is not permissible for an insolvent, once an act of insolvency has been committed, to say that the act was discounted because he had gone round to his admitted creditors and forced upon them a compromise or adjustment. That is not a payment in full within the meaning of section 21 of the Presidency Towns Insolvency Act. Such payment must be in cash in full of the claims and the insolvent cannot escape the result of the adjudicating order and prevent the Court from inquiring fully into his affairs by adjusting his claims and getting the creditors to accept less than what they considered due to them, nor by thus getting a receipt in full can he then contend that his debts have been paid in full, and the adjudication order should be annulled. That can only be done by a composition or scheme of arrangement under the Act. [p. 209, cols. 1 & 2.]

It is only when the petitioning creditor's debt is disputed that the Court can stay proceedings under section 13 (6) of the Presidency Towns Insolvency Act. [p. 209, col. 2; p. 210, col. 1.]

Mr. *Inverarity*, for the Insolvent.

Mr. *Binning*, for the Official Assignee.

Mr. *Strangman*, for the Petitioning Creditors.

*In re* SHIVLAL RATHI.

JUDGMENT.—On the 22nd of January 1917, an order was made for the adjudication of Shivlal Rathi on the joint petition of the Mitsui Bussan Kaisha, Ld., the Japan Cotton Trading Co , Ld., the firm of Gosho Goshi Caisha, the firm of T. Nishimatsu & Co., and the Yokohama Kitto Kwaisha, Ld. The total amount due to the petitioning creditors was about $2\frac{1}{2}$ lakhs. The act of insolvency alleged was that Shivlal Rathi had given notice to the petitioners that he had suspended or was about to suspend payment of his debts, and the affidavit in support of the petition alleged that the insolvent approached the petitioners with a proposal that they should accept a composition and settle with him. He left with them statements showing his assets and liabilities, according to which he was in hopelessly insolvent circumstances. His total liabilities exceeded Rs. 10,00,000, while his assets were valued by him at a net sum of Rs. 1,00,000 or thereabouts. On the 20th January 1917, there was a meeting at the office of the second petitioners at which the said Shivlal Rathi and the representatives of the petitioners were present. At this meeting Shivlal Rathi said that he had suspended payment and that he could not pay the differences in respect of either the January or March or April *vaida* contracts. Shivlal Rathi also laid before the said representatives a statement of his position, and though at first he said that his assets were not worth more than Rs. 1,08,000, he subsequently after further discussion disclosed certain other assets which showed that his assets were worth about Rs. 1,50,000. He then expressed his willingness to pay a composition of four annas in the rupee. The petitioners were not satisfied that he had made an honest statement of his affairs and asked that he should pay a composition of eight annas in the rupee. He expressed his inability to pay so much and ultimately the meeting broke up. On the 20th of January 1917, the insolvent applied for a Rule to annul the adjudication order. He said that besides dealing in forward contracts he dealt in several businesses which were very lucrative. Besides these businesses he was in the habit of making forward contracts in which sometimes he suffered very heavy losses and in that year owing to the fluctuations in the cotton market he did suffer heavy losses and, therefore, he did see the petitioning creditors as stated in their affidavit and told them that he had suffered heavy losses and he was unable to pay the said losses in full if his creditors in the cotton contracts insisted on full payment. He went on to say that most of the people with whom he made such cotton forward contracts were Marwari dealers in the market, who were simply wagering, and, therefore, he really meant to say that he was unable to pay his debts in full, if he chose to pay both the debts which were legal and those which were wagering or illegal. The petitioning creditors seemed not to have fully understood him and they immediately rushed into Court and had him adjudged. That he never suspended his business nor did he ever suspened payment, that he had now adjusted with the petitioning creditors his accounts and he had paid them Rs. 1,02,044-11-6 in full adjustment of their accounts, and he annexed a copy of the letter written by the solicitors of the petitioning creditors to his solicitors showing the payment and consenting to the adjudication order being annulled. The letter is dated the 27th January 1917 from Messrs. Payne and Company to Messrs. Tyabji Dayabhai and Company. It says :—

"With reference to the interview we had with your Mr. Chandulal we beg to note that our clients the petitioning creditors have agreed to adjust their claims in full for the sum of Rs. 1,02,044-11-6 and on account thereof you have paid to our clients to day the sum of Rs. 1,00,000. We will have no objection to the adjudication being annulled on payment of the balance of the adjusted amount on Monday next and our costs of and incidental to the adjudication."

I granted the Rule, because a man who has been adjudicated *ex parte* has a right to have the matter argued in Court and I also granted the Rule because the conduct of the petitioning creditors appeared to be most improper. They had no right to get him adjudicated on the 22nd January 1917 and then receive apparently from the insolvent himself a large sum in adjustment of their claims on the 27th January. A creditor is not entitled to use his petition as a lever to secure preferential treatment for himself,

*In re* SHIVLAL RATHI.

As a matter of fact on the first affidavit of the insolvent there is no ground whatever for annulling the adjudication order. However, he has put in another affidavit of the 5th of February 1917. He distinguishes in that affidavit his legitimate dealings and what he calls purely wagering transactions. In paragraph 4 he says:—

"It is true that I have paid these wagering Marwaris on account of some of the transactions entered into by me but as admitted in paragraph 5 of the said affidavit (*i. e.*, affidavit of Jethabhi Virji of the 3rd of February 1917), I always said that I would have to suspend payment if my creditors in respect of wagering transactions did not accept a composition of four annas in the rupee. But I never said that I had actually suspended payment. In fact my liability to this *sutta* debt did not arise until the 25th day of January last and many of the transactions were even for March and April *vaidas*, and, therefore, I could not have suspended payment before the 25th day of January 1917 while the adjudication order was made on the 22nd January 1917."

Apparently what the insolvent wants to do is to divide his debts into two classes, *viz.*, debts due to persons who might not succeed if they filed suits against him, and debts which he admits. He says he is entitled to disregard the first class of debts entirely and make a compromise with the other class. I cannot assent to that contention. It is not for a person who has incurred debts to lay down to this Court that some of his debts are not recoverable. That would entirely depend upon the decision of the Court before whom the claims came for adjudication. At present all I know is that the insolvent made forward contracts with various persons, and until those contracts have been held to be wagering contracts, they are good contracts and consequently debts due on them are good debts and can be proved in the insolvency. But leaving that aside, the conduct of the insolvent since the 22nd January 1916 shows that the allegations made by the petitioning creditors in their affidavit on the petition were correct, and that he was not able to pay the admitted debts, nor is it permissible for him, once the acts of insolvency had been committed, to say that the acts were discounted because he had gone round to his admitted creditors and forced upon them a compromise or adjustment. That is not a payment in full within the meaning of section 21. Payment must be in cash in full of the claims and the insolvent cannot escape the result of the adjudicating order and prevent the Court from inquiring fully into his affairs, by adjusting his claims and getting the creditors to accept less than what they considered due to them; nor by thus getting a receipt in full can he then contend that his debts have been paid in full, and the adjudication order should be annulled. That can only be done by a composition or scheme of arrangement under the Act. From the insolvent's affidavit it is clear that very large sums have been paid since the 22nd January 1917 to some of his creditors. He says they have been paid by his friends. Those friends, as far as I can see, will find themselves in somewhat embarrassing circumstances. They would have as security the promises of the insolvent, which I have no doubt were given when the payments were made, that his assets would be charged with the repayment of those moneys. But as long as this order of adjudication stands, his assets are vested in the Official Assignee from the date of his acts of insolvency, and persons, who made those payments on his account, will not be able to go against those assets.

It has been contended that a considerable time will elapse before the questions with regard to the disputed claims can be decided and that will involve hardship upon the respondent. In the ordinary course it does not follow that the Official Assignee will disallow those claims which the insolvent now diputes. I have no doubt that the creditors will stoutly deny that they had been wagering with the insolvent and in any case whether the Official Assignee allows or disallows the claims then there will be an appeal to the Insolvency Court by either party against his decisions. Those questions will be very speedily decided. But that is not a ground on which an application to annul an order of adjudication can be supported when it is proved that acts of insolvency have been committed. It is only when the petitioning creditor's debt is disputed that the Court may stay proceedings

under section 13 (6). The insolvent, as I have said, cannot divide his debts into two classes and say that one class is negligible, and then go to the other class and say: "I am prepared to pay you a certain amount." It is suggestsd that those creditors have been paid in full by means of an adjustment and that is not a composition. That is an argument which is puerile. Those creditors have no doubt grasped the situation and are perfectly prepared to take six annas in the rupee on their claims, as a very satisfactory solution of their difficulties. Clearly on the insolvent's own statement of his assets, they would not be able to get so much in the insolvency. The fact remains that it is a composition and not a payment in full. Therefore, in my opinion, acts of insolvency have been committed and that is practically admitted by the affidavit of the insolvent, and in that case I cannot apply the provisions of section 21. I cannot say that the debtor ought not to have been adjudicated insolvent, and it has not been proved to the satisfaction of the Court that the debts have been paid in full.

Therefore, the Rule must be discharged.

The costs of those creditors who opposed the Rule to be added to their claims.

The Official Assignee's costs to come out of the assets.

*Rule discharged.*

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MADRAS HIGH COURT.

**FULL BENCH.**

ORIGINAL SIDE APPEAL No. 52 OF 1915.

November 21, 1916.

*Present*:—Mr. Justice Abdur Rahim,
Mr. Justice Spencer and
Mr. Justice Srinivasa Aiyangar.

ABDUL MAJEETH KHAN SAHIB—
APPELLANT

*versus*

C. KRISHNAMACHARIAR—
RESPONDENT.

*Muhammadan Law—Inheritance—Co-heirs, nature of estate of—Alienation by one co-heir in possession of estate, whether binding on others.*

If one of the co-heirs of a deceased Muhammadan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, such sale is not binding on the other co-heirs or creditors of the deceased. [p. 215, col. 2.]

*Pathummabi* v. *Vittil Ummachabi*, 26 M. 734; and *Hasan Ali* v. *Mehdi Husain*, 1 A. 533; 1 Ind. Dec. (N. S.) 423, disapproved.

Case-law and authorities on the subject reviewed and discussed.

Per *Abdur Rahim, J.*—The theory of Muhammadan jurisprudence, on which the right of succession and inheritance is based, is that even after death, the deceased's rights in his properties still inhere in him, to the extent necessary for meeting the funeral charges and the legal obligations and liabilities incurred in his lifetime and also for carrying out his wishes, as expressed in his last Will and testament, within the limits laid down by the law. [p. 212, col. 2.]

On the death of a Muhammadan, the inheritance vests in his heirs according to their respective shares, although in the administration of the estate the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs. It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies have been paid. [p. 212, col. 2.]

The co-heirs of a deceased Muhammadan take their shares in severalty, their rights being analogous to those of tenants-in-common, and not of members of a joint Hindu family. [p. 213, col. 1.]

According to the principles of Muhammadan Law one co-heir of a deceased Muhammadan has no right to deal with the shares of the other heirs. [p. 213, col. 2.]

Appeal from the judgment of Mr. Justice Bakewell, dated the 23rd March 1915, in Ordinary Original Civil Suit No. 381 of 1913.

This Original Side Appeal coming on for hearing on the 24th and 27th March 1916, upon reading the grounds of appeal, the judgment and decree of this Court in Civil Suit No. 381 of 1913 and the material papers in the suit, and upon hearing the arguments of Mr. *C. Venkatasubbaramiah*, for the Appellant, and of Mr. *C. P. Ramaswami Aiyar*, for the Respondent, and the case having stood over for consideration till 17th April 1916, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

JOHN WALLIS, C. J.—This is an appeal from a judgment of Bakewell, J., in a suit, brought by the Receiver appointed in a creditor's suit for the administration of the estate of a deceased Muhammadan, for a declaration that a sale-deed executed by the widow of the deceased was void and not binding on the creditors and was in any event inoperative except as to the extent of the widow's one-fourth share and for possession. The learned Judge held that the sale was valid only to the extent of the widow's one-fourth share, but gave the 1st defendant, her alienee, a charge on the whole property for

Rs. 3,452 paid by him in satisfaction of a mortgage-decree against the deceased with further interest on the mortgage-money till the date of payment. The learned Judge after discussing the authorities came to the conclusion, as against the creditors of the deceased on whose behalf the suit was brought, that the widow, even though she was in possession of all the properties of the deceased, had no authority to take upon herself the administration of the estate even to the extent of selling the suit properties to raise money to satisfy the mortgage-decree in respect of these very properties which had been passed against the deceased. For the appellant it is contended that this decision is opposed to *Pathummabi* v. *Vittil Ummachabi* (1).

The whole subject is one of considerable difficulty. If a Muhammadan appoints an executor, the executor has no doubt power to sell for the discharge of the debts of the deceased, and in the absence of the executor this could have been done by the *Kazi*. The High Courts, as is well known, have differed as to whether a sale under a decree obtained by a creditor against one of the co-heirs in possession of property of the deceased is binding on the other co-heirs who were not parties to the suit, and the question has been answered in the affirmative both in Calcutta and Bombay. In *Davalava* v. *Bhimaji Dhondo* (2), this was limited to the case where as here one of the co-heirs was in sole *de facto* possession of the whole estate and this limitation was adopted in *Pathummabi* v. *Vittil Ummachabi* (1), where it was further held that a co-heir in possession of the whole estate could equally sell property belonging to the estate in satisfaction of debts without any suit having been instituted and decree passed against such co-heir. At the same time the Court set aside as regards the other co-heirs the sale of item No. 11 to the 13th defendant in consideration of a debt of Rs. 25 and a further payment of Rs. 50, apparently on the ground that it was unnecessary and improper in the circumstances, though this is not expressly stated. This case was cited with approval on another point by Abdur Rahim, J., in *Hyderman Kutti* v. *Syed Ali* (3), with reference to the validity of sales by the *de facto* guardian of a minor. The learned Judge in the course of his judgment referred to the general rule relating to sales by a person professing to deal with another's property but without legal authority so to do, and observed that such sales are generally treated as *mauquf* or dependent, and upheld if made of necessity or if they are manifestly beneficial, and similar considerations may possibly apply in a case like the present. Bakewell, J., was apparently of opinion that the decision in *Pathummabi* v. *Vittil Ummachabi* (1) was inapplicable where, as in the present case, the alienation is being questioned by the other creditors. If the balance of convenience may be regarded, I am not sure that it is for the benefit of creditors any more than of co-heirs to lay down a rigid rule that alienations can be made only by the whole body of co-heirs or in a suit to which they are parties. The question is one of importance and difficulty, and as the authorities are by no means consistent, we have decided to refer the following question to a Full Bench:—

When one of the co-heirs of a deceased Muhammedan in posesssion of the whole estate of the deceased or of any part of it sells property in his possession forming part of the estate for the discharge of the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased, and, if so, to what extent?

PHILLIPS, J.—In this case the plaint property was alienated by a Muhammadan widow, who was in sole possession of the whole property belonging to her late husband, in order to discharge debts due by him. No doubt the sale was voluntary, but it purports to have been made because a creditor was threatening to execute a decree against the property, and the consideration for the sale was not paid until after execution had been taken out against the suit property, the widow and the other heirs being parties to the execution petition. Two of the other heirs admit that they took no

(1) 26 M. 734.
(2) 20 B. 338; 10 Ind Dec. (N. S.) 787.
(3) 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244.

interest in the property, because deceased's debts exceeded his assets but the Receiver of the deceased's estate now questions the validity of the alienation. If the sale to the appellant had been effected by Court it would apparently have been upheld both by the Calcutta and Bombay High Courts in accordance with the decisions in *Khurshetbibi* v. *Keso Vinayek* (4), *Davalava* v. *Bhimaji Dhondo* (2), *Muttyjan* v. *Ahmed Ally* (5) and *Amir Dulhin* v. *Baij Nath Singh* (6). In Allahabad, however, it has been held by the Full Bench that when the property of a Muhammadan intestate is sold in execution of a decree passed against the heirs in possession of the estate, the sale is not binding on an heir who was not a party, but in order to recover possession of his share that heir must pay the purchaser a proportionate amount of the decree-debt [*Jafri Begam* v. *Amir Muhammad Khan* (7)]. In this Court in *Pathummabi* v. *Vittil Ummachabi* (1) it was held that it was immaterial whether the sale was voluntary or effected by Court in execution of a decree, provided that the seller was in possession of all the effects of the deceased and the Bombay cases were followed, but in applying the law as regards sales in which only part of the consideration money was applied in discharge of a debt due by the deceased the principle laid down in *Jafri Begam* v. *Amir Muhammad Khan* (7) was followed, although that case is not referred to in the judgment. In *Jafri Begam* v. *Amir Muhammad Khan* (7) Mahmood, J., discusses fully the Muhammadan Law on the subject and criticises the rulings of the Calcutta High Court referred to above. The decisions in Bombay and Calcutta are not based on the same grounds and the view taken in *Pathummabi* v. *Vittil Ummachabi* (1) appears to be somewhat different to the view of other Courts. In these circumstances I agree in making the proposed reference to a Full Bench.

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This appeal coming on for hearing on the 30th and 31st October 1916 as per above order, upon perusing the Order of Reference and upon hearing the arguments of the Counsel on both sides and the question having stood over for consideration till this day, the Court expressed the following

OPINION.

ABDUR RAHIM, J.– The question referred to us is in these words: When one of the co-heirs of a deceased Muhammadan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased and, if so, to what extent? The answer must be in the negative.

On the death of a Muhammadan, the inheritance vests in his heirs according to their respective shares, although in the administration of the estate the funeral expenses, debts and legacies must be paid first, and it is only the residue that is available for distribution among the heirs. It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies have been paid. This is evident from the following facts: if an heir designated by the law dies after the death of the propositus, his share descends on his own heirs and does not lapse to the general estate. Each heir is entitled to the income that has accrued since the testator's death in proportion to his share and he can transfer his share by sale or gift subject, it may be, as to the latter form of disposition to such restrictions as are imposed by the doctrine of *musha*.

The theory of Muhammadan jurisprudence, on which the right of succession and inheritance is based, is that even after death, the deceased's rights in his properties still inhere in him, to the extent necessary for meeting the funeral charges and the legal obligations and liabilities incurred in his lifetime and also for carrying out his wishes, as expressed in his last Will and testament, within the limits laid down by the law. A deceased person is classed among persons of defective capacity and his rights and obligations are considered not merely with reference to matters pertaining to this world but also with respect to his spiritual concerns. The payment of his funeral expenses

(4) 12 B. 101; 6 Ind. Dec. (N. S.) 553.
(5) 8 C. 370; 10 C. L. R. 346; 4 Ind. Dec. (N. S.) 237.
(6) 21 C. 311; 10 Ind. Dec. (N. S.) 839.
(7) 7 A. 822; A. W. N. (1885) 248; 4 Ind. Dec. (N. S.) 636.

and debts is described as his last need. And as for testamentary bequests, it is stated that, according to strict juristic theory, they should not be lawful at all but have been sanctioned in order that the testator might make up for his shortcomings in life by making gifts to deserving objects.

It is argued that, as soon as a man is seized with 'death illness' (*i. e.*, illness which results in his death), the right of succession of his relatives comes into existence, although it remains in an inchoate state, that is, in the nature of a *spes successionis* until death actually takes place, and the heirs entitled to succession are not ascertained until then. It is upon this theory that the right to bequeath by Will is treated as a concession to the deceased and is limited to one-third of his possessions. The result is, on the death of a person his estate is to be divided in this way, one portion for the deceased himself equivalent to so much of the estate as is necessary and sufficient for meeting his funeral expenses, debts, obligations and bequests, the last not exceeding one-third of the estate, and what remains is to be distributed among the heirs according to their respective shares. Funeral expenses, debts and legacies are given preference because they are allowed by virtue of the rights of the deceased.

As far back as 1878, the Judicial Committee in *Bazayet Hossein* v. *Dooli Chund* (8) held that an heir-at-law was entitled to alienate his share, in spite of the fact that there were debts of the deceased still outstanding and it would not have been possible to hold this if the inheritance did not devolve on the heir on the death of the propositus. Mr. Justice Mahmood in *Jafri Begam* v. *Amir Muhammad Khan* (7) has fully discussed the question and I do not think it would be of any use to add anything more to his reasoning. As regards the nature of the tenure of the co-heirs' shares, the heirs of a deceased Muhammadan take their shares in severalty, their rights being analogous to those of tenants-in-common, and not of members of a joint Hindu family. [See *Abdul Khadar* v. *Chidambaram Chettyar* (9)].

There cannot be the slightest doubt, therefore, upon the principle of Muhammadan Law and also upon the authorities that one heir has no right to deal with the shares of the other heirs. In the Muhammadan system such a tenure of property is called *shirkat*, which literally means "participation" and in law, 'joint rights,' and which is translated as 'partnership' by Mr. Hamilton in his translation of the Hedaya.

The definition of *shirkat* as given by him is, "*shirkat*, in its primitive sense, signifies the conjunction of two or more estates, in such a manner that one of them is not distinguishable from the other. The term *shirkat*, however, is extended to contracts, although there be no actual conjunction of estates, because a contract is the cause of such conjunction. In the language of the law it signifies the union of two or more persons in one concern." (See Grady, Book XIV, page 217.) This definition, however, must be read with what follows and, so reading, it will be clear that *shirkat* is a generic term of law and applies both to joint ownership and to contracts of partnership. The former is called *shirkat ul-milk* which is translated by Mr. Hamilton as "partnership by the right of property;" and the latter, which is partnership proper in the sense of the English law, is called *shirkat-ul-akd*. In *shirkat-ul-milk*, the ownership acquired is either "optional," or "compulsive," to use the terms of Mr. Hamilton, and in the latter category are included the rights of co heirs. With respect to such rights it is laid down, "In this species of partnership (*i. e.*, the rights of two persons inheriting one property), therefore, it is not lawful for one partner to perform any act with respect to the other's share, without his permission, each being as a stranger with respect to the other's share. It is, however, lawful for either partner (*i. e.*, one of the heirs) to sell his own share to the other partner (*i. e.*, the co-heir) in all the cases here stated:—and he may also sell his share to others, without his partners' consent," excepting in certain cases with which we are not concerned.

(8) 4 C. 402; 5 I. A. 211; 3 Sar. P. C. J. 853; 3 Ind. Jur. 121; 2 Shome L. R. 169; 2 Ind. Dec. (N. S.) 255 (P. C.).

(9) 3 Ind. Cas. 876; 32 M. 276; 5 M. L. T. 201.

This is absolutely clear authority in proof of the position that one heir has no authority, in law, to deal with the shares of his co-heirs. In face of it it is not necessary to refer to other original text books. It is stated, however, in *Pathummabi* v. *Vittil Ummachabi* (1), that "if the creditor of the deceased can seek his relief against one of several co-heirs in a case where all the effects of the deceased are in the hands of that heir, it can make no difference whether the heir meets the demand by a *bona fide* voluntary sale, or the property is brought to sale in execution of a decree obtained against him." To the same effect is a decision of the Allahabad High Court in *Hasan Ali* v. *Mehdi Husain* (10). The statement in *Pathummabi* v. *Vittal Ummachabi* (1) was purely by way of *obiter dictum* and with all respect to the learned Judges, they failed to bear in mind that the provision of the Muhammadan Law, that a decree against one heir in possession of all the effects of the deceased is binding on all if obtained after contest, is part of the processual law of that system and is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rent of the heirs for the purposes of administration generally. The ground on which a decree against one of the heirs, in such circumstances, is treated as *res judicata* is, as stated in the books, that the decree in such cases is, in law, against the deceased and not against the particular heir who is made defendant in the suit.

In Hedaya the matter is discussed in the chapter relating to the duties of the *Kazi* and in some other text books in the chapter dealing with claims, in which chapters the rules of procedure of the Muhammadan system are mostly laid down. In dealing with the question whether where one of the heirs obtains a decree for the recovery of the property of the deceased in possession of a third person more than his share in that property should be made over to him in execution of the decree, it is stated that all the three Doctors, that is, Abu Haneefa and his two disciples, agree that the decree enures not only in favour of the heir who actually is the plaintiff but also of the heir who did not join on account of absence from the country, though there is a difference of opinion as to whether the decree-holder shall be given possession of more than his share. This is how the principle is enunciated in the Hedaya (Grady, page 349), "for anyone of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to, or by the deceased, whether it be debt or substance; since the decree of the *Kazi*, in such case, is in reality either in favour of or against a deceased; and any one of the heirs may stand as his representative with *respect to such decree*." The qualifying words "with respect to such decree", which I have italicised, are a material part of the proposition and, negative, by implication, the suggestion that, apart from a decree, of Court, a single heir represents the entire estate of the deceased and can deal with the shares of the co-heirs without their consent. In other text books of Muhammadan Law, such as *Bahrurraiq* and *Alimajullah*, the same proposition is laid down under the heading of 'Claims' Nowhere have I found any general statement that, apart from representation in suits, one heir is entitled by his acts to bind the shares of the others. The dictum to the contrary, therefore, in *Pathummabi* v. *Vittil Ummachabi* (1) and the decision in *Hasan Ali* v. *Mehdi Husain* (10) seem to be without sufficient authority and inconsistent with clear statements of the law in books of authority.

There are a number of rulings, especially of the Calcutta High Court, in which the rule of Muhammadan Law as to one heir representing the other co-heirs in suits has been adopted. [See *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (11), followed by *Muttyjan* v. *Ahmed Ally* (5), *Bussunteram Marwary* v. *Kamaluddin Ahmed* (12), and *Amir Dulhin* v. *Baij Nath Singh* (6).] In the Allahabad High Court, on the other hand, the decision of the Full Bench in *Jafri Begam* v. *Amir Muhammad Khan* (7), where it was held, dissenting from *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (11), that this

(10) 1 A. 533; 1 Ind. Dec. (N. S.) 423.

(11) 4 C. 142; 2 C. L. R. 223; 1 Shome L. R. 219; 2 Ind. Dec. (N. S.) 92.

(12) 11 C. 421; 10 Ind. Jur. 29; 5 Ind. Dec. (N. S.) 1041.

question is not governed by the Muhammadan Law, but by the Civil Procedure Code, has been followed in the later rulings of that Court [see *Dallu Mal* v. *Hari Das* (13).] In Bombay [*Khurshetbibi* v. *Keso Vinayek* (4)], the view taken by the Calcutta High Court on this point has been adopted by the learned Judges, though proceeding to a considerable extent on the analogy of the Hindu Law.

It is not necessary for us to pronounce any definite opinion upon this class of cases, which deal with the question how far a decree against one of the heirs of a deceased Muhammadan binds the others and under what circumstances.

So far as voluntary alienations are concerned, which alone form the subject-matter of reference, the Muhammadan Law is clear that one of the heirs of a deceased person is not competent to bind the other heirs by his acts.

SPENCER, J.—I agree with the judgment of Mr. Justice Abdur Rahim just now pronounced.

SRINIVASA AIYANGAR, J.—I agree. In the absence of any right in one of the heirs to represent the co-heirs, one of several co-heirs can only deal with his or her interest in the ancestor's property inherited by them. My learned brother has shown that there is nothing in the Muhammadan Law giving such a right to one of the co-heirs who may happen to be in actual possession of the whole of the ancestor's estate; such possession, it must be remembered, is presumably on behalf of all the co-heirs. He is not constituted the representative of the deceased and cannot administer his property even for the limited purpose of paying off his debts. In *Khiaraj-mal* v. *Daim* (14), Lord Davey, referring to a sale by one of the heirs of a Muhammadan for discharging the debt due by the ancestor, said, "*prima facie* his conveyance would pass only his share." See page 37. Representation in a suit may conceivably stand on a different footing, for as stated by their Lordships in the same judgment at page 35. "The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control;" and they applied this principle in that very case to the estate of Nabi Baksh. However, that is not the question here.

*Reference answered in the negative.*

V.R.P.

(13) 23 A. 263; A. W. N. (1901) 75.

(14) 32 I. A. 23; 1 C. L. J. 584; 32 C. 296; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2853 OF 1915.

April 19, 1917.

*Present*:—Mr. Justice Richardson and Mr. Justice Walmsley.

PROBHAT CHANDRA SHOME AND OTHERS —DEFENDANTS—APPELLANTS

*versus*

SHASHADHAR KUMAR GHOSE—PLAINTIFF—RESPONDENT.

*Appeal, second – Undue influence—Finding of fact—Registration after period of limitation, validity of—Contract Act (IX of 1872), s. 23—Public policy—Agreement to compound criminal case, validity of—Compoundable and non-compoundable effences.*

The finding of a lower Appellate Court that one of the parties to a suit for cancellation of a document executed it under undue influence is a finding on the merits and is, therefore, not open to question in second appeal, where there is some evidence, however untrustworthy, to show that pressure was put upon that party and that the other party in whose favour the document was executed obtained an unfair advantage. [p. 219, col. 2.]

The registration of a deed is not invalid and ineffectual merely because the deed was presented for registration by the grantee without the consent of the grantor after the expiry of the period limited for the purpose, and the delay was accounted for by the production of a false certificate of the illness of the grantor. [p. 219, col. 2.]

*Quære.*—Whether an agreement for the compromise of a criminal case is void as being opposed to public policy, where the case was initiated by a complaint alleging compoundable and non-compoundable offences but the Magistrate issued summons only in respect of the compoundable offence.

**Appeal against the decree of the Subordinate Judge, Dacca, dated the 19th April**

1915, confirming that of the Munsif, Munshiganj, dated the 15th June 1914.

FACTS material will appear from the following judgment of the Court of First Appeal:—

"This appeal arises out of a suit to cancel a document. The admitted facts of the case are as follows:—

Many disputes were going on between the parties On the 4th November 1912 the plaintiff filed a complaint before the Magistrate charging the defendant No. 1 and two of his relations with offences under sections 143, 447, 426 and 352 of the Indian Penal Code, and on the following day, the defendant No. 1 and a Muhammadan filed a similar complaint charging the plaintiff, his son-in-law, and some others with offences under sections 144, 147, 379, 504, 323 and 352 of the Indian Penal Code. Summonses were issued by the Magistrate in both cases under section 426 only. After some adjournments, the parties entered into a compromise recorded in a separate deed and registered it. Both the criminal cases were dismissed for non-appearance and all the accused acquitted.

The plaintiff's case now is that he only partially executed the document under coercion and undue influence caused by the pressure of the criminal prosecution, specially as his son-in-law was implicated as an accused, and as the latter was to have appeared at the B. A. examination that year; that the compromise to stifle a criminal prosecution was invalid and that there was no legal registration of the document.

The defendants Nos. 1 and 3 only appeared and contested the suit in the lower Court. The lower Court has decreed the suit, cancelling the document but awarding no costs to the plaintiff. The defendants have preferred this appeal. The plaintiff has preferred a cross-appeal as to costs.

The points for decision in this appeal are:—

1. Whether the deed of compromise which had the effect of dropping the criminal cases was valid in law?

2. Whether the document was validly registered ? Has the Civil Court jurisdiction to consider the point ?

3. Whether the document was induced by undue influence or coercion ? Is it binding on the plaintiff? Was it fully executed? Whether the parties acted upon the compromise? Whether the plaintiff is entitled to the costs of the lower Court?

4. The other points are not of much importance and need not be considered.

FINDING.—(1). It has already been observed that the Magistrate issued summons under section 426 only of the Indian Penal Code, which is a compoundable offence. It is argued by the appellants' Pleader that the deed compounding the offence under section 426 is perfectly legal. On the respondent's side it is argued that the competency of the parties to compound a criminal case should be judged not only from the particular section of the Indian Penal Code under which the Magistrate issues summons in the first instance, but from the offences alleged in the petition initiating the case, because it is quite open to the Magistrate to alter the charge at any time and try the accused under the non-compoundable offences mentioned in the original petition.

The appellants' Pleader has cited the following cases in support of his contention, namely, *Amir Khan* v. *Amir Jan* (1), *Mahomed Ismail* v. *Faizuddi* (2), *Rai Charan Purkait* v. *Amrita Lal Gain* (3). The respondent's Pleader contends that the last case rather goes in his favour, for the criminal case ought to have been treated by the Magistrate as a warrant case and the accused should have been called upon to answer the graver charges of a non-compoundable character. The respondent's Pleader also contends that the principles laid down in the case of *Fanindra Nath Chatterji* v. *Emperor* (4) apply here and that the petition of complaint and the complainant's statement on oath (*vide* Exhibit 1) should determine the character of the case, as to whether the stifling of such a prosecution would be opposed to public policy. The cases reported as *Kailash Chunder Pal* v. *Joynuddi* (5) and *Bishu Shaik* v. *Saber Mollah* (6) are also quoted in support of the above view.

(1) 3 C. W. N. 5.
(2) 3 C. W. N. 548.
(3) 5 Ind. Cas. 98; 11 C. L. J. 131.
(4) 1 Ind. Cas 519; 8 Cr. L. J. 227; 36 C. 67; 12 C. W. N. 1041.
(5) 5 C W N. 252.
(6) 6 C. W. N. 713; 29 C. 409.

PROBHAT CHANDRA SHOME *v.* SHASHADHAR KUMAR GHOSE.

I have fully considered the arguments of both sides and I think that the question whether an agreement to stifle a criminal case is opposed to public policy or not, does not depend on the procedure the Magistrate chooses to adopt for reasons of his own. That question depends on the original intention of the complainant as disclosed in his petition and first examination on oath. That should form the determining factor as to whether an agreement dropping such a prosecution would be opposed to public policy or not.

I accordingly hold that the deed is unlawful, and I find this point against the appellants.

(2). As to the registration of the document, it is evident that there were grave irregularities. It is clear that the plaintiff did not appear before the Sub-Registrar within 4 months of the execution as required by section 34 of the Indian Registration Act. The plaintiff did not show cause for the delay in his appearance and in fact he had no business to do so, because he was not willing to register the deed. The opposite party showed cause by producing a medical certificate of the plaintiff's illness. The Sub-Registrar forwarded the same to the Registrar, who accepted it and condoned the delay. I do not think that the proviso to section 34 contemplates any such thing. That section evidently applies to the case of an executant who is desirous of having a document registered and who has been delayed and shows sufficient cause for the same. That section and proviso does not apply where one party wants to force the opposite party to register a document. The procedure in such a case is laid down in section 35 of the Indian Registration Act.

The appellants' Pleader contends that the Civil Court has no authority to question the discretion exercised by the District Registrar. He relies upon the cases of *Durga Singh* v. *Mathura Das*(7) and *Gokulbhoy Mulchand* v. *Tullockchand Harnath* (8) in support of his contention. But the facts of those cases are different. In the present case, the order of the District Registrar was obtained by fraud on the strength of a false medical certificate. The certificate is vague and it refers to the illness in *Chaitra* or *Baisack*. The plaintiff was not at all ill after that and he could have easily attended the Sub-Registrar's office within due date if he had liked. The illness referred to in the petition Exhibit 1F clearly refers to the plaintiff's indisposition on that date only and not on any previous date. The principle laid down in the cases of *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal*(9), *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (10) and *Broja Gopal Mukherjee* v. *Abinash Chandra Biswas* (11), cited by the respondent's Pleader, I think, applies to the facts of the present suit.

I do not think that the irregularity in the present case, which was substantially due to the false medical certificate, is cured by section 87 of the Indian Registration Act. There is another grave defect in the procedure of the Sub-Registrar. The document in dispute contains a map. The map is undoubtedly a part of the document. Under section 21 (4) of the Indian Registration Act, the document could not have been registered unless it was accompanied by a true copy of the map. Under section 62, Chapter XIII of the Registration Rules, the copy of the map requires to be signed by all the executants. If the map attached to the deed Exhibit F be supposed to be the original, it appears that it is not signed by all the parties. The plaintiff has not signed it at all. The map being a part of the document itself, there was thus no complete execution by the plaintiff. If the map be supposed to be the copy required by section 21 (4) of the Indian Registration Act, it transgresses the provisions of section 62 of the Registration Rules. In any case, the document should not have been admitted to registration.

I called for and inspected the register of the Registration Office and examined the map attached to the book. It bears the signatures of all the executants, although the plaintiff denies his own signature. It is, therefore, likely that the Sub Registrar by mistake retained the original and

(7) 6 A. 460; A. W. N. (1884) 173; 4 Ind. Dec. (N. S.) 134.

(8) 21 B. 69; 11 Ind. Dec. (N. S.) 48.

(9) 6 C. W. N. 856; 29 C. 654.

(10) 18 C. 556; 9 Ind Dec. (N. S.) 372.

(11) 5 Ind. Cas. 127; 14 C. W. N. 532.

returned the copy to the parties. But as I have observed before, the document should not have been registered unless the copy was signed by all the applicants. I think that according to the principle laid down in the case of *Jambu Parshad* v. *Muhammad Nawab Aftab Ali Khan* (12), the registration is invalid in the present case. I think that the Civil Court has jurisdiction to make such a declaration. I accordingly find this point against the appellants.

(3). The appellants' Pleader contends that there being no issue on this question, the point cannot be considered. But the lower Court has considered the matter, and the point is covered by the first issue fixed by the Munsif. No doubt, the issue as framed is wide, but it is not vague. The case of coercion and undue influence is set up in the plaint and denied in the written statement. The appellants bave, therefore, not been prejudiced by the lower Court not fixing a separate issue on the point.

The case of coercion is not made out. There is no evidence that the complaint lodged by the defendant No. 1 was false and was thus an act forbidden by the Indian Penal Code. As to the case of undue influence, the defendant No. 1 appears to have been in a position to dominate the will of the plaintiff. The plaintiff's son-in-law was implicated as an accused. The said son-in-law was to have appeared in the B. A. examination in that year. He came on a casual visit to his father-in-law's house and his being implicated in the criminal case was no doubt a cause for sore distress to the plaintiff. If the son-in-law had not been implicated, the plaintiff would never have agreed to the compromise. Then again the defendant No. 1 filed a petition and insisted on the personal attendance of the son-in-law. The defendant No. 1 would not be satisfied by the appearance of the son-in-law through a Mukhtear, although the Magistrate proceeded in the first instance under section 426 of the Indian Penal Code. All this must have weighed greatly on the plaintiff's mind. And then, the defendants did not accept the draft compromise prepared on the plaintiff's side. They insisted on their own draft in its entirety. They gave no quarter. The plaintiff's friends had no option but to urge the plaintiff to accept the defendants' draft. Although the plaintiff has not produced his draft, it is clear that there must have been considerable difference in the two drafts, otherwise the defendants would not have insisted with such tenacity upon the acceptance of their own draft.

It is, however, incumbent on the plaintiff to prove that the defendants obtained an unfair advantage over the plaintiff by the transaction. There is no doubt no detailed evidence on this point, but there is some evidence on the plaintiff's side. The map attached to the deed would go to show that the plaintiff has been put into a disadvantageous position. The plaintiff has been obliged to give up most of the valuable lands which were in his possession before, without an adequate or a fair compensation. The map would also show that roughly the plaintiff has been obliged to give up a large area. The oral evidence under the circumstances on the plaintiff's side as to the unfairness of the transaction is sufficient to shift the onus on the defendants, who have not adduced any evidence to discharge it. Besides it is apparent that the plaintiff took the earliest opportunity of repudiating the transaction. Had it been a fair one, the plaintiff would not have behaved himself in that way. I, therefore, think that the transaction is not binding on the plaintiff. As to the allegation that the compromise was acted upon, I have to observe that the defendants did not remove the eastern huts till after the registration was effected. The service of summons in this suit was effected on the eastern plinth. The defendants' witnesses have deposed contrary to the written statement. The plaintiff is 8 annas owner of Madan Sing's *bari* and the fact of his cutting trees in that *bari* cannot be held to be an acceptance of the terms of the deed. I, therefore think that there has been no acceptance on the part of the plaintiff of the terms of the deed and thus it is quite open to him to bring this suit.

(12) 28 Ind. Cas. 422; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 37 A. 49; 28 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 592; 42 I. A. 22 (P. C.).

I have already observed that the plaintiff did not sign the map which is a part of the document itself. The defendants have adduced no evidence to show that the plaintiff actually signed the original map retained in the registration office. The deed including the map was written in duplicate. The defence evidence shows that all the parties signed both the documents and both the maps at the same time and place, but the said evidence is false. The map in plaintiff's possession was filed in the Court below, and has also been filed here. There is no signature of any party in the said map. The allegation in the plaint that the deed was only partially executed thus seems to be true. Such a deed cannot, therefore, stand even if it is legally valid and duly registered. I find this point in favour of the respondent.

(4) I think that the order of the lower Court as to costs is right.

It is accordingly ordered that this appeal be dismissed with costs and interest at 6 per cent. per annum from this date till realization. The cross-appeal is also dismissed."

Babus *Mohendra Nath Roy* and *Upendra Lal Roy*, for the Appellants.

Sir *Rash Behary Ghose* and Babu *Satya Charan Sinha*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This is an appeal from the judgment and decree of the Subordinate Judge, Dacca, dated 19th April 1915, confirming the decree of the Munsif of Munshiganj.

The suit was brought by the plaintiff, Shashadhar Kumar Ghose, for the cancellation of an agreement dated the 22nd *Magh* 1319 (4th February 1913). It appears that the plaintiff and the defendants are co-owners of certain properties. Something occurred early in November 1912, which led the parties to file complaints against each other in the Criminal Court. The agreement in question, which is an agreement for the partition of the common properties, is expressed to have been made for the purpose of putting an end to all disputes between the parties and for the purpose of settling or compromising the criminal cases which had been instituted and were still pending at the time.

The Courts below have concurred in setting aside the agreement on three grounds. They have held, *firstly*, that the agreement is opposed to public policy as being an agreement to stifle criminal prosecutions and, therefore, void under section 23 of the Contract Act; *secondly*, that the Registering Officer had no jurisdiction to register the agreement, and *thirdly*, that the agreement was obtained by the exercise of undue influence.

There is room for considerable doubt as to the correctness of those conclusions. On the question of the agreement being opposed to public policy, the decision of this Court in *Muhammad Ismail* v. *Samad Ali Bhuyan* (13), and its bearing on the view of the law taken in the Courts below would at least require consideration. On the question of registration again, I am quite unable to follow the reasoning of the those Courts and am satisfied in my own mind that they were wrong in supposing that the agreement was not validly and effectually registered. It is unnecessary, however, to examine these questions in detail because on the remaining question, the question of undue influence, while I doubt very much whether I should have reached the same result on the merits, the merits are not open in second appeal and the jurisdiction of this Court to interfere is limited. The learned Subordinate Judge, at any rate, seems to have found that the implication of the plaintiff's son-in-law in the criminal proceedings caused the plaintiff much distress of mind and placed the defendant No. 1 in a position to dominate the plaintiff's will, and further that the defendants obtained an unfair advantage over the plaintiff. I have considered whether there is a sufficient finding that the defendants or any of them actually brought pressure to bear on the plaintiff. It appears that the plaintiff's son-in-law was due to appear in the B. A. examination of the Calcutta University and that the defendant No. 1 filed a petition in the criminal case which he had instituted and in which the son-in-law was an accused, objecting to the latter appearing through a Pleader and insisting upon his personal appearance. The Subordinate Judge lays stress upon that and upon the defendants refusing to consider any modification at all of the agreement which

(13) 32 Ind. Cas. 227; 20 C. W. N. 946.

they offered to the plaintiff. According to the Subordinate Judge they issued a sort of ultimatum. If the offer was not accepted in its entirety the criminal case would be proceeded with. I do not know whether I should have taken the same view of the evidence. The case is one somewhat near the line. It bears a strong resemblance to the case of *Gobardhan Das* v. *Jai Kishen Das* (14). That case was decided by the Allahabad High Court under the old section 16 of the Contract Act, but according to the commentators is still good law under the section as it now stands (Pollock and Mulla's Contract Act, 2nd edition, page 79). It came before the Court as a first appeal and the merits were open. Here, as I have said, the merits are not open and I cannot say either that there is no finding that the plaintiff was subjected to pressure or that there is no evidence at all on which that finding or the finding that an unfair advantage was obtained can be supported. That being so, the present appeal fails, but, in my opinion, the suit does not redound to the plaintiff's credit. He and his son-in-law were acquitted in the criminal proceedings and though the plaintiff may have got the worst of the bargain, I have a strong impression that if the plaintiff had been a man of sensitive honesty the suit would not have been brought. I propose, therefore, that the appeal should be dismissed without costs.

WALMSLEY, J.—I agree.

*Appeal dismissed.*

(14) 22 A. 224; A. W. N. (1900) 52; 9 Ind. Dec. (N. S.) 1180.

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## PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 592 OF 19 6.

December 20, 1916.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

DUNI CHAND—DEFENDANT—APPELLANT

*versus*

MUHAMMAD HUSSAIN AND OTHERS—PLAINTIFFS, THE FIRM SHAMS DIN-ABDUL HAMID AND OTHERS—DEFENDANTS—RESPONDENTS.

*Provincial Insolvency Act* (*III of* 1907), *s.* 46 (1)—"*May appeal*", "*shall be final*", *meanings of*—*Interpretation of Statute*—*Remedy provided by s.* 46 (1), *whether cumulative or substitutional for regular suit*—*Civil Procedure Code* (*Act V of* 1908), *s.* 9.

The rule that where a Statute creates a right and provides at the same time a remedy, that remedy and no other is available, has no application to a case where a right is not created by the Statute but exists independently of it. [p. 223, col. 2.]

The words "may appeal" in section 45 (1) of the Provincial Insolvency Act mean that a party aggrieved with an order may, if he thinks fit, prefer an appeal against it to the High Court but is not bound to do so. [p. 221, cols. 1 & 2]

The words "shall be final" used in section 46 (1) of the Provincial Insolvency Act do not signify that the decision of the Insolvency Court cannot be impeached in a regular suit, but they simply emphasise that no second appeal lies against an appellate order of the District Judge. [p. 221, col. 2]

*Nagindal Chunilal* v. *Official Assignee*, 12 Ind. Cas. 391; 35 B. 473; 13 Bom. L. R. 900; *Rassul Haji Cassum*, *In re*, 9 Ind. Cas. 344; 13 Bom. L. R. 13 and *Barlow* v. *Cochrane*, 2 B. L. R. O. C. 56, relied on.

*Miller* v. *Barlow*, 14 M. I. A. 209 at p. 222; 2 Sar. P. C. J. 727; 20 E. R. 765, followed.

*Ghasita* v *Wazira*, 10 P. R. 1897; *Sham Lal* v. *Bindo*, 26 A. 594; 1 A. L. J. 266; A. W. N. (1904) 135 and *Sharifa* v. *Munckhan*, 25 B. 574; 3 Bom. L. R. 167, distinguished.

A person whose property is claimed by another person has, under the common law, the right of instituting a suit against the latter to establish his title, and this remedy has not been extinguished by the Provincial Insolvency Act. So that where the Official Receiver takes into his possession property as belonging to the insolvent, which a third party claims as his own, the latter can bring a suit against the Official Receiver in a Civil Court to establish his right. [p. 221, col. 2; p. 222, col. 2.]

Miscellaneous second appeal from the order of the Additional Judge, Amritsar, dated the 9th December 1915.

Mr. *Tek Chand*, for the Appellant.

Mr. *Muhammad Din*, for the Respondents.

JUDGMENT.—The facts of this case lie within the narrowest possible compass. One Azim Bakhsh was adjudged an insolvent and the Official Receiver took possession of his property including the houses in dispute. The plaintiffs thereupon claimed certain rights in the houses, but the Insolvency Court disallowed their claim. Being dissatisfied with this order, they brought a regular action to establish their interest in the property. The Trial Judge dismissed the suit on the ground that the plaintiffs had a right of appeal under section 46 of the Provincial Insolvency Act against the order of the Insolvency Court, and that the remedy by suit was barred. Upon appeal the Additional Judge came to the contrary conclusion, and remanded the case for decision on the merits.

DUNI CHAND v. MUHAMMAD HUSSAIN.

The question for determination in this appeal as well as in the connected Civil Appeal No. 101 of 1916 (in which the Insolvency Court released the property, and the creditor of the insolvent brought the regular suit), is whether the remedy by way of appeal provided by the Provincial Insolvency Act is cumulative or substitutional for a regular suit. Section 46 of the said Act, which is invoked by both the parties in support of their respective contentions, is in the following terms:—

"46 (1). Any person aggrieved by an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final.

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit.

(2). Any person aggrieved by an order made by the District Court under sections 15, 16, 24, 26, 35, 37, 42, 43, sub section (2), or 44 otherwise than in appeal from an order made by a subordinte Court may appeal to the High Court.

(3). Any person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court.

(4). The periods of limitation for appeals to the District Court and to the High Court under this section shall be thirty days and ninety days respectively."

The District Judge, Khwaja Tusadduk Hussain, who decided the case which has led to Civil Appeal No 101 of 1916, considered that the use of the words "may appeal" in the section showed "that a party aggrieved with the order may impeach it by appeal or otherwise if he has any other remedy provided by law. Had the Legislature intended to confine the remedy to appeal only the word 'shall' would have been appropriately used as in old section 540, Civil Procedure Code." This argument is, in our opinion, wholly fallacious, and cannot be accepted. The obvious meaning of the aforesaid expression is that a party aggrieved by a decision may, if he thinks fit, prefer an appeal to the High Court, but is not bound to do so. He has a right of appeal, which he may or may not exercise and it would be intolerable if the Legislature in conferring the right of appeal made it obligatory upon a person to avail himself of it, even when be regarded the decision as correct or, for some other reason, did not wish to take his case to the higher Court. The mere fact that he is not compelled to exercise the right of appeal to which he is entitled under the law does not lead to the conclusion that the remedy by a regular suit is open to him.

Mr. Tek Chand, for the appellant on the other hand, places his reliance upon the words "shall be final" used in the 1st paragraph of the section, which words, he contends, afford an indication of the intention of the Legislature that the decision of the Insolvency Court cannot be impeached in a regular suit. It is to be observed that the word "final" is confined in its operation to orders passed by the District Court upon appeal and does not find a place in the sub-sections dealing with the orders passed by the High Court. There can be no manner of doubt that the intention of the Legislature in using the term "final" was to make it clear that no second appeal lay against an appellate order of the District Judge. There being no Court in India empowerd to hear an appeal from an order passed by the High Court on appeal, there was no necessity of providing expressly that such an order should be final; and indeed any such provision would have been wholly redundant. The contention urged on behalf of the appellant, if accepted, would lead to a *reductio ad absurdum* inasmuch as an action to contest the order of the District Judge would be barred, but the same rule would not, so far as section 46 is concerned, apply to the order passed by the High Court. We are clear that the provisions of section 46 do not support the argument of the learned Pleader for the appellant.

It is incontestable that a person, whose property is claimed by another person, has under the common law the right of instituting a suit against the latter to establish his title; and we do not think that the right of bringing a similar action against the Official Receiver, who is simply the representative of

the insolvent, has been taken away by the Legislature. Now, section 9, Civil Procedure Code, lays down in the clearest possible terms that the Courts shall have jurisdiction to try all suits of a Civil nature excepting suits of which their cognisance is either expressly or impliedly barred. The Provincial Insolvency Act contains no express provision precluding the Court from taking cognisance of a suit of this nature; and as regards the implied intention, the main argument addressed to us is that the aforesaid Act is, as the preamble shews, a consolidating Act, and that it was contemplated that all questions arising thereunder should be determined by the Insolvency Court and should not be made the subject of a regular suit.

The question whether the provisions of an Act contain a necessary implication depriving a person of the right of action must depend upon the language of the particular enactment, and it is impossible to lay down any hard and fast rule which would govern all cases. Now, in respect of the Guardians and Wards Act, a Full Bench of this Court in *Ghasita* v. *Wazira* (1), upon a consideration of the different sections of the Act, has ruled that a regular suit for the custody of a minor is not permissible after the commencement of the above Act; and the same view has been taken by the Allahabad High Court in *Sham Lal* v. *Bindo* (2). The Bombay High Court has, however, adopted a different rule, *vide Sharifa* v. *Munekhan* (3). Can we say that there are provisions in the Provincial Insolvency Act which necessarily lead to the inference that the right of a person to institute a suit to protect his property has been taken away, and that he is bound to have recourse to the Insolvency Court? The fact that the Act consolidates the law relating to matters properly falling within the cognisance of the Insolvency Court does not necessarily conflict with the right of a person to bring an action to establish his title to the property which, according to him, has been wrongly claimed or seized by the Official Receiver. On the other hand we find that section 39, sub-section (5) of the Act, contains a provision to the effect that no suit for a dividend shall lie against the Receiver; and it seems to us that if the Legislature had intended to preclude the ordinary Court from adjudicating upon a dispute between the Official Receiver and an outsider relating to property, it could have easily manifested its intention by inserting a similar provision.

The learned Pleaders on both sides express their inability to cite any case under the Provincial Insolvency Act dealing with the point before us. But the principle enunciated in *Naginlal Chunilal* v. *Official Assignee* (4), a case decided under the Presidency Towns Insolvency Act, III of 1909, is, in our opinion applicable here. The learned Judges of the Division Bench, after considering, *inter alia*, the relevant sections of that Act, arrived at the conclusion that the common law remedy by suit had not been extinguished by the Act, and that where the Official Assignee takes into his possession property as belonging to the insolvent, which a third party claims as his own, the latter can bring a suit against the Official Assignee in a Civil Court to establish his right. And the same rule has been laid down in a Single Bench of the same Court in *Rassul Haji Cassum, In re* (5). The learned Judge, in adjudicating upon the motion by certain claimants to the property seized by the Official Assignee as belonging to the insolvent, made the following pertinent observations:—

"For in all essential respects the case laid before me by this motion is in effect the same as the case of a party who seeks to have an attachment raised. In those circumstances the Court deals with the objection summarily, and if as a result it is *prima facie* satisfied that the attached property was not at the time of the attachment in the possession of, and did not belong to, the judgment-debtor, it removes the attachment and leaves the creditor to establish his right, if any, by a regular suit. So here if the Court were summarily satisfied that the property now in dispute was, when seized, in the possession of, and did belong to, the claimants, it appears to me that it ought to order the Official Assignee to restore that property to them, and, if so advised, to pursue it by means of a regular suit. I think

(1) 10 P. R. 1897.
(2) 26 A. 594; 1 A. L. J. 266; A. W. N. (1904) 135.
(2) 25 B. 874; 3 Bom. L. R. 167.

(4) 12 Ind. Cas. 391; 35 B. 473; 13 Bom. L. R. 900.
(5) 9 Ind. Cas. 344; 13 Bom. L. R. 13.

there can be no doubt that motions of this kind have not infrequently been brought in the Insolvency Court, although there is no recorded case to which my attention has been drawn, and in which all the arguments for and against this procedure have been considered and adjudicated upon."

Further, we find that in a case under the Indian Insolvents Act, which Act has now been replaced by the Presidency Town Insolvency Act, a Division Bench of the Calcutta High Court (Sir Barnes Peacock and Mr. Justice Markby) held that an order passed by the Insolvency Court did not prevent the owner of the property which was the subject of the order from suing the Assginee to establish his right to it; *vide*, *Barlow* v. *Cochrane* (6). Upon appeal to the Privy Council against the decree of the High Court allowing the plaintiff's claim, the point was again raised by the defendants' Counsel, as appears from the following extracts from the arguments given at page 222 of 14 Moore's Indian Appeals [*Miller* v. *Barlow* (7)]:—"The order of the Insolvent Court, pronounced on the 16th May 1867, not having been appealed against, bound the appellant as to the matter decided therein, and he had no right to sue...but having submitted to the jurisdiction of the Insolvent Court, he should have preferred his claim there." The judgment of their Lordships does not contain any expression of opinion upon the matter, but the fact that the decree of the High Court in favour of the plaintiff was upheld clearly, shows that the objection must have been overruled, otherwise the Privy Council would have accepted the appeal and dismissed the suit.

Neither the judgment of the Privy Council nor that of the Calcutta High Court, nor again the one pronounced by the Bombay High Court and reported in Indian Cases was cited at the Bar; but this fact is clearly no justification for ignoring the rulings which have an important bearing upon the point before us. It is accordingly clear that the law obtaining in the Presidency Towns does not prohibit an action to establish title to the property claimed as belonging to the insolvent; and there is no cogent reason for holding that the Provincial Insolvency Act has made a departure from this rule. In the face of these judgments we consider it unnecessary to discuss the argument derived by way of analogy from the provisions of the Land Acquisition Act or the Punjab Municipal Act, or from the decisions based upon those Acts. We fully accept the principle enunciated in *Rama Chandra* v. *Secretary of State* (8) and cited with approval in *Municipal Committee, Ambala* v. *Mohender Singh* (9), that where a Statute creates a right and provides at the same time a remedy, that remedy and no other is available. But that rule has absolutely no application to a case where, as in the suit before us, the right was not created by the Act, but existed independently of it. Section 41 of the Indian Evidence Act cited by the appellant's Pleader enumerates the various judgments, which are to be treated as judgments *in rem*, and provides that they are conclusive not only against the parties, but against the whole world. The section has obviously no bearing upon the matter in issue.

For the foregoing reasons we hold that the plaintiff's remedy to establish his title in a regular suit has not been either expressly or impliedly taken away by any Statute. We accordingly affirm the decision of the lower Appellate Court and dismiss the appeal with costs.

*Appeal dismissed.*

(6) 2 B. L. R. O. C. 56.

(7) 14 M. I. A. 209 at p. 222; 2 Sar. P. J. 727; 20 E. R. 765.

(8) 12 M. 105; 13 Ind. Jur. 50; 4 Ind. Dec. (N. S.) 422.

(9) 9 Ind. Cas. 1000; 38 P. R. 1911; 118 P. L. R. 1911; 97 P. W. R. 1911.

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## MADRAS HIGH COURT

LETTERS PATENT APPEAL NO. 115 OF 1916.

December 4, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

RANGASAMI UDAYAN—DEFENDANT NO. 4—APPELLANT

*versus*

MANICKAM PILLAI—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. VIII, rr 1 to 10, O. IX, rr. 6 (1) (a), (7), 13—Omission of defendant to file written statement—Declaration of* ex parte, *validity of.*

A defendant in a suit appeared in person on 4th September 1915; he was then ordered to file a written statement and given time till 21st September 1915; on the latter date, he appeared and asked for further

RANGASAMI UDAYAN *v.* MANICKAM PILLAI.

time. The request was refused, and he was declared *ex parte*:

*Held*, per *Ayling, J.* (*Seshagiri Aiyar, J.*, dissenting), that the order declaring the defendant *ex parte* was not *ultra vires*. [p. 225, col. 2.]

Per *Ayling, J.*—The rules in Order VIII of the Civil Procedure Code, intervening between rules 1 and 9, are all directed to making clear what should be contained in a written statement referred to in rule 1. They are really of the nature of explanations to rule 1. Rule 10 of Order VIII relates back to rule 1 as well as to rule 9. [p. 225, cols. 1 & 2.]

Per *Seshagiri Aiyar, J.*, (dissenting.)—A party should not be declared *ex parte* when he appears in person, though his defence may be struck out. [p 225, col. 2.]

*Chunni Lal* v. *Chamman Lal*, 7 A. 159; A. W. N. (1884) 313; 4 Ind. Dec. (N. S.) 352.

The omission to make a provision in rule 13 of Order IX, regarding the non-filing of a written statement, is a clear indication that a declaration of *ex parte* can be made only for the non-appearance of a party. [p. 226, col. 2.]

The words "from whom a written statement is required" in rule 9 of Order VIII, cannot be read as referring back to rule 1. A whole mass of matter intervenes between the two rules and it would be doing violence to the language to read those words as referring to rule 1. Rule 10 cannot be connected with rule 1 of Order VIII. [p. 227, col. 1.]

*Sivarajadhani Nilakantham Pillay* v. *Kuppagantulu Ramiah Pantulu*, 2 M. H. C. R. 311; *Shahzada Pakaktar* v. *Jakriram Bhokath*, 11 W. R. 5; *Raghapa* v. *Parapa*, 1 B 217; 1 Ind. Dec. (N. S.) 145 and *Ross & Co.* v. *Scriven*, 34 Ind. Cas. 235; 20 C. W. N. 1192; 43 C. 1001, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Coutts-Trotter, in Civil Revision Petition No. 1881 of 1915, preferred against the order of the Court of the District Munsif, Tirukoilur, in Original Suit No. 480 of 1915.

Mr. *C. Padmanabha Iyengar*, for the Appellant.

Mr. *N. Chandrasekara Iyer*, *Amicus Curiæ*.

JUDGMENT.

AYLING, J.—Appellant before us was the 4th defendant in Original Suit No. 480 of 1915 on the file of the District Munsif of Tirukoilur. He received notice of suit and appeared in person on the 4th September 1915. He was then ordered under Order VIII, rule 1 of the Civil Procedure Code, to file a written statement and at his own request was allowed time till 21st September 1915 to do so. He again appeared on the latter date, and apparently asked for further time but as the reasons he gave were insufficient in the opinion of the District Munsif, this request was refused. As he did not file the written statement on the 21st September 1915, as required, an order was passed on that date declaring him *ex parte*.

On the 12th October 1915, he applied under Order IX, rule 7, to have the *ex parte* order set aside: but this application was dismissed.

He then presented a revision petition to this Court against the order dated 21st September 1915, which was dismissed by Coutts Trotter, J., on the 10th March 1916. Against the latter order, he prefers the present Letters Patent Appeal.

Respondent was not represented; but at our request Mr. Chandrasekara Iyer was good enough to argue the case for him as *amicus curiæ*.

The sole question for disposal is whether the Munsif's order, dated 21st September 1915, declaring appellant *ex parte* for failure to file a written statement as required is *ultra vires*.

The only provision of law specifically empowering a Court to proceed *ex parte* is Order IX, rule 6 (1) (*a*), and this is contingent on the defendant failing to appear. It does not apply to a case in which a defendant appears but fails to file a written statement. Appellant's Vakil contends that there is nothing in the Code penalising disobedience to an order under Order VIII, rule 1; and that the Court can only proceed under Order X, and examine the defendant orally, recording his admissions and denials. Mr. Chandrasekara Iyer, on the other hand, relies on Order VIII, rule 10, as impliedly conferring the power to declare a defendant *ex parte*.

Assuming the last mentioned rule to apply, I think it would authorise an *ex parte* declaration. It runs thus: "Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit."

To summarily pronounce judgment against a party without considering evidence (which the Court is specifically empowered to do under the first part of the rule) is the most drastic measure conceivable; and the power in the alternative to pass any other order it thinks fit must include the power to make any less severe order. It would be a less severe order to defer passing

judgment until the evidence of the other side had been recorded and considered. This is what an *ex parte* declaration amounts to; and it by no means necessarily involves judgment against the person declared *ex parte*.

The difficulty is in deciding whether rule 10 only applies to a failure to comply with a requirement under rule 9; or whether it also covers failure to present a written statement required under rule 1. The word "so" is certainly ambiguous. Appellant relies on the close juxta position of the two rules and argues that the words "so required" in rule 10 can only relate to a requisition under rule 9; otherwise instead of "so required" the words used would be "required under this Order."

On the other hand if this were the intention of the Legislature, there is no object in making a separate rule. The penal clause would more suitably and conveniently form part of rule 9 (*cf.* Order X, rule 4). It would moreover be strange for the Legislature to penalise so heavily the failure to present an additional written statement, when required, and to leave unpunishable the failure to present a written statement when required at the outset of the case: *cf.*, also the case to provide penal clauses in Order X, rule 4, Order XI, rule 21, and Order XVI, rule 20. I do not think that the provisions of Order X afford an adequate explanation. This order merely *ensures* that the material averments of parties shall, somehow or other, be placed on record at the outset of the trial. The Court may take them down from the mouths of the parties but it also may, as empowered by Order VIII, rule 1, require the defendant to put his case in writing. And where the Legislature empowers a Court to *require* a party to do a certain thing, it is most unlikely that it deliberately intended to leave that Court without power to enforce obedience by penalty for disobedience. In fact, the omission of a penalty for disobedience to the requisition under this rule could, in my opinion, only be explained on the ground of oversight, an explanation which, unless compelled to, we should be slow to adopt.

And I do not think on a careful consideration of Order VIII that any such conclusion is justified. The rules in the Order intervening between rules 1 and 9 are all directed to making clear what should be contained in the written statement referred to in the former. They are really of the nature of explanations to rule 1 and might not inappropriately appear as part of it. If they did and if rules 9 and 10 stood numbered as rules 2 and 3, it would, I think, be hard to contend that rule 3 applied only to rule 2 and not to rule 1.

It is curious that a point of this nature should not long ago have been covered by authority; but the only case quoted to us is that reported as *Sivarajadhani Nilakantham Pillay* v. *Kuppagantulu Ramiah Pantulu* (1), in which it was held that failure to file a written statement did not justify the trial of a case *ex-parte*. The Code in force at the date of this decision (Act VIII of 1859), however, contained no provision analogous to Order VIII, rule 10: nor did it empower the Court to require the presentation of a written statement. In my opinion, rule 10 of Order VIII relates back to rule 1 as well as to rule 9; and that the District Munsif's order was not *ultra vires*.

In my opinion, there is no ground for interference and the Letters Patent Appeal should be dismissed.

SESHAGIRI AIYAR, J.—I regret very much I am not able to agree with my learned colleague. The facts have been fully stated in his judgment: but for the fact that an important principle relating to processual law is involved, I would not have considered it necessary to differ from Mr. Justice Ayling's judgment.

In my opinion, the District Munsif acted illegally in the exercise of his jurisdiction in declaring the appellant *ex parte*. I accept the Munsif's statement that he asked the appellant to file a written statement on the 4th September 1915 when he appeared in person. I do not think the failure to file the written statement entitled the District Munsif to declare the appellant *ex parte*. It is admitted that he was present on the adjourned date. It sounds incongruous that a defendant who appears in person should be declared *ex parte* [see

(1) 2 M. H. C. R. 311.

*Chunni Lal* v. *Chamman Lal* (2)], I can understand the Court declaring that his defence should be struck out, and that he is disentitled from filing any written statement in future. From my limited experience of the work on the original side, I know that cases in which defendants fail to file their written statements in time are placed in the Undefended Board. I speak with some hesitation, but I do not think that a defendant who appears but does not file his written statement would be declared *ex parte* on the original side. The difference between declaring a defendant *ex parte* and placing the case in the Undefended Board seems to be this. A defendant declared *ex parte* has no right of audience until the order is set aside, whereas a person whose written statement has not been received would have an opportunity of cross-examining the plaintiff and his witnesses and of showing that the plaintiff has not proved his case, although he may be debarred from proving his defence. To take a concrete instance, the defence to a money claim may be, that it is barred by the rule of *res judicata*. A defendant whose written statement is not accepted would not be allowed to produce evidence to prove this defence: but he could, by cross-examination of the plaintiff and his witnesses, show that the plaintiff is not entitled to the amount he claims. Take another instance; to a suit in ejectment based on title the defence of adverse possession may be the answer. For failure to file his written statement in time, the defendant may be precluded from adducing evidence to prove this: but, if he appears, he would be permitted to show that the plaintiff has no title. Thus the difference between declaring a defendant *ex parte* and refusing to accept his written statement thereby striking out his defence is a substantial one. In my opinion, the defendant to whom time has been given to file his written statement and who fails to tender it in time, but who still appears in person should not be subjected to the disqualification of being declared *ex parte*.

An examination of the Orders and rules of the Code of Civil Procedure seems to bear out this view. Order IX, rule 6 (*a*), makes it a condition precedent to the declaration of *ex parte* that "the plaintiff appears and the defendant does not appear." Rule 11 of the same Order contemplates that when some of the defendants appear and others do not, "the Court at the time of pronouncing judgment shall make such an order as it thinks fit with respect to the defendants who do not appear." Apparently under this rule, so long as all the defendants are not *ex parte*, the defendant who was absent at an earlier stage can take part in the hearing at a subequent stage. Rule 13 appears to me to be fairly conclusive of the question. This rule enjoins on the Court to set aside the *ex parte* order if the defendant satisfies the Court "that he was prevented by any sufficient cause from appearing." The appearance certainly includes personal appearance. The import of the rule is that the defendant could be declared *ex parte* for his non-appearance, and not for failure to file a written statement. If failure to file a written statement is a good cause for declaring a defendant *ex parte*, the rule should have provided for reasons being shown for failure to file the written statement in time. The absence of such a provision is very significant. My conclusion is that a declaration of *ex parte* can only be made for non-appearance of the party.

I shall go back a little and examine Order VIII. Rule 1 of that Order is a considerable improvement upon section 110 of the Code of 1882. Under that section, the written statement could have been tendered at any time; and there was no provision enabling the Court to call for one. Rule 1 supplies that deficiency; but no penalty is imposed for not filing the written statement called for. Rule 9 relates to statements after the filing of the first written statement. Very often the Court may ask the plaintiff to file a statement in answer to some specific allegations made in the defendant's written statement; or it may be that at the suggestion of the plaintiff or after discovery and inspection, the Court considers that the defendant should file a further statement. Rule 9

(2) 7 A. 159; A. W. N. (1884) 313; 4 Ind. Dec. (N. S.) 352.

enables the Court to get from the parties statements of the above description. Rule 10 prescribes the penalty for failure to comply with such a request. Even if I am prepared to read this rule as enabling the Court to declare a defendant *ex parte*, I am unable to hold that the words "*from whom a written statement is so required*" as referring back to rule 1. A whole mass of matter intervenes between the two rules, and I consider it would be doing violence to grammar to read the words I have italicised as referring to rule 1. It may be a case of omission or not, I am unable to connect rule 10 with rule 1. Order X, rule 4, and Order XVI, rule 20, provide for the contumacious conduct of a defendant who appears. The declaration of *ex parte* is not among the penalties.

Therefore, apart from any decisions, I am of opinion that the order declaring the appellant *ex parte* was passed without jurisdiction.

*Sivarajadhani Nilakantham Pillay* v. *Kuppagantulu Ramiah Pantulu* (1) directly and *Shahzada Pakaktar* v. *Jakriram Bhokath* (3) and *Raghapa* v. *Parapa* (4) by implication support this view.

I may also say that the exercise of the discretion by the District Munsif seems to have been very arbitrary, although that would not furnish a ground for interference under section 115. There was only one adjournment given and on this date, time was granted to other defendants to file their written statements. Therefore there was no object to be gained by debarring the appellant alone for defending the suit. Reference may be made to the observations of the learned Judges in *Ross and Co.* v. *Scriven* (5), which contains very salutary cautions about declaring a defendant *ex parte*.

Before closing the judgment, I must express my indebtedness to Mr. Chandrasekara Iyer for having ably argued the case on behalf of the counter-petitioner who was not represented before us.

I would, therefore, reverse the order of the District Munsif declaring the appellant *ex parte* and I remand the case to him for disposal according to law.

(3) 11 W. R. 5.
(4) 1 B. 217; 1 Ind. Dec. (N. s.) 145.
(5) 34 Ind. Cas. 235; 20 C. W. N. 1192; 43 C. 1001.

BY THE COURT.—As a result, the Letters Patent Appeal is dismissed.

*Appeal dismissed.*

V.R.P.

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## PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 941 OF 1916.

April 16, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

SURAJ DEO NARAIN MISSRA—PLAINTIFF—APPELLANT

*versus*

SARJUG PRASAD MISSRA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Guardian* ad litem, *appointment of—Adverse interest—Consent of guardian—Minor, decree against—Suit to set aside decree—Prejudice to minor—Proof.*

The mere omission to obtain the consent of the person whom it is proposed to appoint guardian *ad litem* of a minor is not fatal to the proceeding. It must be shown that the minor was prejudiced by the defect. [p. 228, col. 2.]

A minor when he comes of age can attack a decree obtained against him during his minority upon the ground that the person who represented him in the litigation had an adverse interest, but he must show that in that particular case that particular person had in fact a particular adverse interest. He cannot be allowed to succeed on mere surmise. [p. 228, col. 2.]

Where S., a minor, was sued on a mortgage-bond executed on his behalf by his mother for legal necessity and benefit of the minor, and the mother, who was also the certificated guardian of the person and property of the minor, was appointed his guardian *ad litem*, but she failed to appear in the suit though notice was served upon her, and a decree was passed against the minor:

*Held*, that the decree could not be set aside merely on the ground that the mother's consent to act as guardian *ad litem* was not obtained, when it was proved that the minor was in no way prejudiced by the procedure adopted. [p. 228, col. 2.]

Appeal against a decision of the District Judge, Durbhanga, dated the 24th May 1916, reversing that of the Subordinate Judge, Durbhanga.

FACTS.—The mother of the appellant, during his minority, executed on his behalf a mortgage-bond in favour of the respondents, in order to pay off the debts due from his father for recovery of which a suit was going to be instituted and to defray certain necessary expenses of the minor. The mortgagee sued the minor on the mortgage-bond and nominated his mother, who had also been appointed

guardian of his person and property by the District Judge, as guardian *ad litem*. The usual notices were served on the minor and the proposed guardian, but no appearance was made. The Court duly recorded an order appointing the mother as guardian *ad litem* and passed an *ex parte* decree against the minor. The mother later on tried to have the *ex parte* decree set aside under Order IX, rule 13, Civil Procedure Code, and also to have the sale held in execution of the mortgage decree quashed on the grounds of material irregularity and substantial loss, but without success. The minor on attaining majority sued to have the decree set aside on the ground of fraud, and also on the ground that he was not properly represented in the suit inasmuch as express consent of his mother was not taken, and that the mother having executed the bond her interest was adverse and she was not a proper person to be appointed as guardian.

Messrs. *Saroshi Charan Mitter* and *Murari Prasad*, for the Appellant.

Messrs. *Baidyanath Narayan Sinha* and *Harnarayan Prasad*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit to set aside a decree on the ground of fraud. The decree had been obtained against the plaintiff during his minority. For the purposes of the suit which resulted in the decree the plaintiff's mother had been appointed as guardian, his mother being at the time appointed as guardian of his person and property by the District Judge. The suit has been dismissed in both Courts.

It has been found that the bond was executed by the mother on behalf of the plaintiff for necessity, that the plaintiff has benefited by the money, and that his mother executed the bond with full knowledge of its contents. We are asked to interfere in second appeal upon the ground that before the order appointing the mother as guardian her consent was not obtained. What happened was that notice was served upon the mother in accordance with the Code of Civil Procedure and she raised no objection to appear for the minor as his guardian. Having regard to the fact that she had executed the bond with full knowledge and for legal necessity it is not surprising that she did not appear in the actual suit, but she did appear in the execution proceeding and she did appear on behalf of the minor in an application for revising the suit. I am of opinion that the mere omission to obtain the consent of the person whom it is proposed to appoint as the guardian is not a defect which is necessarily fatal to the proceeding. The Privy Council have more than once pointed out that a defect in complying with the rule laid down upon the subject of appointing guardians is not necessarily fatal to the proceeding. It must be shown that the minor was prejudiced by the defect. No doubt the Court will be jealous on behalf of the minor in such a case and the Court will be inclined to find that the minor is prejudiced. In the present case there appears to have been overwhelming evidence that there was no sort of prejudice whatever.

It is then contended that the mother had an adverse interest to the minor in the suit. The suggestion is that if some other unknown person had been appointed guardian, the minor might have instructed that unknown person that he should impugn the *bona fides* of his mother and suggest that his mother had entered into a fraudulent conspiracy against him. That does not appear to me to be a sound suggestion. No doubt when the minor comes of age he can attack the decree obtained against him upon the ground that the person who represented him in the litigation had an adverse interest, but he must show that in that particular case that particular person had in fact a particular adverse interest. He cannot be allowed to succeed upon mere surmise. In the present case the mother was the certificated guardian of the person and property of the minor, and there was in addition ample reason for holding that in fact she had no adverse interest. The result is that I would dismiss the appeal.

JWALA PRASAD, J.—I agree.

*Appeal dismissed.*

AMIR HAIDAR KHAN *v.* RAM DAT.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 234 OF 1916.

March 12, 1917.

*Present*:—Mr. Lindsay, J. C.

AMIR HAIDAR KHAN—
DEFENDANT—APPELLANT
*versus*
RAM DAT—PLAINTIFF—RESPONDENT.

*Limitation—Construction of document—Bond authorising suit on default of payment of yearly interest or of principal after fixed period—Suit for principal sum—Cause of action.*

Where an unregistered bond executed on the 1st of July 1906 provided that the borrower was to pay interest yearly and the principal sum was to be paid within a period of six years and the general clause relating to what was to happen in case of default was, "*dar surat wada khilafi mahajan mazkur ko ikhtiar hasil hai ki jaidad mankula wa ghair mankula se wasul kar len:*"

*Held*, that on the proper construction of these words, the plaintiff had a cause of action for a suit for the principal sum, if he brought it within three years from the date of the period fixed for payment, but that the suit for interest which had not been paid for more than three years was barred. [p. 230, col. 1.]

Appeal against the decree of the District Judge, Rae Bareli, dated the 7th April 1916, upholding that of the Subordinate Judge, Rae Bareli, dated the 4th January 1916.

Mr. *Aditya Prasad*, for the Appellant.

Mr. *Ali Mohammad*, for the Respondent.

JUDGMENT.—The principal question which arises for discussion in this second appeal is one of limitation. The suit was on a bond executed on the 1st July 1906, the executant being the father of the defendant-appellant. The bond was executed in favour of the plaintiff-respondent's father. The sum borrowed was Rs. 1,000, and the following provisions of the bond are material to the consideration of the question of limitation. It was provided in the first place that the borrower was to pay interest yearly at the rate of 8 annas per cent. per mensem. Another undertaking given by the borrower was that the principal sum was to be repaid within a period of six years. Then follows the general clause relating as to what was to happen in case of default. The words used are as follows: "*Dar surat wada khilafi mahajan mazkur ko ikhtiar hasil hai ki jaidad mankula wa ghair mankula se wasul kar len.*" According to the interpretation which was put upon this clause by the Courts below, the words which indicate what is to follow in case of default relate only to the latter covenant, namely, the covenant to pay the principal sum within six years from the date of the execution of the bond; and so both the Courts have held that the claim was within time and have decreed it in full, that is to say, for principal and interest. According to the argument which has been addressed to me on behalf of the defendant-appellant, the suit was beyond time altogether inasmuch as it is said that on a breach of either of the conditions mentioned in the bond the creditor was at liberty to bring a suit for the full money. It is proved, and indeed there can be no doubt, that there has been no payment of interest subsequent to the year 1911 and consequently it must be taken that there has been a breach of the first covenant in the bond, namely, the covenant to pay interest year by year. If we adopt the argument put forward by the learned Counsel for the appellant the whole suit, of course, is time-barred. A number of authorities has been cited to me. These, however, relate for the most part to cases to which either Article 75 or Article 132 of the First Schedule to the Limitation Act applies. I am dealing in the present case with a suit on a bond and I have to try and construe the bond so as to ascertain the meaning of the parties. It is an unfortunate fact, but it has to be faced, that the language of the document is far from clear; in other words, it is difficult to arrive at the interpretation as to what is meant by the words "*wasul kar len:*" do those words mean that the creditor was to be in a position to sue for the whole money? Or do they merely mean that he was to be entitled in case of default of payment of interest to sue for payment of interest only and in case of breach of the contract to pay the principal sum within six years to sue for ths principal only? The question is one of some nicety, but having carefully considered the language of the bond it seems to me that it would be unreasonable in the present case to exclude the claim for the principal sum. We have a bond in which there are two covenants; the breach of either of those covenants would constitute what is described in the latter portion of the bond a "*wada khilafi.*" It seems to me that it may very well be argued that if, as in the present instance, the borrower has failed to pay up the principal sum within a period of six years from the date on which the

bond was executed, there has been a breach (*wada khilafi*) of the second covenant which gives the creditor a cause of action; and as the suit has been brought within three years from the date on which the principal sum was realizable the suit would to that extent be within time. Of course on this construction the claim for interest must be excluded, inasmuch as the breach of the contract to pay interest has taken place at a period much more remote than three years before the date of the suit. It would, I think, be unjust in the present case to dismiss the case in its entirety and as the words are open to the construction which I put on them, namely, that the plaintiff has a cause of action for a suit for the principal sum if he brings it within three years from the date of the period fixed for payment, I think he is entitled in the present case to a decree for the principal sum with proportionate costs. The only other point argued in the case was that the passing of consideration has not been established but I think this plea is untenable. Execution of the deed having been proved, it was for the defendant to show that no consideration had passed.

I allow the appeal in part and give the plaintiff-respondent a decree for Rs. 1,000 with proportionate costs in all three Courts.

*Appeal partly allowed.*

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CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 158 OF 1914.
January 19, 1916.
*Present*:—Mr. Justice Richardson and Mr. Justice Roe.
GOBIND CHANDRA PAL AND OTHERS—DECREE-HOLDERS—APPELLANTS
*versus*
KAILASH CHANDRA PAL—JUDGMENT-DEBTOR—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 14, 15—Transfer of Property Act (IV of 1882), s. 99—Decree on security bond—Execution—Property charged, whether can be sold—Rateable contribution—Value of properties, determination of—Objection of law not pressed by party, whether can be given effect to—Pleadings.*

The respondent executed a security bond in favour of the appellant by which some properties were made security for a certain sum. A money decree was obtained by the appellant on the bond which, though it declared a lien on the properties mentioned in the bond, did not amount to a decree on the footing of a mortgage:

*Held*, that the decree-holders could not bring the charged properties to sale in execution of the decree and that their only course was to institute a suit on the lien declared by the decree. [p. 232, col. 1.]

The distinction between section 99 of the Transfer of Property Act and rule 14 of Order XXXIV, Civil Procedure Code, pointed out. [p. 231, col. 2.]

*Semble.*—Where several properties are made security for a debt, in order to determine the liability of each property to contribute rateably to the debt, the practice of the High Court is to take the valuation of the properties at the date of the instrument creating the security. [p. 231, col. 1.]

An objection of positive law apparent on the face of the proceedings should be given effect to, even if it has not been pressed by the party in whose favour it would work. [p. 231, col. 2.]

Appeal against the order of the Subordinate Judge, First Court, Dacca, dated the 21st February 1914.

Mr. *N. Sirkar* and Babus *Provash Chandra Mitter* and *Susil Madhab Mullick*, for the Appellants.

Dr. *Sarat Chandra Bysack* and Babu *Chundra Sekhar Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings taken in execution of a decree dated the 25th April 1907. The appellants are the decree-holders and the respondent is the judgment-debtor.

It appears that on the 27th April 1899, the respondent mortgaged thirty-seven properties to Krishna Chandra Pal, the predecessor-in-interest of the appellants, as security for a sum of Rs. 22,000. On the same date the respondent executed in favour of the same person another instrument described as a security bond by which the same thirty-seven properties were made security for a sum of Rs. 25,000.

Decrees were obtained on both instruments. The decree now under execution is the decree on the security bond. The decree on the mortgage is dated the 26th June 1908.

The decree on the security bond has been printed. It is a decree against the respondent personally for the sum of Rs. 55,000 with interest and costs. A declaration is added that the appellants are entitled to a lien over the thirty-seven properties but a decree on the footing of a mortgage is expressly refused. The words are: "Plaintiffs' lien to the properties mentioned in the security bond is declared, but the plaintiffs cannot get a decree for the sale of the said pro-

Perties...as properties mortgaged and...plaintiffs' prayer to the above effect is rejected." The decree, therefore, while it declares the existence of a lien, is a money decree and can only be executed as such. No suit has been brought on the lien. The decree was put in execution in 1908, with the result that a sum of Rs. 11 was realized. Further attempts were made to execute it in 1910 and 1912 but without success.

In execution of the mortgage decree the appellants purchased some of the mortgaged properties, *viz.*, Nos. 16 and 17 in 1909 for Rs. 1,000, No. 15 in 1910 for Rs. 24,000 and Nos. 1—6 in 1912 for Rs. 24,300.

A fresh application for execution of the decree on the security bond was made on the 11th December 1912. The respondent, by a petition dated the 23rd June 1913, contended *inter alia* that he was entitled to rateable contribution in respect of the debt due under that decree from the nine properties purchased by the appellant in execution of the mortgage decree and that execution could only proceed for the balance. The appeal is from the judgment of the learned Subordinate Judge in the Court below, dated the 21st February 1914, giving effect to that contention in the following terms:—"the nine properties purchased by the mortgagees should rateably contribute to the debt under the decree obtained on the security bond." By further orders dated the 28th February and 7th March 1914, he directed that all the thirty-seven properties should be valued by a Commissioner and that the Commissioner should ascertain their present market value, their value at the date of the security bond and their value at the time some of the properties were sold. We may remark incidentally that it was quite unnecessary to direct so many valuations. The practice of the Courts here is to take the valuation at the date of the instrument creating the security. However, proceedings were stayed by an order of this Court after the appeal was filed.

At the first hearing the only question argued was whether the respondent was entitled to claim rateable contribution in the execution department or whether such a claim should not be made the subject of a separate suit. When we came, however, to examine the papers, it appeared to us that there was a more substantial question involved. The mode in which execution is now sought is by the sale of the thirty-seven properties over which a lien was declared by the decree itself and it seemed to us that the course suggested was within the prohibition enacted in rule 14 read with rule 15 of Order XXXIV of the Civil Procedure Code. We accordingly had the appeal argued on this point, with the result that we are confirmed in the view that the present proceedings are inherently defective and must prove infructuous.

No doubt the objection, though it seems to have been mentioned in paragraph 14 of the petition of obections above referred to was not pressed in the Court below and was not urged on the respondent's behalf in this Court until we drew attention to it. Nevertheless the objection is one of positive law apparent on the face of the proceedings, and it cannot be ignored.

The present case is on all fours with the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1), which was decided under section 99 of the Transfer of Property Act. Section 99 has, of course, been repealed and rule 14 of Order XXXIV which has taken its place is not couched in precisely the same terms. The difference is that while section 99 spoke of "any claim, whether arising under the mortgage or not," rule 14 is limited to claims arising under the mortgage. But the decree now in question is clearly "a decree for the payment of money in satisfaction of a claim arising under" the lien which the decree declares or creates. For the present purpose, therefore, the two provisions are identical and indistinguishable. The decree-holders cannot sell the properties charged except under a decree under which the chargee has had the opportunity to redeem the charge within a fixed period. The case we have cited is similar to the cases of *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (2) and *Matangini Dassee* v. *Chooneymoney Dassee* (3) reported in the same volume and so far as we are aware, the correctness of these decisions has never been questioned.

(1) 22 C. 813; 11 Ind. Dec. (N. S.) 538.
(2) 22 C. 859; 11 Ind. Dec. (N. S.) 568.
(3) 22 C. 903; 11 Ind. Dec. (N. S.) 598.

RAM PARSHAD v. QADRO.

We may regret that the decree holders are confronted by this obstacle but it is clear they can obtain no benefit from the present proceedings. That being so, the controversy which led to the appeal loses all substance and we need express no opinion in regard to it. The decree-holders cannot bring the charged properties to sale in execution of the decree of the 25th April 1907. Their only course is to institute a suit on the lien declared by that decree.

The judgment of the 21st February and the order of 28th February and 7th March 1914 are set aside.

The case will be remitted to the Court below with the direction that the present application for execution be dismissed.

*Orders set aside.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 232 OF 1916.

March 7, 1917.

*Present*:—Pandit Kanhaiya Lal, A. J. C.

RAM PARSHAD—PLAINTIFF—APPELLANT

*versus*

*Musammat* QADRO AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Mortgage—Option of suit on failure to pay interest or on expiration of term fixed for payment, effect of—Waiver, effect of—Limitation, commencement of.*

A covenant empowering the mortgagee to sue for payment on the happening of a certain event or to wait till the period originally fixed for payment has expired, gives him an option which cannot be taken away by Statute unless there is anything to show that the grant of such an option is illegal or forbidden by law. [p. 232, col. 2; p. 233, col. 1.]

The option is for the benefit of the mortgagee and if he waives it, limitation cannot start running against him in spite of that waiver. [p. 233, col. 1.]

A mortgage bond provided for payment of principal money with interest in two years and contained a stipulation that if the interest was not regularly paid every month, the mortgagee shall be at liberty (*ikhtiar hoga*) either to sue for the unpaid interest or for the entire money due on the mortgage and further provided that on the expiry of the period fixed for re-payment (*ba surat inqizai wada*) the mortgagee shall be at liberty to recover the entire money due to him by the sale of the mortgaged property:

*Held*, that there being alternative contracts provided for in the mortgage bond, it was open to the mortgagee to forego the one and sue to enforce the other. [p. 232, col. 2.]

Appeal against the decree of the Subordinate Judge, Rae Bareli, dated the 22nd March 1916, reversing that of the Munsif, Rae Bareli, dated the 30th November 1915.

Mr. *Ali Mohammad*, for the Appellant.

Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued in this case for the recovery of money due on a registered mortgage bond, executed in his favour by *Musammat* Qadro and her son, Tummi Khan, on the 18th July 1901. Tummi Khan died and was succeeded by his mother, *Musammat* Qadro, who is alive and a party to the suit. The bond provided for the re payment of the principal money with interest at 2 per cent. per mensem in two years: and clause 2 of it contained a stipulation that if the interest was not paid regularly in every month the mortgagee shall be at liberty (*ikhtiar hoga*) either to sue for the unpaid interest or for the entire money due on the mortgage. In clause 5 there was a stipulation that on the expiry of the period fixed for repayment (*ba surat inqizai wada*) the mortgagee shall be at liberty to recover the entire money due to him by the sale of the mortgaged property and the other property of the mortgagors.

It is admitted that nothing was paid by the mortgagors on account of the said mortgage. The suit was filed on the 19th July 1915 and was decreed by the Court of First Instance. The Lower Appellate Court, however, dismissed it on the ground that the claim was barred by limitation.

Article 132 of the Indian Limitation Act (IX of 1908) provides a limitation of twelve years for a suit to enforce payment of money charged upon immoveable property from the date when the money sued for becomes due. If the covenant referred to in clause 2 of the mortgage bond in suit is taken into consideration, the money fell due on the 18th August 1901 when the interest for the first month was not paid, and the claim would be barred by time. Bu if the condition referred to in clause 5 be considered, the limitation started running from the date when the period prescribed for the repayment of the mortgage money expired. There were thus alternative contracts provided for in the mortgage bond and it was open to the mortgagee to forego the one and sue to enforce the other. A covenant empowering

the mortgagee to sue for payment earlier or to wait till the period originally fixed for payment has expired gives him an option which cannot be taken away by Statute, unless there is anything to show that the grant of such an option is illegal or forbidden by law. The option is for the benefit of the mortgagee, and if he waives it the limitation cannot start running against him in spite of that waiver. In *Durga* v. *Tota Ram* (1) it was held that where a bond gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for repayment, whether the interest due on the bond was regularly paid or not, the claim of the plaintiff could not be regarded as barred by limitation, if he chose to stick to the longer term. In *Juneswar Dass* v. *Mahabeer Singh* (2), where a person engaged to repay the amount borrowed with interest on a day named and hypothecated certain lands by way of security with a condition that in the event of the said lands being sold in execution of a decree before the date fixed for repayment, the mortgagee shall be at liberty at once to sue for the recovery of the debt; and before the term fixed for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a subsequent mortgage, their Lordships of the Privy Council, in repelling the plea of limitation, observed: "Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred if the limitation of six years under clause 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within six years before the commencement of the suit." In *Bakhtawar Begam* v. *Husaini Khanam* (3), where a mortgage by way of conditional sale was accompanied by an agreement that the sale would be cancelled on payment of the amount of the consideration in nine years, their Lordships of the Privy Council observed that there was nothing in law to prevent the parties from making a provision that the mortgagor might discharge the debt within the specified period and take back the property, but such a provision should usually be to the advantage of the mortgagor. In *Narna* v. *Ammani Amma* (4) it was held that a hyphothecatee was not bound to take advantage of a clause in his bond which in case of default in payment of interest, enabled him to demand the principal before its due date and that a suit restricted to a claim to recover the principal and interest at the rate originally agreed brought within twelve years from the date fixed for repayment of the principal, though beyond twelve years from the date of the first default in respect of interest, was not barred by limitation. The decision in *Sheo Narain* v. *Ram Din* (5) does not apply, because it was a case of an instalment bond governed by Article 75 of the Indian Limitation Act. It is noticeable that Article 75 provides for waiver which has the effect of preventing limitation from running; but Article 132 cannot be said to exclude such waiver if the contract in express terms provides for it or prescribes an alternative. In *Nettakaruppa Goundan* v. *Kumarasami Goundan* (6) effect was given to the privilege of the obligee to exercise the option and not to demand payment before the specified date. In *Gaya Din* v. *Jhuman Lal* (7) the learned Judges who decided that case were not unanimous, and the facts and circumstances of that case cannot be used as a guide to the construction of the document now in suit. Clause 2 of the bond provides an alternative and does not in any way restrict or qualify clause 5, if the alternative referred to in clause 2 is not chosen or is waived.

The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to re-admit the appeal under its original number and to dispose of it in the manner provided by law. The costs will abide the event.

*Appeal allawed; Case remanded.*

(1) 19 Ind. Cas. 738; 16 O. C. 45.

(2) 1 C 163; 25 W. R. 84; 3 I. A. 1. 3 Sar P. C. J. 58; 3 Suth. P. C. J. 222; 1 Ind. Dec. (N. S.) 105 (P. C.).

(3) 23 Ind. Cas. 355; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813 (P. C.).

(4) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125; 31 M. L. J. 865.

(5) 11 Ind. Cas. 526; 14 O. C. 129.

(6) 22 M. 20; 8 M. L. J. 167; 8 Ind. Dec. (N. S.) 15.

(7) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

GOLJAN BIBI *v.* NAFAR ALI.

CALCUTTA HIGH COURT.
RULE *Nisi* No. 973 OF 1916.
March 19, 1917.
*Present*:—Mr. Justice Richardson and
Mr. Justice Walmsley.
GOLJAN BIBI—PETITIONER
*versus*
*Sheikh* NAFAR ALI AND ANOTHER—
OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 10, cl. (2)—Appeal, dismissal of—Re-admission—Judge, power of—Limitation Act (IX of 1908), Art. 168—Application for re-admission, limitation for.*

A Judge has jurisdiction to re-admit an appeal dismissed by an order under clause (2), rule 10, Order XLI, Civil Procedure Code. [p. 235, col. 1.]

But an order re-admitting such an appeal without notice to the other side is not binding on it. [p. 235, col. 1.]

Even if Article 168 of the Limitation Act does not apply to an application for the restoration of an appeal dismissed under rule 10, Order XLI, Civil Procedure Code, such an application ought to be made within a reasonable time and ordinarily would be too late if made after thirty days from the date of dismissal. [p. 235, cols. 1 & 2.]

Rule against the order of the District Judge, Dacca, dated the 2nd November 1916 in Case No. 133 of 1916.

FACTS of the case appear from the judgment.

Babu *Bimal Chandra Das Gupta*, for the Petitioner.—There is no provision in the Code of Civil Procedure for an application of such a nature as the one in the present case. It was to invoke the inherent power of the Court which can entertain such an application in exercise of that inherent power. The first order made by the Court re-admitting the appeal was good and it had no jurisdiction to make the second order on the same day. The Judge was *functus officio*. As to inherent power of the Court, *vide Balwant Singh v. Daulat Singh* (1). The Judge is obviously wrong in saying that the application was time-barred. Article 168 of the Limitation Act does not apply. There is no "want of prosecution" as provided for in Article 168, in this case. That Article applies to an order under Order XLI, rule 19. This case is not under that rule. This application was made to restore an appeal which had been dismissed under rule 10, Order XLI. Order XXV deals with the furnishing of security. Refers also to *Ramhari Sahu* v. *Madan Mohan Mitter* (2). Though *Fatimunnissa* v. *Deoki Pershad* (3) has overruled *Ramhari Sahu* v. *Madan Mohan Mitter* (2) it was on quite a different ground. The Judge exercised his discretion in the petitioner's favour but vacated his order subsequently without any application on the other side.

Babu *Sures Chandra Taluqdar*, for the Opposite Party.—The Court had no option but to reject the application under Order XLI, rule 10, sub-clause (2). The period of limitation is one month. Article 168 of the Limitation Act applies. *Ramhari Sahu* v. *Madan Mohan Mitter* (2) does not apply, it speaks of non-compliance with High Court rules. Failure to pay costs amounts to non-prosecution of the appeal. The opposite party had no notice whatsoever, so he is not bound by the order of the Judge of the 2nd November 1916 re-admitting the appeal.

Babu *Bimal Chandra Das Gupta*, in reply.—As there was an exercise of jurisdiction by the Court, the subsequent order was erroneous. Without an application for review the Judge could not vacate his former order. Article 168 does not apply.

JUDGMENT.

RICHARDSON, J.—This is a Rule calling on the opposite party to show cause why the order of the Officiating District Judge of Dacca, dated 2nd November 1916, should not be set aside.

The order was made in the following circumstances. The petitioner filed an appeal in the District Judge's Court on the 31st May 1916. On the 4th July 1916 she was directed under rule 10, Order XLI, to furnish security in the sum of Rs. 80 for the costs of the appeal and of the original suit. The time for furnishing security was more than once extended. On the 26th August 1916 the Officiating District Judge refused to extend the time further and dismissed the appeal under clause (2) of Order XLI, rule 10. On the 2nd November 1916, the petitioner applied for the re-admission of the appeal. By the first of the two

(1) 8 A. 315; 13 I. A. 57; 4 Sar. P. C. J. 707; 4 Ind. Dec. (N. S.) 1176.

(2) 23 C. 339; 12 Ind. Dec. (N. S.) 227.

(3) 24 C. 350; 1 C. W. N. 21; 12 Ind. Dec. (N. S.) 901.

orders made on that date, the Officiating District Judge directed that the appeal should be re-admitted if the amount of the security ordered were deposited in Court by the 8th November 1916. By the second order of the same date against which this Rule has been obtained, he rejected the application on the ground that it had just come to his notice that the application was time-barred by more than a month.

It is not disputed that the Judge had jurisdiction to re-admit the appeal after having dismissed it by an order under clause (2), rule 10, Order XLI.

It is argued for the petitioner that inasmuch as the Officiating District Judge had jurisdiction in the exercise of his powers to re-admit the appeal by his first order of the 2nd November, he was *functus officio* and had no power to pass the second order of the same day. It is further argued for the petitioner that the Officiating District Judge was wrong in deciding that the application was time-barred. Apparently the Officiating District Judge applied Article 168 of the Schedule of the Limitation Act. It is contended that that Article applies to an application made under rule 19, Order XLI, and has no application when an application is made to restore an appeal which has been dismissed under rule 10.

On the other hand, it is contended for the opposite party that both the first and second orders of the 2nd November 1916 were made by the Officiating District Judge without notice to them and that they are not bound by those orders. On the question of limitation, it is argued for the opposite party that the District Judge is right in applying Article 168 of the Schedule of the Limitation Act.

It seems to me that the contention of the opposite party that they are not bound by the order of the 2nd November 1916 re-admitting the appeal should be accepted. That raises the question whether this Court ought to exercise its revisional jurisdiction in the matter.

In regard to the question of limitation even if Article 168 does not apply to an application for the restoration of an appeal dismissed under rule 10, Order XLI, it is clear that such an application ought to be made within a reasonable time; and by anology an application made after thirty days would ordinarily be an application unduly delayed

The petitioner had had every opportunity of complying with the order for furnishing security and she did not apply to set aside the order dismissing the appeal till the 2nd November. As the Officiating District Judge has said, that was more than thirty days beyond the period allowed by Article 168. Whether the Article applies or not, the petitioner did not, in my opinion, act with due diligence in the matter. We have come to the conclusion that this Court ought not to interfere in this case.

In that view, the Rule should be discharged. We make no order as to costs.

WALMSLEY, J.—I agree that the Rule should be discharged.

*Rule discharged*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 924 OF 1915.

November 14, 1916.

*Present*:—Mr. Justice Srinivasa Aiyangar.

SOARI AYYANGAR—PLAINTIFF—PETITIONER

*versus*

SUBBARAYAR—DEFENDANT—RESPONDENT.

*Contract Act (IX of 1872), s. 23—Promissory note—Pannayal service, in lieu of interest—Public policy—Limitation Act (IX of 1908), Sch. I, Art. 68—Bond, suit on—Condition, breach of—Limitation.*

The plaintiff lent a certain sum of money to the defendant, on condition that the latter should hand over three of his *pannayals* to work with plaintiff, that their services should be in lieu of interest on the money lent and that if the *pannayals* failed to do satisfactory work, the money should become payable. The *pannayals* left plaintiff's service and the plaintiff more than three years after brought a suit to recover the amount lent with interest:

*Held*, (1) that the transaction amounted to a transfer of possession of human cattle and was opposed to public policy and the money was, therefore, not recoverable; [p. 236, col. 1.]

(2) that the suit was barred by limitation as it was brought more than three years after the condition of the bond had been broken. [p. 236, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the

order, dated the 10th July 1915, of the Court of the District Munsif, Tiruvalur, in Small Cause Suit No. 479 of 1915.

Mr. *V. Raghavachariar* for Mr. *N. S. Rangaswami Aiyangar*, for the Petitioner.

Mr. *R. Rangachariar*, for the Respondent.

JUDGMENT.—This is a curious case. The defendant borrowed Rs. 40 from the plaintiff and pledged his farm servants, Karanapuram, his wife Veeri and his son Samudram, to the plaintiff on the 18th June 1899. The bond Exhibit A executed by the defendant to the plaintiff on that day recites that the defendant has handed over these people. The stipulation of the bond is that the plaintiff should take work from them in lieu of interest and if they failed to do satisfactory work, the defendant should pay the principal with interest at one per cent. per month. There is no other covenant to pay the debt.

There can be no doubt that the intention of the parties was to create a pledge of these persons as if they were cattle and the plaintiff frankly states that they were the defendant's bondsmen. Karanapuram died a few years after the pledge, and his wife Veeri did not work for the plaintiff afterwards. Samudram is said to have worked for the plaintiff till about a year before the suit, which was filed in April 1915. The plaintiff sues to recover the debt alleging his cause of action to be the failure of Samudram to work for him. The District Munsif dismissed the suit, holding that the transaction was opposed to public policy and also that the action was barred by limitation. It is argued for the plaintiff that in substance the transaction amounts only to a loan of the services of the defendant's servants—they need not do any service unless they chose—and there is nothing illegal or against public policy in the arrangement. It is nothing of the sort; the defendant does not pay their wages, they are to be paid by the plaintiff himself. The transaction in substance is what it purports to be, namely, a transfer of possession of the human cattle in consideration of the plaintiff lending Rs. 40 to the defendant. The plaintiff in fact pays for the defendant's proprietorship of these people. It is nothing to the purpose to say that these people in the eye of law are free people and that the defendant cannot in law have any right over them. I am not desirous of inventing a new head of public policy, but this transaction falls within well-known heads as it practically enforces a state of slavery.

The other point is equally fatal to the suit. The cause of action to recover the money arose when Karanapuram died and his wife ceased to do work as the condition of the bond was broken then, as there can be no question of satisfactory work thereafter. That was much more than three years before the suit, as admitted by the plaintiff. In answer to this, it was said that as Samudram, the son, was working till within three years of the date of the suit, that amounts to payment of interest on the bond under section 20 of the Limitation Act. There was no such plea in the lower Court, there is no finding that Samundram did work and if he did, he worked in lieu of interest payable by the defendant. I reserved judgment in this case as it was said that my brother Sadasiva Aiyar, J., in a similar case from the same District Munsif held that the action was not barred. I have now looked into the papers (Civil Revision Petition No. 1022 of of 1914) and the judgment and I find that that case was quite different. The defendant in that case borrowed some money from the plaintiff and agreed to render certain services in lieu of interest and did those services till within three years of the suit. Sadasiva Aiyar, J., held and, if I may say so with respect, quite correctly, that payment of interest need not be in money but may consist of money's worth.

There was no question of pledging men and there was no payment for services as there was in this case. Unlike this case the plea of acknowledgment of liability by payment was raised there. I, therefore, dismiss this petition with costs.

*Petition dismissed*

V.R.P.

PARSANI *v.* MANGAL SINGH.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1560 OF 1915.
February 17, 1917.
*Present*:—Mr. Justice Shah Din,
Chief Judge.
*Musammat* PARSANI AND ANOTHER—
DEFENDANTS—APPELLANTS
*versus*
MANGAL SINGH AND ANOTHER—PLAINTIFFS,
DIDAR SINGH—DEFENDANT—
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Appeal—Practice—Respondent, whether can maintain decree on ground decided against him—Cross-objections—Suit for declaration of invalidity of gift—Non-ancestral property.*

One *B.* made an oral gift of his landed property to his unmarried daughters and mutation of the gifted land was effected in favour of the donees. On *B.*'s death his collaterals in the sixth degree sued for a declaration to the effect that the gift made by *B.* to his daughters should not affect their reversionary rights after the death of the widow. The Subordinate Judge, holding that the land was ancestral but that by custom applicable to the parties the gift was valid, dismissed the suit. In appeal it was contended by the defendants that the plaintiffs had no *locus standi* to question the gift because the land in suit was not the ancestral property of *B.* The District Judge refused to hear arguments on the point because no cross-objections had been filed against the finding that the land was ancestral:

*Held*, (1) that the decree of the Subordinate Judge being one dismissing the suit, the defendants in their capacity of respondents in the District Judge's Court were entitled to maintain that decree upon any ground decided against them by the Subordinate Judge without filing any cross-objections under Order XLI, rule 22, Civil Procedure Code, and that the District Judge acted illegally in declining to hear arguments on the question whether the land in dispute was ancestral or not: [p. 238, col. 1,]

(2) that the evidence on the record was insufficient to prove that the land was ancestral and that the plaintiffs' suit was, therefore, liable to be dismissed upon this ground alone. [p. 238, col. 2.]

**Second appeal from the decree of the District Judge, Lahore, dated the 20th March 1915, reversing that of the Subordinate Judge, first class, Lahore, dated the 25th July 1914, dismissing the claim.**

Mr. *Nand Lal* and Sardar *Kharak Singh*, for the Appellants.

Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—In the year 1909 one Budha Singh, a *Wirk Jat* of *Mauza* Chak Bhera in Tehsil Lahore, made an oral gift of half of his landed property to his unmarried daughters, *Musammat* Parsani and *Musammat* Natho. The gift was reported to the *patwari* shortly after but the mutation proceedings were protracted for certain reasons, which it is unnecessary to state here; and the final mutation order was not passed until 5th June 1912. By that order mutation of the land gifted was made in favour of the donees.

Meanwhile Budha Singh died leaving a widow *Musammat* Bishen Kaur; and in August 1912, the present plaintiffs, who are collaterals of Budha Singh in the sixth degree, brought a suit for a declaration to the effect that the gift made by Budha Singh to his daughters should not affect their reversionary rights after the death of the widow. It may be stated here that one of the daughters was married before the suit was brought, and the other has been married since the institution of the suit. Further, one of the plaintiffs' brothers, namely, Didar Singh refused to join with them in the suit as a co-plaintiff, and so he has been added as a co-defendant with the donees.

The defendants pleaded *inter alia* that the land in suit was not ancestral *qua* the plaintiffs, and that the gift was valid by custom because (*a*) it was made by the deceased proprietor in favour of his daughters and the resident son-in-law in lieu of services rendered to him; and (*b*) the daughters were the heirs of the deceased in preference to the plaintiffs. Upon the pleadings of the parties, the Subordinate Judge framed five issues, the first, second and fifth of which related to the alleged non-ancestral character of the land and to the question of custom involved in the case. The Subordinate Judge held that the land was ancestral, but that by custom applicable to the parties the gift in favour of the daughters was valid, inasmuch as they were unmarried at the time of the gift and subsequently when one of them was married her husband resided in the donor's house since the date of the marriage On this ground the Subordinate Judge dismissed the plaintiffs' suit.

On appeal by the plaintiffs the learned District Judge differed from the Subordinate Judge on the question of custom, holding that the daughters of Budha Singh on whom the onus lay had failed to prove that by custom applicable to them, the land in dispute could be gifted to them by their father in the presence of the plaintiffs. On behalf of the daughters it was contended

that, apart from the alleged invalidity of the gift, the plaintiffs had no *locus standi* to question it because the land gifted was not the ancestral property of Budha Singh *qua* the plaintiffs. But the learned District Judge refused to hear arguments on this point, because on behalf of the daughters no cross-objection against the Subordinate Judge's finding that the land was ancestral had been filed. It is clear that the District Judge was in error in shutting out the defendants' contention on the ground stated; the decree of the Subordinate Judge being one dismissing the suit, the defendants in their capacity of respondents in the District Judge's Court could have maintained that decree upon any ground decided against them by the Subordinate Judge without filing any cross-objections under Order XLI, rule 22, Civil Procedure Code.

The District Judge, having decreed the suit of the plaintiffs, granted a certificate for second appeal to the defendants under section 41 (3) of the Punjab Courts Act, and in virtue of that certificate the present appeal was filed in this Court. The first point raised by the Counsel for the appellants is that the District Judge acted illegally in declining to hear arguments on the question whether the land in dispute was ancestral or not, and that since the evidence on the record is insufficient to prove that the land is ancestral, the respondents' suit must be dismissed upon this ground alone. In the view that I take of the case in connection with the point thus raised it is unnecessary for me to consider and decide the question of custom involved, which was also argued before me at some length. It seems to me that the Subordinate Judge was not justified in holding, upon the material on the record, that the land gifted by Budha Singh to the respondents had been proved to be his ancestral property *qua* the plaintiffs. As has been stated above, the plaintiffs are Budha Singh's collaterals in the sixth degree; and it is not denied that so far as the entries in the revenue records go, there was no direct proof of the land in question being ever held by Shian, the common ancestor of the parties. The facts noticed by the Subordinate Judge that, according to the entries of the Settlement of 1856, the sons of Bakshish (see copy of the pedigree on the record) and the father of Budha Singh deceased held equal shares of land in the village is clearly insufficient itself to prove that the land gifted by Budha Singh to the respondents was at one time held by Shian and had descended from him through five generations to Budha Singh. There is no other evidence of any description to prove the ancestral character of the land in question, and I must hold that it is not proved that the land was the ancestral property of Budha Singh *qua* the present respondents.

This finding is sufficient for the disposal of the case. I accordingly accept this appeal and setting aside the decree of the District Judge restore that of the Subordinate Judge with costs throughout.

*Appeal accepted.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 683 OF 1915.

April 5, 1916.

*Present*:—Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

VENA SUBBARAYULU NAIDU—DEFENDANT No. 2—APPELLANT

*versus*

M. K. SUBBARAYALU NAIDU AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

*Madras Estates Land Act (I of 1908), s. 192 (c)—Rent suit——Rent, reduction of, claim for, on ground of non-repair of irrigation works—Set-off, equitable, whether can be allowed in suit for rent.*

Where the defendant (*ryot*), who had accepted a *patta* and had also executed a *muchilika* without objection agreeing to pay the rent claimed by the plaintiff, claimed a reduction on the ground that the plaintiff had failed to repair the well on the land and rendered him unable to raise the garden crops for the cultivation of which the rent had been fixed:

*Held*, that the defendant's plea for reduction of rent on the ground of failure of water supply was in the nature of an equitable set-off, being in effect a claim for damages in respect of the contract to cultivate, and was, therefore, barred under section 192 (*c*) of the Madras Estates Land Act, 1908.

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 111 of 1914, preferred against that of the Court of the Honorary Deputy Collector, Tinnevelly, in Summary Suit No. 302 of 1913.

Mr. *K. Bhashyam Aiyangar* for Mr. *K. Rajah Aiyar*, for the Appellant.

Mr. *T. R. Venkatarama Sastriar*, for the Respondent.

JUDGMENT.—In defending a suit for rent, appellant alleged that the rent was not due, because respondent had failed to repair the well on the land and consequently he (appellant) had been unable to raise the garden crops for the cultivation of which the rent had been fixed. The first Court allowed an abatement of rent, but the lower Appellate Court disallowed appellant's contention because under section 38 of the Estates Land Act he could and should have applied to the Collector for a reduction of rent.

*Patta* was accepted by defendant for *Fasli* 1318 and a *muchilika* executed; and similar *pattas* were tendered for *Faslis* 1319 to 1321 (the suit period) and were not objected to. It must be taken, therefore, that there was a contract between the parties, under which the appellant was bound to pay the rent now claimed. His plea for reduction of rent on the ground of failure of water supply is undoubtedly in the nature of an equitable set-off, for, in effect, it is a claim for damages in respect of the contract to cultivate, for into that contract appellant wishes to import another contract that the landlord was to repair the well which irrigated the land. In the language of Scotland, C. J., in *Stephen Clark* v. *Ruthnavaloo Chetti* (1), "the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit." In this case defendant's plea undoubtedly amounts to an equitable set-off and as such is barred under section 192 (*e*) of the Act.

In this view it is unnecessary to discuss the larger question of whether, apart from the question of set-off, defendant is precluded by the provisions of the Act from setting up in defence to a suit for rent, a right which he is specifically allowed by the Act to enforce by suit or otherwise.

The District Judge has not recorded any finding on the question whether two instalments of rent for *Fasli* 1319 are barred by limitation. The appeal is accordingly remanded for a finding on this point. The finding should be submitted within six weeks from this date, and seven days will be allowed for filing objections.

(1) 2 M. H. C. R. 296.

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In compliance with the order contained in the above judgment, the District Judge of Tinnevelly submitted the following

FINDING.—It is directed that finding be submitted on the evidence on record on the issue whether two instalments of rent for *Fasli* 1319 are barred by limitation. It is alleged in paragraph 10 of the plaint that the plaint was instituted by calculating all the arrears as a single arrear, consistently with the action of the plaintiff complying with the request of the defendants that they should be permitted to pay them as a whole at the end of every *fasli*. The agent of the plaintiff (his first witness) states that the *ryots* of the village had agreed to pay the rent for the whole *fasli* in a lump at the close of the *fasli*. The payment of interest for the previous instalments was not always insisted upon, although the landlord had the right to do so. He also stated that Subbarayulu Naidu (the defendant) requested the landlord to allow him to pay the rent for the whole *fasli* at the end of the *fasli* in his presence and the landlord agreed to it for *Fasli* 1319. There is no evidence to the contrary. The lower Court does not believe that this request was made by the defendant because of the state of the relations between the parties. But there is no evidence that at that time the relations between the parties were strained. If the agreement to pay at the end of the *fasli* be believed, the arrears for two instalments for *Fasli* 1319 are not barred by limitation. On the evidence I find that the agreement is proved and that the two instalments are not barred by limitation.

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This second appeal came on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial on 5th April 1916.

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.

*Appeal dismissed.*

V. R. P.

ZINAT BIBI *v.* EMNA.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL NO. 964 OF 1914.
May 15, 1917.
*Present*:—Mr. Justice Shah Din, Chief Judge, and Mr. Justice Le Rossignol.
*Musammat* ZINAT BIBI—PLAINTIFF—APPELLANT
*versus*
*Musammat* EMNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Property held by owner of shrine, nature of—Inheritance.*

One *L.*, who made a living by *piri muridi* and owned in a graveyard the tomb of an ancestor of his, executed a Will whereby he left the whole of his property to his wife with a reversion after her death to her brother *K.* He also appointed *K.* manager of the estate on behalf of his wife after his death and also his own successor and representative for the continuation of the *urs* and for carrying out the duties and receiving the offerings connected with the *piri muridi*. On his death his daughter by an earlier wife sued for possession of her share of the property:

*Held*, that there was nothing to show that the testator appointed *K. sajjada nashin* in the usual acceptance of the term or that the property in dispute was ever dedicated to the upkeep of the shrine, but that it was held by the testator in proprietary right and not as a keeper of the shrine and that the plaintiff was entitled to her share under the Muhammadan Law. [p. 241, col. 2.]

First appeal from the decree of the District Judge, Montgomery, dated the 23rd January 1914, dismissing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Nur ud-Din*, for the Appellant.

Dr. *Muhammad Iqbal* and Sayed *Mohsin Shah*, for the Respondents.

JUDGMENT.—Ilahi Bakhsh, a *Kureshi* who resided at Pakpatan town, made a living by *piri muridi* and owned in a graveyard outside the city of Pakpatan the tomb of Hafiz Kaim, his ancestor. On the 12th of July 1910 he executed a Will whereby he left the whole of his property to his wife, *Musammat* Emna Bibi, with reversion after her death to her brother Karam Din. In the said Will he appointed the said Karam Din manager of the estate on behalf of his sister after the death of the testator, and further he appointed Karam Din as his successor and representative for the continuation of the *urs* or death day festival of Hafiz Kaim and also for carrying out the duties and receiving the offerings connected with the *piri muridi*. Having made this Will he died some eight months later, and his wife and her brother took possession of his estate.

The present suit was brought by *Musammat* Zinat Bibi, daughter of the testator by an earlier wife, and it has been defended by Karam Din, brother-in-law of the testator, alone, for *Musammat* Emna the widow has let the case proceed against her *ex parte*. The Court below has dismissed the suit, holding that Muhammadan Law is not the rule of succession followed by this family, that the testator held the position of *gaddi nashin* and that Karam Din having been nominated by the deceased as his successor to the *gaddi* was entitled to the succession. The property left by the testator, apart from moveable property, consists of a *pacca* house, a house known as *dera*, a two-storied shop, all these three being situated within the town of Pakpatan, and finally, the *rauza* or tomb of Hafiz Kaim situate in a graveyard lying outside the city walls.

For all practical purposes there is but one issue in the case, and that is whether this immoveable property was attached to the tomb of Hafiz Kaim and whether the testator held it as keeper of the tomb or whether he held it in full proprietary right, and on behalf of the plaintiff-appellant it was strenuously urged that inasumch as *prima facie* the property was private property and the burden of proving any particular fact lies on the person who wishes the Court to believe in its existence, the burden of proof should have been laid upon the defendant in the first instance. It is to be noted that the defendant-respondent does not rely at all upon the Will executed by the testator, for obviously that would not suit his purpose. His contention is that the testator had no power to dispose of the property by Will and that defendant is entitled to it not by inheritance but as the testator's nominated successor in the office of *sajjada nashin* of the shrine. The oral evidence is voluminous but, in our opinion, very untrustworthy, for in most cases it represents merely the opinions of the persons who gave it and who from their own evidence clearly are little qualified to give any opinion at all in the matter. If the testator can be called *sujjada nashin* of the tomb, such a title can be recorded only as a courtesy title, for the tomb or the

shrine cannot by any stretch of language be regarded as a public religious institution. As stated before, it consists of an old tomb in the last stages of disrepair, in the neighbourhood of which there is neither well nor shop nor refuges for the accommodation of any pilgrims; and it is in evidence that only once a year, *viz.*, on the death day of Hafiz Kaim did persons proceed to the spot. Estimates of the persons who so attended vary extensively from 100 to 1000, but it is quite clear that the tomb lay deserted except for one or at most two days during the year and that it was not a regular place of pilgrimage. It appears to be merely the tomb of a deputed saintly man whose descendants make a little money from the offerings received there during one day in the year. Such a tomb cannot be compared in any respects, especially in respect of the rules governing the rights in it, with the large institutions which are presided over by *mahants* who in their turn are controlled by brotherhoods. Such a comparison in a case of this kind would be quite fallacious. On behalf of the defendant-respondent it has been urged that the tomb was originally owned by *Sayyids* and that the testator and his father came into possession of it not in accordance with the rules of ordinary succession but as *murids* or disciples and successors of the first *sajjada nashin*. That Hafiz Kaim, whose remains are said to be covered by the tomb in question, was a *Sayyid* is, however, not proved, for whilst plaintiff asserts that Hafiz Kaim was a *Kureshi*, the defendant avers that he was a *Sayyid*. The only piece of documentary evidence upon the record, an old sale-deed, which is more than thirty years old and which appears to be *prima facie* genuine, shows that Pir Bakhsh was the son of Ghulam Resul; and we are quite unable to find it established that Hafiz Kaim Din was a *Sayyid* and was not a *Kureshi* and the blood ancestor of the testator. That being so, the respondent's argument that the testator received this property from Hafiz Kaim Din as the keeper of the shrine and not in absolute proprietary right falls to the ground. The plaintiff and the testator are *Kureshis* by caste, and as regards them there exists a strong presumption that they followed Muhammadan Law. The site of the tomb is recorded in the revenue papers as the personal property of the testator and it is therein described merely as a graveyard, and not as a shrine. If we turn now to the Will executed by the testator, we find that the whole of the property including the tomb and its site is therein described as the personal property of the testator and he proceeds to dispose of it as such, leaving it in the first instance to his wife and after her death to the respondent. In his Will he does not describe himself as *sajjada nashin* nor does he describe the respondent as his successor in the *sajjada nashini*, but he does describe him as his representative and successor in the *piri muridi* and in the celebration of the *urs*.

Respondent himself does not contend that the property is *wakf*. Indeed, he asserts that it is not *wakf* and drawing a distinction, which we find to be too fine to appreciate, asserts that the property though not *wakf* is attached to the shrine.

Our conclusion then is that there is no reason to hold that the property in dispute is not the personal property of the testator, that there is no proof that the testator appointed the defendant *sajjada nashin* in the usual acceptance of the term, and that there is no proof that the property was ever dedicated to the upkeep of the shrine or that, in fact, the income of the property was used for the upkeep of the shrine. But we find it proved that the property was held by the testator in proprietary right.

On these findings we accept the appeal and decree the plaintiff's claim with costs throughout.

*Appeal accepted.*

MINA KUMARI BIBI *v.* BIJOY SINGH.

## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 11, 1916.

*Present*:— Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

MINA KUMARI BIBI—PLAINTIFF—APPELLANT

*versus*

*Raja* BIJOY SINGH DUDHURIA—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act XIV of 1882), ss. 274, 276, 295—Execution—Attachment—Sale of attached property by judgment-debtor—Subsequent attachment and sale of same property in execution of another decree—Execution purchaser and private purchaser, rights of Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Preferential payment to creditor, whether fraudulent—Document, execution of—Date—Presumption—Judgment—Evidence, nature of.*

Where certain immoveable properties of a judgment-debtor were successively attached in execution of two decrees held by the same decree-holder and were sold under the second attachment and purchased by the decree-holder himself and it was also found that on the day previous to the second attachment in pursuance whereof the execution sale was held, the judgment-debtor had conveyed the properties absolutely to the plaintiff by a private sale:

*Held*, in a suit by the plaintiff to recover possession of the properties,

(1) that the private sale, being prior to the second attachment, took effect in preference to the Court sale; [p. 244, col. 2.]

(2) that under section 276 of the Code of Civil Procedure, 1882, the decree-holder could not take advantage of any attachment other than the one which actually led up to the sale and that, therefore, the decree-holder could not avail himself of the first and earlier attachment in execution of his earlier decree to render the sale to the plaintiff void. [p. 245, col. 1.]

*Held*, also (1) that the existence of assets in Court was a condition precedent to bring section 295 of the Code into play and there being none such in the case, the decree-holder was not entitled to rateable distribution; [p. 245, col. 2.]

(2), that even assuming that section 295 could apply and the conditions required by that section were fulfilled, the decree-holder could not under section 276 of the Code take advantage of any attachment other than the one which actually led up to the sale. [p. 245, col. 2.]

Where a purchaser in Court auction questions the validity of a prior private sale on the ground that it was either *benami* or fraudulent, but admits that the vendor owed the private purchaser more than the actual consideration for the sale, the admission is a complete answer to the plea of *benami* and also operates strongly against the plea of fraudulent transfer. [p. 244, col. 2.]

For all that is contained in section 53 of the Transfer of Property Act, a debtor may pay his debts in any order he pleases and prefer any creditor he chooses. [p. 244, col 2.]

The mere fact that a debtor prefers one of his many creditors and executes a conveyance to him of his properties and does so of set purpose, would not stamp the transaction as a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act. [p. 244, col. 2.]

It is a general though not a conclusive presumption that a document was made on the day of the date it bears. [p. 244, col. 2.]

A Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. [p. 245, col. 1.]

Appeal from the judgment and decree of the Calcutta High Court (Chitty and Teunon, JJ.), dated the 26th March 1912, reversing those of the Subordinate Judge, Murshidabad at Berhampur.

FACTS of the case appear fully from the judgment.

Messrs. *Upjohn, K. C.*, and Sir *William Garth*, for the Appellant.—The judgment of the Subordinate Judge was right and ought not to have been reversed. There is absolutely no evidence that the document was antedated and the judgment of the High Court on this point is based on mere suspicion. The pleas of *benami* and fraud are completely answered by the defendant's admission that the judgment-debtor owed to the plaintiff more than the consideration for the sale. These grounds were not taken in the written statements and there were no issues joined thereon. They ought not to have been allowed by the High Court. See *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (1).

Messrs. *De Gruyther, K. C.*, and *Bhugwandin Dube*, for the Respondent, contended that the plaintiff's sales were collusive and fictitious and were proved to be so by the record. The evidence also proved their being antedated. The earlier attachment of 1902 was then subsisting and the sale was, therefore, also inoperative.

[Mr. Upjohn, objected to the last point on the ground that it was not pressed before the High Court but Mr. DeGruyther contended that it would be open to him, even though abandoned by his legal advisers in the High Court as it was raised in the written statement and was a point of law. Their Lordships overruled the objection.]

The respondent is entitled to rateable distribution under sections 276 and 295 of the Code of 1882, as the attachment in

(1) 29 Ind. Cas. 639; 13 A. L. J. 570; 19 C. W. N. 729; 17 Bom. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; (1915) M. W. N. 484; 18 M. L. T. 1; 42 I. A. 135; 39 B. 441; 2 L. W. 611 (P. C.).

execution of his earlier decree was subsisting at the time of the sale. See *Sorabji Edulji* v. *Govind Ramji* (2). See also section 73 of Act V of 1908.

Their Lordships did not want to hear appellant's Counsel on facts.

Mr. *Upjohn, K. C.*, in reply (on the point of law).—In order to entitle the respondent to avoid appellant's sale under section 276, Civil Procedure Code, 1882, the attachment must be the one which led up to the sale in his favour. That attachment was subsequent to the sale to the appellant. There being admittedly no assets in Court, section 295, Civil Procedure Code, does not apply. In any event the earlier attachment was abandoned long ago and ought not to be held subsisting on the date of the sale to the appellant.

JUDGMENT.

SIR LAWRENCE JENKINS.—This is a suit for the possession of immoveable property brought by a purchaser under a private alienation against a purchaser at an execution sale, who was also the decree-holder, and against the judgment-debtor. There was also originally another defendant, but he has since died and is now represented by the decree-holder.

The suit was decided in the plaintiff's favour in the Court of the Subordinate Judge at Berhampur, but on appeal it was dismissed with costs by the High Court of Calcutta. From the High Court's decree the present appeal has been preferred to His Majesty in Council.

The judgment debtor is Chhatrapat Singh Dugar, who is not inexperienced in litigation. Two decrees were passed against him in the High Court of Calcutta on its original side, one on the 24th August 1896, in Suit No. 449 of 1896, the other on the 3rd January 1901, in Suit No. 302 of 1900. The defendant, Raja Bijoy Singh Dudhuria, the purchaser at the execution sale, was a transferee of both decrees, and so became the decree-holder under each.

It will be convenient to trace briefly the history of these decrees, both of which were sent for execution to the Court of the District Judge of Murshidabad.

On the 13th June 1902, an application was made at Murshidabad by the decree-holder for execution of the decree of 1896, and the proceedings became execution case No. 8 of 1902.

On the 12th July 1902, an order of attachment was made under section 274, Civil Procedure Code, prohibiting the judgment-debtor from alienating the property there specified until any other order should be passed by that Court.

The proceedings were protracted by adverse claims, but ultimately on the 29th March 1905, the following order was recorded:—"Nothing further can be done in this case at present. The application for execution is accordingly dismissed with the consent of the decree-holder. Certify result to the Hight Court, Original Side."

Though this does not appear on the record, it may be assumed that the Murshidabad Court certified the result to the High Court, in accordance with the provisions of the Code (section 223).

On the 26th July 1907, another application, No. 19 of 1907, was made to the Murshidabad Court for execution of the decree of 1896, and here, too, it may be assumed that an order was made by the High Court for the transmission of the decree. The order made on the application was, "Now issue warrant of attachment. Returnable on 16th August"

On the 29th July 1907, at the decree-holder's instance, the issue of the warrant of attachment was stayed, and a direction given for the issue of notice to the judgment-debtor to show cause, on the 16th August, why the properties should not be advertised for sale.

On the 16th August the decree-holder applied for the issue of a sale proclamation, "the attachment being taken to have subsisted since the order passed on the 27th March 1905, on his previous application for sale of the same properties . . . . . Previous to that order there had been an order passed on the 20th March 1905, directing that the 'sale of the (other) property now for sale here is postponed indefinitely.'"

Notwithstanding Chhatrapat's opposition, the District Judge held that the application No. 19 of 1907 must be received as one in continuation of the former proceedings, that the properties were still under attachment

(2) 16 B. 91; 8 Ind. Dec. (N. S.) 537.

and that a sale proclamation might issue without the property again being attached. Though on the face of things it seemed no real concern of his, still Chhatrapat appealed, but the order was affirmed by the High Court. So much, then, for the proceedings under the decree of 1896.

Under the other decree, that of 1901, an application for execution, No. 16 of 1907, was made by the decree-holder on the 16th July 1907, in the Murshidabad Court. Notice was issued, and on the 25th July 1907, an order was made for the issue of a warrant of attachment. On the 23rd August 1907 attachment was effected. A claim was preferred by the present plaintiff, but the property was sold in execution, notwithstanding her opposition, the purchaser being the decree-holder, in whose favour an order had been made, allowing the purchase-money to be set off against the decretal amount, which was considerably in excess of the price.

The private alienation under which the plaintiff derives title was effected by two sale-deeds expressed to be executed in her favour on the 15th July 1907 by the judgment-debtor. The question in this litigation is which of the two titles is to be preferred, the plaintiff's or the decree-holder's.

The plaintiff alleges that hers is the earlier, and that the judgment-debtor had no right, title, or interest in the property in suit at the date of the attachment in execution case No. 16 of 1907, under which the decree-holder bought. The plaintiff also questions, with certain exceptions, the identity of the property in the two sales, but in the view their Lordships take, this topic need not be pursued. The decree-holder denies the plaintiff's priority of title, and contends that the assurances to her were collusive and fictitious; that the sale-deeds, though purporting to be of a date prior to the attachment in execution case No. 16 of 1907, were in truth executed later; and that in any case the private alienation to the plaintiff was during the continuance of an attachment, and, therefore, void. First, then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "the judgment-debtor, Babu Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute." Strictly this means that the transaction was *benami*, and not that it was a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act. The difference is distinct, though it is often slurred. To the suggestion that the transaction was *benami*, a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale-deeds and more.

And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour.

It may be that the judgment-debtor preferred the plaintiff, with whom he was connected by family ties, and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. And whatever may be suspected and however slender the confidence that Chhatrapat may inspire, there is no evidence on which any fraudulent intention can be imputed to the plaintiff.

Had it been made out that the sale-deeds to the plaintiff were really executed after the attachment in execution case No. 16 of 1907, then there would have been justification for a finding of fraud; though in that case the finding would have been unnecessary, for the plaintiff's title would have been defeated, apart from fraud, under the express terms of section 276 of the Civil Procedure Code.

But the contention that the sale-deeds were antedated cannot be sustained. It is a general though not a conclusive presumption that a document was made on the day of the date it bears, so that for what it is worth the plaintiff starts with that in her favour; but her case does not rest there, for such oral evidence as there is on the point supports the presumption, and was not seriously challenged by cross-examination. It has been suggested that the plaintiff should have called other witnesses to the date of execution. But her

advisers had no reason to apprehend that this contention would be advanced. It is not pleaded in the written statement, it is not raised in the issues, and the judgment of the first Court certainly does not suggest that it was given prominence even at the trial.

There may be ground for suspicion, and Chhatrapat's treatment of his creditors in the past may engender doubt, but the Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. Such as it is, the legal proof here is all on the plaintiff's side, while if indirect signs are sought the keenness which marked the contest as to the continuation of the execution proceedings No. 8 of 1902 is hardly intelligible unless it be assumed that both parties realised the importance of the dates, and the dates could only have possessed importance if the sale-deeds had been already executed.

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the *kobalas* bear, are nevertheless void under section 276 of the Civil Procedure Code. That section provides that when an attachment has been made as there described, any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore, it cannot be avoided by that attachment.

But the decree-holder argues that it was made during the continuance of the attachment in execution case No. 8 of 1902, and in support of this, reliance is placed on the order of the District Judge of the 16th August 1907, which was affirmed on appeal by the High Court.

The plaintiff is not bound by those decisions, and their correctness has been forcibly questioned before their Lordships. But it is unnecessary and inadvisable to deal further with this point, and more especially as there is another and surer answer to the decree-holder's plea. He relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there were such assets and the indications in the record point the other way. But apart from this, section 295 cannot help the decree-holder. Though the word "attachment" occurs three times in section 276, the reference is to one, and only one attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji Edulji* v. *Govind Ramji* (2) is correct, and that the conditions of section 295 have been satisfied, it cannot advance the decree-holder's case.

It still is the attachment in execution case No. 16 of 1907 that is the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that the earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

The result then is that the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge, so far as it directs that the plaintiff do get *khas* possession of the properties in suit, restored with costs in both Courts, and any costs paid under the decree of the High Court must be refunded and the costs of this appeal paid by the decree-holder.

And their Lordships will humbly advise His Majesty accordngly.

*Appeal allowed.*

Solicitor for the Appellant: Mr. *G. C. Faw.*

Solicitor for the Respondent : Messrs. *Watkins and Hunter.*

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 430 OF 1917.

May 15, 1917.

*Present*:—Mr. Shah Din, Chief Judge, and Mr. Justice LeRossignol.

MOHAMMAD BAKHSH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

*Musammat* KARM ILAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Widow's estate—Right to enjoy whole income*—Riwaj-i-am, *entry in, construction of*—Bhoplas *of Multan Tahsil—Widow, whether entitled to maintenance only.*

The universal rule of Punjab agricultural custom is that a widow in the absence of male issue succeeds to a life-interest in her deceased husband's estate. [p. 246, col. 2.]

She is entitled to the enjoyment of the whole of the income of the estate and is not bound to account for her expenditure to possible reversioners. [p. 247, col. 1.]

An entry in the *riwaj-i-am* must be construed as being strictly limited to the case which is set out in the question under reply. [p. 247, col. 1.]

Where the reversioners of one *A*, a member of the *Bhopla* tribe in the Multan Tashil, sued his widow for possession of the property left by the deceased or in the alternative for an injunction restraining her from wasting the estate, alleging that according to the custom of the tribe the widow was entitled only to maintenance:

*Held*, that the plaintiffs had failed to establish the custom set up by them. [p. 247, col. 1.]

First appeal from the decree of the District Judge, Multan, dated the 4th November 1912, dismissing the suit with costs.

The Hon'ble Mr. *Fazl-i-Hussain* and *Shaikh Niaz Ali*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi, K. B.*, and *Sheikh Muhammad Bakhsh*, for the Respondents.

JUDGMENT.—On the 20th September 1907 died Ahamd Bakhsh of the *Bhopla* tribe of Tahsil Multan, leaving a considerable estate. Plaintiffs are his collaterals, whilst the chief defendants are respectively the widow, the minor daughter and the mother of the deceased, and the claim brought by the plaintiffs is that these defendents are not entitled to the succession but only to maintenance. Consequently the plaintiffs ask for possession and failing that pray for an injunction restraining the defendants from wasting the estate. Plaintiffs based their claim to the relief on the assertion that the parties are governed by their own tribal and general custom and that defendant No. 1 was wasting the estate. Defendants traversed all the allegations of the plaintiffs and denied their *locus standi* to bring the suit in the presence of the daughter of the last male owner. The most important issues in the case are whether the property in suit is ancestral and whether the widow, *Musammat* Karm Ilahi, is entitled solely to maintenance and not to possession of her deceased husband's estate. The lower Court has found that only the properties marked Nos. 3, 4, 5, 8, 13 and 16 are ancestral, that there is no proof that the widow was wasting the property, that the plaintiffs have failed to establish a custom whereby among them a widow fails to succeed to her husband's estate and is entitled only to maintenance and that the plaintiffs, who are removed by more than three generations from the deceased, have no *locas standi* in the presence of the daughter.

We have considered carefully the various instances of the operation of custom cited by the two parties, and as a result we find ourselves in agreement with the Court below that the plaintiffs have not succeeded in establishing the custom propounded by them, custom which is certainly at variance with the almost universal Punjab agricultural custom that a widow in the absence of male issue succeeds to a life-interest in her deceased husband's estate.

On behalf of the plaintiffs-appellants it was urged that the *riwaj-i-am* of the Multan Tahsil favoured their contention and that the instances produced by the defendants, which appear to be contrary to the custom set forth in the *riwaj-i-am*, were cases of recent date which were still open to challenge and which dealt with only quite small estates. With regard to the *riwaj-i-am* entry, we find that the *riwaj-i-am* of

the Multan Tehsil was compiled more than 35 years ago and the replies to the question indicate that there was a considerable diversity of opinion among the various tribes regarding the custom which prevailed in the cases propounded in them. The *riwaj-i-am*, or rather that portion of it upon which the appellants rely, is printed at page 6 of the paper-book and its meaning, as contended for by the appellants, is that a widow in the presence of collaterals is entitled to maintenance only. The reply, however, must be construed as being strictly limited to the case which is set out in the question, and the question evidently contemplates the death of a sonless proprietor leaving a widow as also a brother or brother's sons. In such a case, says the *riwaj-i-am* the widow is entitled only to maintenance. Such, however, is not the set of facts with which we have to deal in this case, for Ahmad Bakhsh died without leaving any brother or brother's sons. His nearest relatives are the plaintiffs who are the descendants of his great-grandfather and are, therefore, related to him in the fourth degree. Consequently the *riwaj-i-am* establishes nothing in favour of the appellants and it is noteworthy that in all the cases quoted by them which they have succeeded in establishing, the widows have given way not to collaterals but to brothers or brothers' sons of the deceased.

Finding as we do that the plaintiffs have not proved the custom propounded by them and that the widow of Ahmad Bakhsh is entitled to a life-interest in the estate, we see no necessity to decide the other questions debated in the Court below except that dealing with the alleged waste by the widow. Before us Mr. Fazl i-Hussain on behalf of the appellants has been forced to admit that he can point to no proof of waste except this, that the widow professes to have spent the whole of her income from the estate but can give no details of the channels down which the money disappeared. To this, it is a sufficient reply that the widow is entitled to the enjoyment of the whole of the income of the estate and is not bound to account for her expenditure to possible reversioners. The question whether the daughter of Ahmad Bakhsh was the next heir after her mother's demise was put in issue solely with reference to the objection that in the presence of the daughter the plaintiffs had no *locus standi* to sue either for possession or for an injunction. This issue, however, since we find that the plaintiffs are not on the merits entitled to a decree either for possession or for an injunction, we see no adequate necessity for deciding.

We find, therefore, that the widow is entitled to retain possession of her husband's property during her lifetime and that no waste of the estate by her has been established; and on these findings we dismiss the appeal with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2371 OF 1914.

September 22, 1916.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

THACHANGOT CHERUVANI NARAYANI AMMA AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

MALAMMAL KOOTANCHERI KUNCHUKUTTI AMMA AND OTHERS—DEFENDANTS Nos. 1, 2, 12 TO 24, 26 AND 27—RESPONDENTS.

*Malabar Campensation for Tenants' Improvements Act* (*Mad. Act I of* 1900), *ss.* 4, 5, 10, 19—*Trees of spontaneous growth—Compensation—Right of* jenmi *to value of trees cut by tenant—Agreement enabling* jenmi *to cut and remove trees, validity of.*

There is nothing in the Malabar Compensation for Tenants' Improvements Act of 1900 which deals or was intended to deal with the transfer of ownership in trees of spontaneous growth from the *jenmi* to the tenant. The Act is confined to the question of compensation. The Act awards compensation to the tenant in respect of all spontaneously grown timber left on the holding on ejectment which came into existence either during the term of the tenant or that of his predecessor, provided that no compensation has already been paid for it. [p. 250, col 2.]

A contract entered into after 1886, which allows the landlord to come on the land and cut and remove spontaneously grown trees, is void as it contravenes the provisions of the Act. [p. 251, col. 1.]

NARAYANI AMMA *v.* KUNCHUKUTTI AMMA.

During the continuance of the tenancy the tenant is entitled to cut down trees in the ordinary course of prudent forestry, though they may belong to the landlord. [p. 251, col. 1.]

*Quære*:—Whether trees of spontaneous growth in Malabar before Madras Act I of 1900 was passed belong to the *jenmi* or the tenant?

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat, in Appeal Suit No. 1057 of 1913, preferred against that of the District Munsif, Ottapalam, in Original Suit No. 331 of 1912.

FACTS.—This was a suit to redeem a *kanom* of 1895 (which itself was a renewal of a *kanom* of 1887, which in its turn was a renewal of an earlier *kanom* of 1873), under which the defendants Nos. 1 to 10 held the properties under the plaintiffs. The principal questions in dispute were whether (1) the plaintiffs-*jenmies* or the defendants-*kanomdars* were entitled to the value of certain trees of spontaneous growth which had been cut and removed by the defendants from the holding and (2) whether the defendants-*kanomdars* were entitled to compensation for other trees of spontaneous growth which were still standing on the land. The determination of these questions depended on the effect of the undermentioned clause in the *kanom* document and of the provisions of the Malabar Compensation for Tenants' Improvements Acts, 1887 and 1900. The clause referred to was as follows:—"As *parambas* Nos. 3 and 4 of the schedule are forest plots, all the teak, rosewood trees, etc., which are in them now, having grown there spontaneously and which are yet to grow belong to you, and they can be cut and removed for your purposes."

Messrs. *J. L. Rosario* and *K. Kuttikrishna Menon*, for the Appellants.

Mr. *K. P. M. Menon* and *T. Eroman Unni*, for the Respondents.

This second appeal coming on for hearing and having stood over for consideration till the 21st March 1916, the Court delivered the following

JUDGMENT.

COUTTS TROTTER, J.—This is an appeal by the plaintiffs from the decision of the Subordinate Judge of Palghat. The suit was brought to redeem a *kanom* demise, dated the 20th October 1895. The *kanom* demise was in renewal of prior demises dating from 1887 and 1873. So that while the actual contract of tenancy out of which the suit arises dates from 1895, the defendants or their predecessors-in-title may in some sense be said to have been tenants of the plaintiffs since 1873.

The first point raised in the appeal was as to the identity of certain lands sought to be redeemed. Mr. Rosario very rightly admitted that this part of his case ultimately required that we should accept the plan put forward as Exhibit I as being more correct and reject the other plan referred to by the Subordinate Judge in his judgment. In so far as it was a question of deciding which of the two plans was the more correct, it was obviously unarguable, for the learned Judge has expressly decided that the second plan was more reliable than the first. But Mr. Rosario went further and contended that the second plan was not admissible at all, because it had been prepared not for the purposes of this case but for those of a connected case, Original Suit No. 330 of 1912. I do not think that this contention can possibly be upheld. It is quite obvious that the second plan was put in in the present suit and if it was not proved strictly, I assume it to be because the parties who were aware that it had been proved formally in the earlier suit took no objection to its being used and treated as evidence in this case. I should be very reluctant to come to any other conclusion on this matter. One plan is made by a Vakil and the second by a competent surveyor and one has only to glance at the two to see which is the more likely to be correct.

The next point taken by Mr. Rosario raises questions of interest and difficulty. The *kychit* of 1887 contains the following clause: "Without making such a payment (*i. e.*, of the seigniorage) to you for your *jenm* right and satisfying you, no trees will be cut." This seems to imply that the *jenmi* had rights of ownership in the trees. But it is not necessary to consider this matter, because the really material clause is the clause in the later *kychit* of 1895, which deals much more explicitly with the subject of trees and it is this clause which in my view decides the rights of the parties.

It is as follows: "As *parambas* Nos. 3 and 4 of the schedule are forest plots, all the teak, rosewood trees, etc., which are in them now, having grown there spontaneously and which are yet to grow belong to you and they can be cut and removed for your purposes." The dispute which has arisen between the parties relates to certain trees which must be taken to have grown spontaneously on the property, some during the currency of the present tenancy, *i.e.*, since 1395, others between 1873 and 1895. The tenants just before the expiration of the tenancy cut down and removed a large quantity of these trees and the landlord claims that they all belonged to him either at common law or by virtue of the terms of the *kychit*. A further question arises with relation to other trees of spontaneous growth which the tenants left standing on the property and for which they have been awarded compensation under the Malabar Compensation for Tenants' Improvements Acts of 1887 and 1900.

The Act of 1887 has for its broad purpose to award compensation to ejected and outgoing tenants for improvements on the demised property effected by them, the future benefit of which enures to the landlord. Section 3 defines improvements and enacts that certain specified words should be presumed to be improvements until the contrary is shown. Among such "improvements" are the following: (*h*) the planting, protection or maintenance of fruit trees, timber trees and other useful trees and plants: (*i*) the protection or maintenance of such trees, the same having grown spontaneously during the tenancy. Section 6 enacts in general terms that the compensation to be awarded is the amount by which the value, or the produce of the holding or the value of that produce is increased by the improvement; and certain guides are given to enable the Court to arrive at that value. Section 7 enacts in effect that any stipulation in a contract between landlord and tenant made after the 1st January 1886 shall be void so far as it contravenes the provisions of the Act. This Act was repealed by the Consolidating Act of 1900; but it has to be remembered that it was the Act in force at the time when the *kychit* of 1895 was executed. The Act of 1900 is a more ambitious and elaborate enactment than its predecessor: but it can hardly be said to be an advance upon it as regards felicity of expression or clearness of drafting. Section 4 takes the place of section 3 of the old Act; sub-section (*h*) practically exactly corresponds to (*h*) of the old Act; but sub-section (*i*) of the old Act is gone. By section 5 (1) every tenant shall on ejectment be entitled to compensation for improvements which have been made by him or his predecessor-in-title. By section 6 (1) where a claim is established for compensation under section 5, the Court is to determine the amount of compensation by the method provided in sections 9 to 18. For the purposes of this case, it is necessary to examine the provisions of those sections, and I may shortly summarise them as follows: For improvements other than those relating to trees the compensation is arrived at by a calculation based on the present value of the improvement together with the cost of its execution. Where the improvement consists of trees spontaneously grown during the period of the tenancy or planted by the tenant or his predecessors, the compensation is to be three-fourths of the value which the timber would fetch if cut and sold in the open market (section 10). Where the improvement consists of trees not planted by the tenant or his predecessor or of trees spontaneously grown before the commencement of his tenancy, the compensation is to be calculated on a lower basis designed to arrive at the amount due to the tenant for his labour for their protection and maintenance. Mr. Rosario's able argument is as follows. The policy of the Act of 1900 is to give to the tenant compensation on a large scale for those improvements which but for the Act he would up to the time of ejectment be entitled to treat as his own property and remove, and to give him compensation on a less generous scale for "improvements" which can only be regarded in the light of maintenance and care of the landlord's property. The Act for the first time brings within the category of improvements for which the more generous rate is awarded trees of spontaneous growth, and, therefore, he says, must be regarded as having intended for the first time to declare such

trees to be the property of the tenant, the necessary corollary being that without the Act they would be and before the Act were the property of the landlord. At the time when the *kychit* of 1895 was executed, the Act of 1900 was not in force and, therefore, there was nothing to prevent the parties from making what agreement they pleased with regard to the treatment of the timber. Accordingly there was nothing illegal or invalid in the clause of the *kychit* which provided that the teak and other trees which had grown spontaneously and were yet to grow belonged to the landlord and could be cut and removed by him. In so far as the ownership of the trees is concerned there is nothing retrospective in the Act, for although section 19 is retrospective in so far as the right of the tenant to make improvements and to claim compensation for them is concerned, it does not otherwise purport to have a retrospective effect and, therefore, can have no effect upon his claim for damages for trees cut down during the tenancy, though it is conceded that it will have retrospective effect on the tenant's claim for compensation for trees left on the land, at any rate from the coming into force of the *kychit* of 1895, since section 19 is retrospective in the case of all instruments later than the 1st of January 1886. Mr. Rosario's position then, as I understand it, may be summarised as follows: Before the passing of the Act of 1900 all spontaneously grown trees accrued to the landlord, the owner of the soil. By the Act of 1900 the ownership in trees of spontaneous growth was transferred from the landlord to the tenant; but in so far as that transfer of ownership was effected, it only operated in the case of trees which first came into being after the passing of the Act. On this footing the landlord will be entitled to damages in respect of all spontaneous timber cut and removed by the tenant whose growth was earlier than 1900. With regard to the tenant's claim for compensation, the policy of the Act is to give him generous compensation only for what is to be regarded as his own property and the Act not, as has been pointed out, being retrospective in this respect, the parties are bound by the *kychit* of 1895 which at the time it was made was a perfectly legal stipulation, and the tenant can only recover what I may call the full compensation for trees of a growth subsequent to the passing of the Act. For those of earlier growth he will be relegated to the lower scale of compensation provided for in sections 11 and 13.

Mr. Rosario very candidly admitted that it was vital to this argument to follow him in his first contention that the Act effected a change of ownership in the case of trees of spontaneous growth from the landlord to the tenant. I am unable to accept that contention and do not think that the Act deals or was intended to deal with questions of ownership at all but is confined to the question of compensation. I may add that I do not think that the amount of compensation awarded by section 10 of the Act in the case of spontaneously grown trees, namely three-fourths of their value, throws any light on the question whether or no the Act intended to effect a change of ownership. I do not think it is necessary in an Act so loosely drafted as this to follow Mr. Menon's minute deductions from the language of sections 5 and 6 and say that the Act enacts that a tenant who passively allows trees to take root and grow on the land is "making improvemen's" within the meaning of the Act. I think it is sufficient to say that the Act in enumerating certain things for which the tenant should be given compensation, the great majority of which can be properly described as improvements made by him, includes in the list spontaneously grown trees which can hardly be properly described as "improvements" and certainly cannot be said to be made by him or anybody else. I am, therefore, of opinion that the Act awards compensation to the tenant in respect of all spontaneously grown timber left on the holding on ejectment which came into existence either during the term of the tenant or that of his predecessor, provided that no compensation has already been paid for it. It is conceded that on this construction in the present case the tenant will be entitled to compensation on what I may call the larger scale in respect of all trees which came into existence in 1873 or any subsequent year.

With regard to the landlord's claim for

damages for trees cut and removed by the tenant the position is this. If the trees in question were the property of the tenant, he is obviously entitled to do what he likes with them. I have already held that the Act of 1900 does nothing to alter the position with regard to this or vest a new ownership in the tenant. Then it is said that whatever may have been the position at common law, the provision in the *kychit* of 1895 clearly vests the ownership in the landlord. It, therefore, becomes necessary to examine that clause in the contract and see whether it is obnoxious to the provisions of section 19. it is clear that under the Act the tenant would be entitled to claim compensation for all spontaneously grown trees which he left standing at the end of his tenancy. It follows that a contract which allows the landlord to come on the land and cut and remove such trees must necessarily limit the right of the tenant to claim compensation for such improvements. I, therefore, hold that the provision in the *kychit* that the landlord may cut and remove these trees is contrary to the Act and bad. It is argued that the early words which purport to give the property in the trees to the landlord, are separable and do not contravene any provision of the Act. Treating them as separable I do not think they help the appellant, because, in my opinion, they do not form an operative portion of the clause but are merely declaratory of the supposed rights of the parties. Some Judges of this Court have expressed the opinion that trees of spontaneous growth become the property of the tenant at common law apart from any que tion of the effect of the Statute. See *Krishnacharya* v. *Anthakki* (1). I do not, however, clearly follow the reasoning by which this conclusion is attained and should be inclined myself to the view that that which came to grow on the land naturally became the property of the ultimate owner of that land; but I do not think it is necessary to decide that question for the purposes of this case. During the tenancy the tenant is entitled to cut down trees in the ordinary course of prudent forestry, though they may belong to the landlord. His only obligation is to return the property in substantially the same condition as he took it and to abstain from any act of the nature of waste. No allegation is made in this case that there has been any substantial diminution in the value of the property during the term by reason of the cutting of these trees, nor is there any allegation of any act in the nature of waste. In these circumstances I think the landlord's claim for damages fails.

The last point taken in appeal relates to the price which the learned Subordinate Judge has fixed for the paddy. The Fort St. George Gazette of the 11th March 1913 fixes 21·23 as the number of imperial seers per rupee and proceeds to set out the equivalent for that in the Walluvanad *Taluk* as 17·40 Macleod's seers. The learned Judge apparently holds that Macleod's seers in the notification is a mistake for *edangalis*, for the reason that the local measures in use in the *taluk* are not Macleod's seers but *edangalis* or *narayams*. This appears to me to be quite arbitrary and unwarrantable, and the Judge's finding in this respect must be reversed and the case sent back for a fresh finding on this issue. Six weeks for finding and seven days for objections.

We are also asked to direct an enquiry to be held as to which of the trees were anterior to 1873 and which were subsequent to that date. We asked Mr. Rosario at the last hearing and he said that all that he could suggest was there might be two trees which went back to that date. I am extremely doubtful if even these could be identified with certainly and even if they could be, we think the expenses of having a finding on the point will be far in excess of any possible advantage that might result to either party from it. We do not, therefore, think it necessary to call for a finding on this point.

SESHAGIRI AIYAR, J.—I agree.

On the question of the identity of the properties mortgaged I agree with my learned brother that the conclusion of the Subordinate Judge is right. Mr. Rosario says that the Subordinate Judge has mainly relied upon the description of the northern boundary and has from that inferred that the property which is described as the northern boundary of item No. 1 included certain plots in dis-

(1) 31 Ind. Cas. 12; 29 M. L. J. 314; 18 M. L. T. 218; (1915) M. W. N. 726.

pute. He argues that applying the test of the Subordinate Judge the western boundary should have been differently described. It may be, as argued by the learned Vakil, that the test applied by the Subordinate Judge is not a conclusive one; but it has to be remembered that he has considered the position of the plots with reference to the survey plan. The District Munsif made no reference at all to the survey plan. In these circumstances I am not prepared to say that the Subordinate Judge is wrong.

The main contention is, that trees of spontaneous growth which came into existence before Madras Act I of 1900 was passed are the property of the *jenmi*, and that the declaration of the defendant in Exhibit A admitting the right of the *jenmi* is binding on him. The first mortgage was granted by the predecessor-in-title of the plaintiff to the defendant in 1873. It was renewed in 1887 by Exhibit VII and finally by Exhibit A in 18[illegible]. On the question of the right of the trees no judicial pronouncements have been quoted to us on either side. Mr. Rosario relied upon certain observations in *Narayana* v. *Narayana* (2) as indicating that the trees under the Customary Law of Malabar belong to the landlord. I do not think that this suggestion is borne out by the judgment. What the learned Judges say is that they were not aware of any law which recognised in the *kanomdar* the right to compensation on account of trees of spontaneous growth. As I understand the judgment, it only lays down that prior to the passing of the Act of 1887 and the Act of 1900 it was not competent to the tenant to compel the landlord to purchase him out with reference to trees of spontaneous growth. The contention of Mr. Menon on the other hand that the trees belong to the tenant is not sustained by the authorities quoted by him. No doubt in *Krishnacharya* v. *Anthakki* (1), a case from South Canara, the learned Judges inclined to the view that trees of spontaneous growth belong to the tenant in possession; but they say "the appellant" (the landlord) "has not adduced any evidence of custom or usage by which he is entitled to such spontaneous growths." I do not think that that decision is clear authority for the position that tenants are owners of trees of this description in Malabar. On the other hand, the decision in *Vasudevan Nambudripad* v. *Valia Chathu Achan* (3), which seems to concede that the landlord can restrain the tenant from removing certain trees during the continuance of the tenancy, may by implication be said to lay down that the landlord is the owner of the trees. I do not consider that *Vasudevan Nambudripad* v. *Valia Chathu Achan* (3) decides the right of the landlord any more than I consider that *Krishnacharya* v. *Anthakki* (1) gives the right to the tenant. In the first edition of his work Mr. Wigram, who had considerable experience of Malabar, says that "it is the practice of Courts to hold that in a *kuzhikkanom* or ordinary *kanom* or any superior tenure there is an implied covenant to compensate for all *unexhausted* improvements." This would seem to imply that it was open to the tenant to have exhausted the improvements during the continuance of the tenancy. In this state of the authorities I feel great difficulty in giving a decision regarding the respective rights as to the ownership of the landlord and the tenant in trees of spontaneous growth. In this case it does not seem necessary to give a definite opinion on the question, as I think that the second appeal can be disposed of upon other grounds.

I do not think that the two Acts, Act I of 1887 and Act I of 1900, should be construed as in any way declaring or defining the rights of the landlord and the tenant to trees of spontaneous growth. They were intended to fix the amount payable to the outgoing tenant or mortgagee, as the case may be, in respect of the improvements existing at the time of the eviction or redemption. The principle adopted in the Acts is to compensate the tenant for the labour expended by him on the land, irrespective of the question whether he had acquired a proprietary right to the trees or not. This is rendered clear by a reference to section 3, clauses (*h*) and (*i*), of the Act of 1887. Clause (*h*) refers to the trees which have been planted and includes

(2) 8 M. 284; 3 Ind. Dec. (N. S.) 195

(3) 24 M. 47; 10 M. L. J. 321.

in the amount of compensation to be awarded the cost of planting them. Clause (*i*) which deals with trees of spontaneous growth restricts the right of compensation to the cost of protection or maintenance. From these two clauses the conclusion is irresistible that in the case of trees planted by the tenant as well as in the case of trees of which he is only the care-taker, the compensation has reference not to the proprietorship in them but to the labour spent by the tenant in either rearing or protecting them. The Act of 1900 by section 13 carries out this principle a step further by fixing a different scale of fees in respect of trees which have grown spontaneously, from the scale applicable to trees planted by the tenant himself. Therefore in applying the two Acts it is not necessary to decide the question whether the trees belong to the landlord or the tenant. It is well settled that in awarding the compensation we have to be guided by the Act which is in force at the time of the decree. See *Koshikot Pudiya Kovil g th* v. *Chundayil Madattul Ananta Pattar* (4). Therefore the only question that need be considered in this second appeal is the quantum of compensation payable, and not the proprietorship in the trees. Mr. Rosario raised the point that, as the contract of mortgage on which the suit is brought was entered in 1895, the tenant is only entitled to compensation as regards trees which were either planted by him after the contract or which came into existence after 1895. Prior to the passing of the two Acts there was some little doubt as to whether a tenant who obtains a *kanom* can claim to stand in the shoes of those whom he had succeeded. Mr. Holloway was of opinion that "reason, convenience and the principle of the law all point to the date of renewal as that from which improvements to be paid for are determined or calculated." This dictum apparently did not find favour with the learned Judges of this Court in *Mupanagari Narayanan Nayar* v. *Virupatchan Nambudripad* (5). They point out that no invariable rule can be deduced on this point, but that the question must be decided on the evidence as to custom adduced in each case. When the Act of 1900 was passed, section 5 provided that every tenant shall be entitled to compensation for improvements which have been made by him, his predecessor-in-interest or by any person not in occupation at the time of the ejectment who derived title from either of them. It follows from this that a tenant who has obtained a renewal is entitled to claim compensation for improvements made during his first tenancy; for if a tenant is entitled to compensation for improvements made by his predecessor, *a fortiori* he is entitled to compensation for improvements made by himself during his first tenancy. Therefore, in any opinion, the defendant is entitled to compensation for all improvements which came into existence since the commencement of his first tenancy in 1873. See also *Thekkemannengath Raman* v. *Kakkeseri Pazhiyot Manakkal* (6) per Sadasiva Aiyar, J.

The further contention raised by the learned Vakil is that the clause in Exhibit A, which says that the trees which have grown spontaneously and which are yet to grow "belong to you and they can be cut and removed for your purposes," does not offend against the provisions of either Act 1 of 1887 or of Act I of 1900 and that it is binding on the defendant. The argument is that this clause does not either take away or limit the right of the tenant to make improvements; it was conceded that if the clause operated in that direction it cannot be binding upon the defendant. I am unable to agree that the effect of this clause is not to restrict the tenant in his right to make improvements. The clause implies that the landlord can enter upon the land and cut and carry away the trees. It would impede the operations of the tenant in making improvements if the landlord is permitted to enter on the land, whenever he chooses to cut and carry away the trees. Further it undoubtedly debars the tenant from claiming compensation, because if the landlord cuts and carries away the trees, nothing will be left outstanding at the time of eviction, and the tenant would be disentitled to compensation if they are not there. I, therefore, think that the clause in Exhibit A is opposed to section 19 of the Act of 1900 and section 7 of the Act 1887.

(4) 6 Ind. Cas. 887; 34 M. 61; (1910) M. W. N. 402; 8 M. L. T. 218; 20 M. L. J. 849.

(5) 4 M. 287; 1 Ind. Dec. (N. s.) 1035.

(6) 27 Ind. Cas. 989; 28 M. L. J. 184; 2 L. W. 433.

One other contention of the learned Vakil may be dealt with in this connection before dealing with the value of paddy. Mr. Rosario contended that he ought to be given damages for the trees of spontaneous growth which the tenant had unlawfully cut and carried away during the tenancy. This proposition implies that the landlord was the owner of the trees. With reference to this contention, it may become necessary to decide the question whether the landlord or the tenant is the proprietor of the trees, if the clause which declares the right of the landlord to the trees is not opposed to section 7 of Act I of 1887 and section 19 of Act I of 1900. I have already stated that the condition as to cutting and carrying away the trees is obnoxious to both the sections. It is impossible to separate the clause as to ownership from the clause which entitles the landlord to enter upon the premises to cut and carry away the trees. The contract as to an essential portion being unenforceable, it is void in its entirety. See section 24 of the Contract Act. As the right to damages was rested upon this admission of the landlord's right by the tenant in the contract of 1895, and as I hold that this contract is not binding on the defendant, it is unnecessary here again to consider the broader question raised by Mr. Rosario regarding the ownership in the trees.

On the third question raised by Mr. Rosario as to the value of the paddy it seems to me that the Subordinate Judge's judgment is unsatisfactory. There are a number of surmises in paragraph 20 for which we have not been referred to any evidence in the case. The Commissioner has given a valuation which the Subordinate Judge says he is unable to accept. In that case he was bound to have looked into the evidence and to have arrived at a finding on it instead of indulging in speculations as to whether the Government Notification rightly fixes the proportion between the imperial seer and Macleod's seer. The Subordinate Judge's conclusion upon this point cannot be sustained and he must be asked to return a fresh finding regarding the price of paddy.

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In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Palghat submitted the following

FINDING.—I am asked to submit a revised finding on the following issue:—

1. What is the rate at which price of paddy must be calculated?

2. The evidence on this point consists of the testimony of plaintiffs' witness No. 1 on the one side, and defence witness No. 1 on the other side. Plaintiffs' witness No. 1 says that paddy sells at 9 *narayams* per rupee, and at Rs. 36 per 60 *paras*, and that the price was nearly the same for the last ten years. 9 *narayams* per rupee will be $11\frac{1}{4}$ *edangalis* per rupee Rs. 36 per 60 *paras* will be 20 5/6 *edangalis* per rupee. Thus there is considerable difference between the two amounts. It is not possible to say what was the price on an average. In the plaint he has claimed at the rate of $13\frac{3}{4}$ *edangalis* per rupee.

3. On the side of defendants there is the affidavit of defendants objecting to the Commissioner's valuation and it says that the price must be calculated at the rate of 16 *edangalis* per rupee. The same man is examined as plaintiffs' witness No. 1 and he says that for the last ten years the price of paddy is between 13 and 15 *narayams* per rupee. If it is 13 *narayams* it will be $16\frac{1}{4}$ *edangalis*, If it is 15 *narayams* it will be $18\frac{3}{4}$ *edangalis*. As he says that the price is between 13 and 15 *narayams* we may take 14 as the average. If that be so, the price will be $17\frac{1}{2}$ *edangalis* per rupee. I am inclined to believe this witness.

4. I find that the price must be calculated at the rate of $17\frac{1}{2}$ *edangalis* per rupee.

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The second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding. The second appeal is dismissed with costs. Time for redemption will be four months from this date.

*Appeal dismissed.*

V. R. P.

SRI RAM *v.* KANSHI RAM.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 342 OF 1916.

January 9, 1917.

*Present*:—Mr. Justice Broadway.

SRI RAM—DEFENDANT—APPELLANT

*versus*

KANSHI RAM—PLAINTIFF, BADRI DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. II, r. 2, s. 11—Suit to recover share of inheritance—Suit, subsequent, to recover share of gifted property, whether barred*—Res judicata—*Specific Relief Act (I of 1877), s. 42—Suit for declaration of share in decree, maintainability of.*

One *B. M.* in his lifetime divided his moveable property among his four sons, *S.*, *K*, *B* and *A.*, and directed that a sum of Rs. 3,000 odd due to him from one *B. L.* should be held jointly by all four of them. On his death *S.* sued the representatives of *B. L.* and got a decree for the whole sum as due to himself. *K.* then brought a suit to recover his share in the moveable and immoveable properties left by *B. M.* His suit was decreed in respect of the immoveable property but was dismissed as regards the moveable property, inasmuch as it was held that *B. M.* had divided all his moveable property among his sons in his lifetime. *K.* then sued for a declaration of his one-fourth share in the decree obtained by *S.* against *B. L.'s* representatives:

*Held*, (1) that the suit for a declaration was competent; [p. 256, col. 1.]

(2) that inasmuch as the previous suit related to a share in the property left by *B M* it was not incumbent on *K.* to include in it a claim for a share in the property held by *S.* in which *K.* had an interest, and that, therefore, the suit was not barred either by Order II, rule 2 or by section 11 of the Civil Procedure Code [p. 257, col. 1.]

*Mahomed Riasat Ali* v. *Hasin Banu*, 21 C. 157, 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374: Rafique & Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737, relied upon.

**First appeal from the decree of the District Judge, Jullundur, dated the 30th May 1912, decreeing the claim.**

Mr. *Nanak Chand*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The following pedigree-table will show the relationship between the parties:—

BHANA MAL

| Sri Ram, Defendant No. 1. | Kashi Ram, Plaintiff. | Badri Das, Defendant No. 2. | Achhru Ram |
|---|---|---|---|
| | | | Walaiti Ram, Defendant No. 3. |

The facts of this case are briefly as follows:—

Bhana Mal in his lifetime divided up a certain portion of his property among his four sons and separated from them. Each son was also separated from his brothers and held his own share individually. This separation took place in 1903 and was evidenced by four *chaupatras* in which the detail of the shares allotted to each of the brother was duly entered. These *chaupatras* are dated the 21st February 1903 and have been admitted as correct by the parties.

There was a sum of Rs. 3,000 odd due to Bhana Mal by one Brij Lal and with regard to this in the *chaupatras* it is distinctly entered that the debt due by Brij Lal, amounting to Rs. 3,000, is to be held jointly by the four brothers each having a quarter share amounting to Rs. 775.

On the 24th March 1905 Brij Lal struck a balance in favour of Bhana Mal acknowledging, a sum of Rs. 3,031 as due. Bhana Mal died in December 1905.

Sri Ram is the elder brother and on the 15th September 1907 Brij Lal struck a balance, Rs. 3,780, as due by him but in favour of Sri Ram alone.

On the 19th November 1910 Sri Ram sued the sons of Brij Lal, who had then died, for the money due on this balance and impleaded his own brothers as defendants. In that suit Sri Ram alleged that he had spent about Rs. 1,400 on the funeral ceremonies of his father and that he and his brothers had come to an arrangement by which the money due by Brij Lal was to be taken over by him in lieu of the Rs. 1,400 so spent and that he had paid their share of the balance to each of his brothers. Badri Das admitted this claim on his own behalf as well as on behalf of his nephew Walaiti Ram, whose father was dead. In this suit on the 14th December 1910 Kanshi Ram flatly denied the alleged settlement and claimed to be entitled to a share in the whole of the money due by Brij Lal. He was directed to bring a regular suit and Sri Ram obtained a decree in his favour on the 23rd December 1910.

Kanshi Ram then on the 17th July 1911 brought a suit against his brothers in which he claimed one-fourth share in all that had been left by Bhana Mal. He detailed the immoveable property and fixed the value of the moveable property including the outstandings, at Rs. 11,000 approximately, alleging that if it was found on taking account that the

moveable property exceeded this sum he was prepared to pay the necessary Court-fee on the excess. This suit resulted in a decree in favour of Kanshi Ram *qua* the immoveable property but his claim to the moveable property was dismissed. Sri Ram, who defended that suit, pleaded that Bhana Mal had left no moveable estate inasmuch as all moneys due to him had been divided up in his lifetime between his four sons, but admitted that Kanshi Ram was entitled to a fourth share in the immoveable property.

On the 27th February 1912 Kanshi Ram brought the present suit against his brothers and nephew, praying for a declaration to the effect that he was entitled to a fourth share in the sum decreed in favour of Sri Ram on the 23rd December 1910 and his suit has been decreed. Against this decree Sri Ram has filed his present appeal through Mr. Nanak Chand and Mr. Tek Chand has appeared on behalf of Kanshi Ram. Mr. Nanak Chand has raised various legal points. *Firstly*, he alleged that no declaratory suit lay. He did not, however, press this and as Sri Ram has not as yet executed the decree it seems to me that there is no legal bar to the suit as brought.

*Secondly*, it was urged that the present suit was barred by section 11 and Order II, rule 2, Civil Procedure Code. It was urged that the plaintiff had in 1911 sued for a quarter share in the whole of the property left by Bhana Mal, that as his claim for a quarter share in the moveable property had been dismissed no suit, therefore, lay. With regard to Order II, rule 2, it was contended that as the sum now in suit ought to have been included in the suit in 1911, the present suit is not competent, and I have been referred to *Mahi* v *Usman* (1), *Nawab Muhammad Kabir Khan* v. *Musammat Bhag Bhari* (2) and *Dampanaboyina Gangi* v. *Addala Ramaswami* (3). On the merits it was urged that Badri Das's evidence, the only evidence produced by Sri Ram, should be accepted. Mr. Tek Chand on the other hand has pointed out that Kanshi Ram's position has been throughout that this money now in suit was not left by Bhana Mal and did not form a part of his estate at the time of his death, but that it had been made over by Bhana Mal in his lifetime to the four brothers jointly, and that, therefore, neither section 11 nor Order II, rule 2, Civil Procedure Code, was a bar to the case. He referred me to the written statements of Badri Das and Sri Ram (in the former case), in which the fact that Bhana Mal had divided up all the moveable property between the four brothers was clearly and unmistakably pleaded. In fact Badri Das clearly pleaded that in this case, and in his statement alleged that on the death of Bhana Mal the brothers had agreed to make over the debt of Brij Lal to Sri Ram in lieu of Rs. 1,400 expended by him, and that Sri Ram had paid each of them Rs. 400 as a share of the balance. There is no proof of this other than the statement of Badri Das, which is, of course, contradicted by Kanshi Ram's statement, and it seems to me that the learned District Judge (old style) was right in thinking that had the arrangement alleged been really arrived at with regard to this particular debt due by Brij Lal there would have been some writing to evidence the fact, if it was only a receipt executed by the brothers for Rs. 400 that each of them are alleged to have been paid by Sri Ram. Sri Ram himself, as I have pointed out above, clearly pleaded in the suit in 1911 that his father had distributed the whole of his outstandings amongst his sons. In these circumstances I have no hesitation in holding that this debt did not form part of Bhana Mal's estate when he died. With regard to the legal aspect I have consulted the authorities cited by Mr. Nanak Chand as well as *Dalipa* v. *Suraj Kaur* (4), *Har Dyal* v. *Aya Ram* (5), *Muhammad Ali* v. *Mir Haidar* (6), *Sumeka Dasi* v. *Baikuntha Chandra Das* (7), *Musammat Badshah* v. *Sahib* (8) and *Mahomed Riasat Ali* v. *Hasin Banu* (9) referred to by Mr. Tek Chand. It seems to me that the last case of *Mahomed Riasat Ali* v. *Hasin Banu* (9), which is a Privy Council ruling, is very much

(1) 15 P. R. 1885.
(2) 17 P. R. 1897.
(3) 25 M. 736 at p. 739; 12 M. L. J. 103.
(4) 34 Ind. Cas. 581; 48 P. R. 1916; 142 P. W. R. 1916.
(5) 22 Ind. Cas. 664; 83 P. L. R. 1914; 43 P. W. R. 1914.
(6) 28 Ind. Cas. 301; 82 P. L. R. 1915.
(7) 30 Ind. Cas. 607.
(8) 87 P. R. 1903.
(9) 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique and Jackson's P. C. No. 133; 10 Ind. Dec. (N. s.) 737.

to the point. My own view is that inasmuch as the suit in 1911 related to a share in the property left by Bhana Mal, it was not incumbent on Kanshi Ram to include in it the claim for a share in the property held by Sri Ram in which Kanshi Ram had an interest. He certainly did not make any claim with regard to this sum of money so that section 11 clearly does not apply and as he was not bound to include the present claim in that suit, Order II, rule 2, is no bar.

In these circumstances I hold that the decree passed by the learned District Judge (old style) is correct and I confirm it and dismiss this appeal with costs.

*Appeal dismissed.*

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PATNA HIGH COURT.
**FULL BENCH.**
CIVIL REVISION No. 207 OF 1916.
March 30, 1917.
*Present*:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Sharfuddin, Mr. Justice Chapman, Mr. Justice Mullick and Mr. Justice Atkinson.
MAHADEO LAL—APPLICANT
*versus*
LANGAT SINGH AND OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), ss.* 170 (3), 161 —*Transferee of portion of occupancy holding not transferable by custom, whether entitled to make deposit—Interest of transferee—Interest and encumbrance, difference between.*

Per *Curiam* (*Mullick, J.*, dissenting).—The transferee of a portion of an occupancy holding not transferable by custom is not a person who has in the holding proclaimed for sale an interest which is "voidable on the sale" within the meaning of section 170(3), Bengal Tenancy Act, and is not, therefore, entitled to deposit the amount of the landlord's decree and costs under that section. [p. 262, col. 1; p. 263, col. 2.]

The interest of such a transferee is not an encumbrance as defined in section 161 of the Act. [p. 262, col. 1; p. 263, col. 2.]

*Mahanti Lal Sahu* v. *Harkissen Jha*, 19 C. W. N. clxxvi (176) followed.

*Sahdeo Singh* v. *Kuldip Singh*, 18 C. W. N. ccxix (219), not followed.

*Abdul Rahman* v. *Ahmadar Rahman*, 31 Ind. Cas. 554; 22 C. L. J. 356;19 C. W. N. 1217, 43 C. 558, relied upon.

Per *Mullick, J.*—The purchaser of a portion of an occupancy holding not transferable by custom has an interest voidable on the sale, and is entitled to deposit the arrears under section 170 (3), Bengal Tenancy Act. The interest of such a person is not an encumbrance within the meaning of section 161, Bengal Tenancy Act. The word "interest" in section 170 is a wider term than encumbrance and includes rights other than those falling within the narrow limits of section 161, Bengal Tenancy Act. [p. 264, col. 1; p. 265, col. 1; p. 267, col. 1.]

*Rameshwar Singh* v. *Raghunandan Khawas*, 38 Ind. Cas. 337; 1 P. L. J. 403, doubted.

Case-law discussed and reviewed.

Civil revision against an order of the Munsif, Sitamarhi, dated the 7th September 1916.

FACTS of the case appear from the judgment.

Mr. *Lakshmi Narayan Singh* (with him Mr. *Nirsu Narayan Singh*), for the Petitioner.—The question is whether a purchaser of a portion of a non-transferable occupancy holding can make a deposit under section 170 (3), Bengal Tenancy Act, to save the holding from sale in execution of a decree for rent against the registered tenant.

I would refer first to the ruling of this High Court in *Rameshwar Singh* v. *Raghunandan Khawas* (1), in which the purchaser of an entire non-transferable occupancy holding was held not so entitled. If the holding is not transferable by custom, and if the whole has been transferred, the tenant has walked out and the transferee has no interest in the eye of law and so he cannot make a deposit. If the holding is transferable, the landlord being bound by the transfer, cannot sue the original tenant; and the suit itself being incompetent, the decree is wrong, and the transferee being not affected by the decree and sale, he cannot make a deposit. Thus, in either case, the purchaser of an entire holding cannot make a deposit.

But the question of the purchaser of a portion only stands altogether on a different footing. Refers to the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2).

[CHAMIER, C. J.—(After consulting the other Judges). We propose to accept this Full Bench decision. I believe both the sides accept it.]

Refers to order of reference at page 174* which speaks about the interest of such a purchaser.

(1) 38 Ind. Cas. 337; 1 P. L. J. 403.

(2) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

*Page of 42 C.—*Ed.*

The Full Bench has held that the purchaser of a portion has an *interest* in the holding, and the logical corollary from that is that he should be given a right to protect that interest. The phrase in section 170, clause (3), "any person having an interest voidable on the sale" should be construed liberally. If the interest is not 'voidable' but 'void', he has greater right to prevent the sale.

[CHAPMAN, J.—His interest is avoided by the sale, but I would like to know if the term 'viodable' has been used in that sense.]

[MULLICK, J.—The meaning of that word has been explained in *Tarak Das Pal* v. *Harish Chandra Banerjee* (3).]

[CHAMIER, C. J.—Is it not a fact that all the Judges who have touched the point have held the word 'voidable' to refer to 'incumbrances' under section 161.]

Yes, except Justice Mookerjea. I am, however, greatly hampered by the judgment of your Lordishp, the Chief Justice, in *Rameshwar Singh* v. *Raghunandan Khawas* (1).

[CHAMIER, C. J.—Do not be hampered, you are arguing before Full Court.]

Encumbrances are (1) notified and registered incumbrances; (2) ordinary ones. The purchaser's interest is voidable on the sale, as the execution purchaser has to take some steps before dispossessing him, that is, he has to avoid the purchase.

[CHAMIER, C. J.—Has he to apply to the Collector under section 167 ?]

No. But he must go to the Civil Court.

[MULLICK, J.—Then by your argument the purchaser of an entire holding will also be said to have an interest 'voidable' on the sale.]

The Full Bench in *Dayamoyi's* case (2), has, however, held that the purchaser of a portion only in a non-transferable holding has an interest, while that of the whole has no interest at all.

[CHAPMAN, J.—Your argument is that even if it is not an 'incumbrance' and the landlord need not apply to the Collector, your client's interest is 'voidable' on the sale because it will be avoided by the sale.]

Yes.

[CHAMIER, C. J.—You seem to be putting the cart before the horse. See section 170 and look to section 174 which is very limited as compared with Order XXI, rule 89, Civil Procedure Code. The purchaser of a portion, according to your argument, easily comes under Order XXI, rule 89. Would your client by paying the money under section 170, claim under section 171, a mortgage for money so paid?]

No. I will not be a mortgagee. I pay money before sale and can only bring a suit for contribution against the original tenant.

[SHARFUDDIN, J.—Section 171 is clear.] I have not come across any case on the point.

[MULLICK, J.—Why do you say, you cannot be a mortgagee in respect of the whole holding?]

[CHAMIER, C. J.—It is quite clear that if we hold that he has an interest 'voidable' on the sale under section 170, he becomes a mortgagee under section 171.]

I now draw your Lordships' attention to *Tarak Das Pal* v. *Harish Chandra Banerjee* (3).

[CHAMIER, C. J.—That case is peculiar and distinguishable, as the transferee had remained in possession for 12 years to the knowledge of the landlord.]

But the Judges were not influenced by that circumstance, as appears from the observations at page 165 of the report, left hand column. The word used in section 170 is 'interest' and not 'incumbrance'.

[CHAPMAN, J.—What is the strongest and the best case on your side?]

The case exactly in point is *Ahmadullah Chowdhury* v. *Harkaru Saha* (4). But it is not for us to say what is the best case—your Lordships can better say that. Mr. Justice D. Chatterjee decided the case of *Sahdeo Singh* v. *Kuldip Singh* (5). I also rely upon *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (6).

[CHAMIER, C. J.—This is contrary to *Abdul Rahman* v. *Ahmadar Rahman* (7). The authorities are on both sides. Let us discuss the various words used in the section.]

I may refer to *Abdul Rahman* v. *Ahmadar Rahman* (7), *Jugal Mohini Dasi* v. *Sri Nath Chatterjee* (8). I strongly rely upon the dissen-

(3) 16 Ind. Cas. 977; 17 C. W. N. 163; 16 C. L. J. 548.

(4) 27 Ind. Cas. 176; 20 C. W. N. 39; 18 C. W. N. ccxxxi (231); 22 C. L. J. 106.

(5) 18 C. W. N. ccxix (219).

(6) 3 Ind. Cas. 835; 13 C. W. N. 1175; 10 C. L. J. 473.

(7) 31 Ind. Cas. 554; 22 C. L. J. 356; 43 C. 558; 19 C. W. N. 1217.

(8) 7 Ind. Cas. 477; 12 C. L. J. 609 at p. 611.

tient judgment of Mr. Justice Mullick in the former at page 565*. My argument is of a threefold character; (1) that the interest of the purchaser of a portion is *voidable* on the sale, (2) even if it be held to be *void*, he has greater right to protect the sale, and (3) he is an *encumbrancer* under section 161, his purchase being in limitation of the original tenant's interest in the portion sold. Section 170 has not to be read with section 161, as it does not speak of any *encumbrance* voidable on the sale, but any *interest* voidable on the sale.

[ATKINSON, J.—It speaks of 'voidable' on the sale.]

[CHAMIER, C. J.—Chapter XIV has to be read as a whole. It provides for annulling interest defined in the chapter as encumbrances. The purchaser's interest is not a protected interest, under section 160, section 310A old Civil Procedure Code (Order XXI, rule 89) does not apply now to Bengal Tenancy Act, section 174 of which bears a stiking difference in language.]

Yes, it has been held that no one but the judgment-debtor can deposit it *after* the sale, but before the sale, one can make a deposit and section 170 provides for that. Clause (2) says, 'paid into Court' but not 'by whom'.

[CHAMIER, C. J.—But the succeeding clause says, who can pay the money.]

The ruling in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (9), is against me. But it has been doubted and discussed in *Asgar Ali* v. *Gouri Mohan Roy* (10), also in Mr. Justice Mullick's judgment in *Abdul Rahman* v. *Ahmadar Rahman* (7).

[CHAMIER, C. J.—You can get a number of cases on either side.]

On the merits, I submit that the tenants in this Province generally sell a portion of their holdings; and your Lordships' decision, if against me, will be disastrous to the entire tenantry of Bihar, who, then, will not be able to raise money on marriage occasions or to pay up arrears of rent. But I confess, as a landlord, I shall have personally reason to rejoice.

Mr. *Baidyanath Narayan Sinha*, for the Opposite Party.—Chapter XIV of the Bengal Tenancy Act is a self-contained chapter and the sections of any other Act should not be read into it. Section 170, clause (3), speaks of 'interest *voidable* on the sale.' It is opposed to a 'void' interest. We have next to see what is meant by 'voidable'. I submit it refers to those interests which have to be *avoided* or *annulled* by the landlord under Chapter XIV, sections 159. It speaks of two kinds of interest, 'protected interests' and other 'interests', which, for the sake of convenience, have been included under a catch-word 'encumbrance'. It is thus immaterial that the word 'encumbrance' has not been used in section 170 (3), as I submit Chapter XIV does not contemplate a third kind of interest, all interests coming under, (1) 'protected ones', or (2) 'encumbrance,' which, has been used as synonymous with 'interest;' the word 'avoided' also is same as 'annulled'. Section 159 speaks clearly of 'interests.'

[MULLICK, J.—Has the purchaser of a portion no 'interest'?]

He has an 'interest' under the Full Bench decision of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2), but his interest does not come under the stringent provisions of Chapter XIV, which provides for a special procedure relating to sales in execution of rent decrees.

[CHAMIER, C. J.—The phrase is 'voidable on the sale' and not 'avoided by the sale'.]

I may refer to section 159 and proviso (*b*).

[CHAMIER, C. J.—The whole question is, whether the words 'interest voidable on the sale' refer back to section 159. Section 166 also speaks of 'with power to *avoid*', and in the very next sub-section, the word 'annul' is used. They may be convertible terms.]

I may refer to *Jotindra Mohan Tagore* v. *Durga Dabe* (11); further, a co-tenant's interest has been held to be 'void' and not 'voidable' as his interest passes along with the sale. 'On the sale' means '*after* the sale'.

[CHAMIER, C J.—Has the Full Bench decision given the purchaser of a portion any right other than resisting ejectment by the landlord as long as the original tenant retains the other portion?]

I submit he has not been given any right other than that, and of applying under

(9) 5 Ind. Cas, 116; 14 C. W. N. 229; 11 C. L. J. 16.
(10) 21 Ind. Cas. 58; 18 C. W. N. 601; 18 C. L. J. 257.
(11) 10 C. W. N. 438.

*Page of 43 C.—*Ed.*

MAHADEO LAL v. LANGAT SINGH.

Order XXI, rule 90, to set aside a fraudulent sale, as a representative of the judgment-debtor under section 47, Civil Procedure Code.

[CHAMIER, C. J.—He is only a shadow of the original tenant.]

[MULLICK, J.—What about interests other than 'encumbrances'? How are they to be avoided?]

Bengal Tenancy Act does not say anything about that.

[CHAMIER, C. J.—The purchaser of a transferable holding is an encumbrancer.]

Yes, but not that of *non-transferable* holding.

[CHAMPMAN, J.—As it has not to be 'avoided'.]

Yes, it passes along with the sale. Moreover, a *sale* is not an interest *on* the tenure or holding, nor is it in *limitation* of the tenant's right.

[CHAMIER, C. J.—Cannot an occupancy *raiyat* create a sub-lease?]

Yes, but not for more than nine years. See section 85.

[MULLICK, J.—Suppose, it exceeds nine years.]

[CHAMIER, C. J.—The under-tenant goes with the tenant.]

The ruling in *Sahdeo Singh* v. *Kuldip Singh* (5) proceeds upon assumptions and does not discuss the point. *Nalini Behari Roy* v. *Fulmani Dasi* (12) is in my favour, also *Tamizuddin Khan* v. *Khoda Nawaz Khan* (9).

[MULLICK, J.—It only holds that the purchaser of a portion is not an encumbrancer.]

Then I submit he cannot be entitled to come under section 170 (3).

[MULLICK, J.—You are begging the question.]

I may draw your Lordship's attention to the clear and explicit observations of Jenkins, C. J. in *Abdul Rahman* v. *Ahmadar Rahman* (7), where it is said the purchaser of the entire holding or a portion stands on the same footing—both 'stand or fall together' (reads the passage).

The case of *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) overlooks the fact that an 'encumbrance' is also an 'interest' under sections 159 and 161.

[MULLICK, J.—Justice Mookerji's decision has remained unshaken.]

The decision in *Abdul Rahman* v. *Ahmadar Rahman* (7) does not expressly refer to it, but it dissents from it by implication, just as the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2) overrules the previous decisions without referring expressly to any one of them. Some case wrongly interpreted the Full Bench decision as giving the purchaser a right to make a deposit, and so the learned Chief Justice in *Abdul Rahman* v. *Ahmadar Rahman* (7) expounded its true effect and thus, in a way, by implication challenged the correctness of the rulings to the contrary.

I may refer to *Ashutosh Ghose* v. *Abinash Chandra Chowdhuri* (13), where a co-tenant's interest was held to pass along with the sale, being wholly 'void' and not 'voidable on the sale'. The purchaser of a portion cannot certainly claim a higher privilege and protection than a co-tenant. The ruling in *Ahmadullah Chowdhury* v. *Harkaru Saha* (4) is the same case as *Ahmadullah Chowdhury* v. *Harkaru Saha* (4) (notes portion).

The cases of *Sahdeo Singh* v. *Kuldip Singh* (5) and *Ahmadullah Chowdhuy* v. *Harkaru Saha* (4) were decided by the same Bench on one and the same day.

The decision in *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) is based upon other cases which are distinguishable, and it is, I submit, not logical, as an interest, which passes with the sale, cannot be held to be 'voidable', there being nothing to 'avoid'.

Mr. *L. N. Singh*, in reply.—Under the Full Bench decision, the purchaser of a portion can apply to set aside the sale under Order XXI, rule 90, on the ground of fraud and irregularity, and it would thus be absurd to contend that he cannot in time make a deposit and prevent the sale. When he can come after the sale and impeach it, he should surely be allowed to come and deposit before the sale.

[CHAMIER, C. J.—There seems to be no absurdity. If the landlord conducts the execution sale properly, why should he not buy up the property?]

JUDGMENT.

CHAMIER, C. J.—The question for decision is

(12) 13 Ind. Cas. 487; 16 C. W. N. 421; 15 C. L. J. 388.

(13) 11 Ind. Cas. 501; 15 C. W. N. 782.

whether the applicant, the purchaser without landlord's consent of a part of a non-transferable occupancy holding, which has been proclaimed for sale under section 163 of the Bengal Tenancy Act, is entitled to deposit the amount of the landlord's decree and costs under section 170, sub-section 3 of the Act. That section provides *inter alia* that when an order for the sale of a holding in execution of a rent-decree has been made the holding shall not be released from attachment, unless before it is knocked down to the auction-purchaser the amount of the decree and certain costs are paid into Court, and that the judgment-debtor or any person having in the holding any interest "voidable on the sale" may pay money into Court under that section.

The case has been referred to this Bench partly on account of the importance of the question involved and partly because there has been a difference of opinion on the question in the Calcutta High Court, D. Chatterji and Walmsley, JJ., having decided it in the affirmative in *Sahdeo Singh* v. *Kuldip Singh* (5) and Jenkins C. J. and N. R. Chatterjea, J., having decided it in the negative in *Mahanti Lal Sahu* v. *Harkissen Jha* (14). These two cases are so far as I am aware the only cases in which the precise question has been decided. Our attention has been drawn to a large number of cases which bear more or less upon the question but they cannot be said to establish any settled *cursus curiæ* on the subject which this Court ought to follow. Both sides have in this case admitted the correctness of the propositions laid down by the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2) and it may be conceded that as held in that case a purchaser with the landlord's consent of a part of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale, as a representative of the *raiyat*, to have the sale of the holding set aside on the ground of fraud, but the question which we have to decide is whether such a person has an interest in the holding "voidable on the sale" within the meaning of section 170 of the Act.

Section 159 lays down that when a holding is sold in execution of a decree of arrears due in respect thereof the purchaser shall take subject to the interest defined in Chapter XIV as "protected interests" but with power to annul the interests defined in that Chapter as "incumbrances" provided that the power to annul shall be exercisable only in the manner directed by that Chapter.

Section 160 shows what are "protected interests." No one suggests that the applicant has a "protected interest."

Section 161 defines the term "incumbrance" used with reference to a tenancy as meaning any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section.

Section 163 provides *inter alia* that in the case of an occupancy holding the proclamation of sale shall announce that the holding will be sold with power to annul all incumbrances.

Section 166 provides that when an occupancy holding has been advertised for sale under section 163 it shall be put to auction and sold with power to avoid all incumbrances and the purchaser at a sale under this section may in manner provided by the next following section and not otherwise annul any incumbrance on the holding.

Section 167 prescribes the procedure to be followed by a purchaser having power to annul encumbrances and desiring to annul the same.

It seems to me quite clear that the words "annul" and "avoid" as used in these sections are convertible terms, that the only interests which are "voidable on the sale" within the meaning of section 170 are those interests which can be avoided by means of an application under section 167 and that the only interests which can be avoided by means of such an application are the interests defined in section 161 as "incumbrances". The result, in my opinion, is that the answer to the question which we have to decide depends

(14) 19 C. W. N. clxxvi (176).

upon whether the applicant has an incumbrance as defined in section 161. In my opinion he has not. He certainly has not either a "lien, sub-tenancy, or easement." Has he "any other right or interest created by the tenant on his holding or in limitation of his own interest therein?" These words refer presumably to some right or interest which is *ejusdem generis* with the opening words of the definition and not to some much larger right or interest of a different description. Upon the construction of this definition I accept what was said by Jenkins, C. J. and N. R. Chatterjea, J., in *Abdul Rahman* v. *Ahamadar Rahman* (7). That was the case of a tenure and not of a holding but the reasoning of the learned Judges applies as much to a holding as to a tenure.

A transferee without the landlord's consent of a plot of land forming part of a non transferable holding may be entitled to retain possession of that plot while the tenant also retains possession of some portion of his holding, but, if an execution sale of the holding takes place, the holding passes to the auction-purchaser and it seems to me that the previous transferee of a plot, forming part of that holding must give way to the auction-purchaser, in other words the interest of transferee of the plot, whatever it may be, is avoided by the sale and the holding passes to the auction-purchaser free from any claim on the part of the transferee.

Chapter XIV of the Bengal Tenancy Act appears to me to be self-contained so far as the present question is concerned and upon a construction of the various provisions contained in that Chapter, I am of opinion that the applicant is not a person who has in the holding now proclaimed for sale an interest which is "voidable on the sale" within the meaning of section 170. I would, therefore, dismiss this application with costs. Hearing fee three gold *mohurs*.

CHAPMAN, J.—I agree with the judgment delivered by the Chief Justice.

ATKINSON, J.—I concur with the judgment delivered by the Chief Justice.

SHARFUDDIN, J.—The question referred to this Special Bench is one of very great importance. It is of importance to the landlords, to the occupancy *ryots* and to the transferees of a part of the holding. This question produced many conflicting rulings and for that reason this Special Bench was constituted in order to give a definite answer to the question put to this Bench in the Letter of Reference. The question referred to this Bench is whether a purchaser of a portion of an occupancy holding, not transferable without the consent of the landlord, can make a deposit as directed by sub-section 3 of section 170 of the Bengal Tenancy Act. The sub-section is to the following effect:—"The judgment-debtor or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section." On the first reading of this sub-section it would no doubt appear that the wordings are most comprehensive but when we refer to other provisions of the Chapter wherein section 170 takes its place it seems to me clear that the purchaser referred to ought not to be given a right to make the deposit.

In the present dispute both sides have admitted the correctness of the propositions laid down by the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2). In this reported case it was held that after the execution sale a purchaser without the landlord's consent of a part of a non-transferable occupancy holding has an interest in that holding as a representative and has a right to apply for the setting aside of the sale on the ground of fraud but the question that we have to decide is as to whether such a person has an interest in the holding "voidable on the sale" within the meaning of section 170 of the Act.

Section 171 provides that when a person having in a tenure or holding advertised for sale under this Chapter (Chapter XIV) or in execution of a certificate for arrears of rent due in respect thereof signed under the Bengal Public Demands Recovery Act of 1913 an interest which would be voidable by the sale pays into Court the amount requisite to prevent the sale:—

(*a*) the amount so paid by him shall be deemed to be a debt at 12 per cent. per annum and secured by a mortgage of the tenure or holding to him;

(*b*) his mortgage shall take priority

of every other charge on the tenure or holding other than a charge for arrears of rent; and

(*c*) he shall be entitled to possession of the tenure or holding as mortgage of the tenant and to retain possession of it as such until the date, when interest due thereon has been discharged.

It is clear, therefore, that in accordance with the provision of section 171 of the Act, the purchaser of a part of a non-transferable occupancy holding, if allowed to make the deposit, becomes a mortgagee of the tenant, and as such he cannot be ousted by the landlord or by the purchaser of the holding in execution sale and the result would, therefore, be that new purchaser would be thrust on the landlord which I think certainly cannot have been the intention of the Legislature. The Legislature in enacting the Bengal Tenancy Act had in its view the safe-guarding of the interests both of the landlords and the tenants and it seems to me from other povisions of the Act that the Legislature is against forcing a stranger on the landlord without his consent and it is on this account that it has been held that the landlord is not bound to rcognise a transferee of a part of an occupancy holding not transferable by custom.

In the present case the purchaser is certainly not a judgment-debtor. The question is whether he is entitled to avail himself of the provision of section 170 of the Act. Sub-section 3 of this section clearly provides that if a person has an interest "voidable on the sale" he is entitled to make the deposit. The question, therefore, resolves itself into this, namely, whether a purchaser of a part of an occupancy holding not transferable by custom has an interest "voidable on the sale." In order to determine that question I think it is necessary to refer to some other sections of the Act. Section 159 of the Act refers to the general powers of a purchaser to avoid encumbrances. That section provides: "Where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined in this Chapter as 'protected interest' but with power to annul the interests defined in this Chapter as 'encumbrances'." As to what an encumbrance is we must refer to section 161 of the Act and as to how an encumbrance is to be avoided we have to refer to section 167 of the Act. On a perusal of these sections it is clear that under the provision of section 159 a purchaser takes the tenure or holding free from encumbrances and encumbrance as defined in section 161 can be voided or annulled under section 167. It follows from the provisions of the sections quoted that the encumbrance holders whose interest are voidable on the sale are persons who are entitled to make the deposit. It is also to be determined whether he has any encumbrance within the meaning of the section 161 of the Act under which section an encumbrance means a lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined by section 160 of the Act. In order, therefore, to determine whether a purchaser of a portion of an occupancy holding not transferable by custom is entitled to make the deposit, it has to be found whether he has an encumbrance within the meaning of the Bengal Tenancy Act and if he has not such an encumbrance he has no right to make the deposit. In accordance with the definition of an encumbrance it seems to me clear that the purchaser of a part of an occupancy holding not transferable by custom is not an encumbrance holder. That being the view that I take, I hold that in the present case the purchaser had no right to make the deposit and I would, therefore, dismiss this application with costs

MULLICK, J.—I am of opinion that the petitioner is entitled to deposit the arrears under section 170 (3), Bengal Tenancy Act.

The matter turns upon the meaning of the words "interest voidable on the sale."

The learned Vakil for the opposite party contends that the words mean "incumbrance liable to annulment after the sale by the special procedure for annulment of incumbrances in Chapter XIV, Bengal Tenancy Act," and that no interest which does not fall within the definition of incumbrance given

in section 161 can be saved by payment under section 170.

To this the petitioner's first re-joinder is that he is in fact an incumbrancer. Now although there may have at one time been some foundation for the contention that the purchaser of a part of a tenure or holding is an incumbrancer the question is, I take it, now settled by the decision of Jenkins, C. J., in *Abdul Rahman* v. *Ahamadar Rahman* (7), which went before him on a reference to which I was myself a party.

The petitioner's next contention is that even if he is not an incumbrancer the word interest in section 170 is a wider term than incumbrance and includes rights other than those falling within the narrow limits of section 161.

In my opinion this contention is well founded. Chapter XIV does not in terms say that interest and incumbrance are synonymous, then why should we strain language and give the word interest a meaning it does not ordinarily possess.

Again if we rely on decisions in the Calcutta Court I have been able to find only one in support of this interpretation, namely *Behari Lal Pau* v. *Fakir Chandra Roy* (15), decided by Dass, J., sitting alone.

On the other hand the weight of authority is wholly in favour of the view that the protection afforded by sections 170 and 173, Bengal Tenancy Act, is not limited to incumbrances.

In principle there is no difference in this connection between a tenure and a holding and I give below the cases which seems to me to support my view. In *Anund Lal Mookerjee* v. *Kalika Pershad Misser* (16) it was held that the unregistered transferee of an under-tenure could stop a sale by payment of the arrears under section 6, Act VIII (B. C.) 1865. That case was decided before the Tenancy Act of 1885 but it is useful as showing if the judgment of Dass, J., in 1908, is correct, then the law has materially altered the position of unregistered transferees by sale.

So in *Jotindra Mohan Tagore* v. *Durga Dabe* (11), on which case the learned Vakil for the opposite party himself relies the transferee of a whole tenure was allowed to deposit the arrears under section 170 on the ground that he had been allowed to do so on a previous occasion.

To the same effect is *Jugal Mohini Dasi* v. *Sri Nath Chatterjee* (8), where the purchase was in respect of a part of a tenure.

To like effect is *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (6), where Jenkins, C. J. and Mookerjee, J., held that the unregistered purchaser of a share in a *darpatni* was entitled to deposit under section 171, Bengal Tenancy Act.

Again in *Brindarani Choudhrani* v. *Annoda Mohan Ray Choudry* (17), a person who had purchased a tenure long before the decree was allowed to deposit, it being held that although he was not strictly bound by the decree he would be allowed to deposit because he had been so allowed before.

In regard to occupancy holdings the purchaser of the whole or part has been allowed to deposit under sections 170 and 173, Bengal Tenancy Act in the following among other cases:—

*Asgar Ali* v. *Gouri Mohan Roy* (10), *Ahmadullah Chowdhury* v. *Harkaru Saha* (4), *Sahdeo Singh* v. *Kuldip Singh* (5), and *Tarak Das* v. *Harish Chandra Banerjee* (3).

The last of these cases is particularly in point because there the learned Judges decided in clear terms that interest and incumbrance were not synonymous terms for the purposes of Chapter XIV.

The opposite party relies on *Nalini Behary Roy* v. *Fulmani Dasi* (12). So far as I can see that is the only case in his favour, but even that decision was not based on the ground that the transferee had no incumbrance. In that case the purchaser of the whole of a non-transferable occupancy holding was held debarred from coming in under section 170, not because he had no incumbrance but because he had no interest which was valid against the landlord.

The other case in which the opposite party seeks to rely is *Mahanti Lal Sahu* v. *Harkissen Jha* (14). In this case Jenkins, C. J. and Chatterjee, J., did not decide the point whether the purchaser of part of a non-transferable occupancy holding

(15) 12 C. W. N. ccxxxi (231).
(16) 20 W. R. 59; 12 B. L. R. 489 *note*.
(17) 13 Ind. Cas. 328; 16 C. W. N. 94.

was entitled to deposit under section 170. If their Lordships had thought incumbrance and interest were synonymous, they would have forthwith decided against the transferee, but they seemed to be of opinion that it was not necessary to adjudicate upon the rights of a transferee of part of a non-transferable occupancy holding if in fact the holding under consideration was a transferable one. They accordingly remanded the case.

In these circumstances, I am clearly of opinion that the weight of authority is against the view taken by Dass, J., in *Behary Lal Pau* v. *Fakir Chandra Roy* (15.)

The next question is whether the petitioner's interest is one voidable on the sale. The opposite party contends that it is void and not voidable. In my opinion, there is ample authority for the view that a transferee who is liable to be ejected by the auction-purchaser after the sale has an interest viodable on the sale. And it will suffice to cite in support the judgment of Jenkins, C. J. and Mookerjee, J., in *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (6). The principle is the same whether the subject-matter is a tenure or a holding, and I confess, I have some difficulty in appreciating the difference in this connection between a void and voidable interest.

What the Court sells is the tenure or the holding. *Per se* the sale cannot be said to avoid anything. By the operation of sections 158 (B) and 195, Bengal Tenancy Act, the sale gives the auction-purchaser the right to step into the shoes of the tenant subject to the limitations and the procedure of Chapter XIV. Whether the person in possession is a transferee by purchase or an incumbrancer, the auction-purchaser cannot on being resisted re-enter without further recourse to law which in the one case is a suit and in the other the special procedure under section 167. If as in *Brindarani Choudhrani* v. *Annoda Mohan Ray Choudry* (17), the person in possession is not affected by the decree then *ex hypothesi* his interest is not voidable on the sale. But where he is so affected the expression "void on the sale" is meaningless. In fact every interest is voidable where the decree and sale give the auction-purchaser the right to re-enter.

It is true that a contrary view was taken in *Jotindra Mohan Tagore* v. *Durga Dabe* (11), but that case has been repeatedly dissented from (see the observations of Mookerjee, and Beachcroft, JJ., in *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) and does not, in my opinion, correctly interpret the law.

And even there the Court although expressing the opinion that the transferee had no voidable interest granted his application to deposit because he had been allowed to deposit on previous occasions. In *Tarak Das Pal* v. *Harish Chandra Banerjee* (3), the transferee had been in possession to the knowledge of the landlord for over 12 years, but nothing turned on this as the Court did not decide whether he had acquired a tenancy by adverse possession and held that possession *qua* the landlord was sufficient to give an interest voidable on sale.

Even in *Nalini Behari Roy* v. *Fulmani Dasi* (12), which is the opposite party sheet anchor and in which the transferee of a non-transferable occupancy holding was held not entitled to deposit under section 170, the decision was based not on the ground that the transferee did not possess a voidable interest but on the ground that his interest was not valid as against the landlord.

This brings me to the opposite party's third contention which is that interest in section 170 means interest valid against the landlord at least as regards occupancy holdings.

In my opinion this contention must also fail.

It is necessary, however, to examine the decisions on the rights of the purchaser of an occupancy holding.

In *Gadadhar Ghose* v. *Midnapur Zemindari Company* (18) it was held that the purchaser of a non-transferable occupany holding had a right to bring a suit to impeach a rent sale on the ground of fraud and in *Brahamdeo Narain Singh* v. *Ramdown Singh* (19) the same power was held to lie in a purchaser of a part of a non-transferable occupancy holding. In

(18) 17 Ind. Cas. 126; 16 C. L. J. 141.
(19) 17 Ind. Cas. 125; 16 C. L. J. 139.

*Abdul Aziz* v. *Tafajuddin Sheikh* (20) it was held that the transferee of a portion of an occupancy holding can come in under Order XXI, rule 90 of the Civil Procedure Code of 1908, as he is a person, whose interests are affected by the sale, these words being wider than the corresponding word of Order XXI rule 89, which corresponds to section 310A of the Civil Procedure Code of 1882.

In *Azgar Ali* v. *Asaboddin Kazi* (21), it was held that the transferee of a non-transferable occupancy holding is a person whose immovable property has been sold; that he is a representative of the judgment-debtor, and that he can apply under section 173 of the Bengal Tenancy Act. In *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) the purchaser of a non-transferable occupancy holding was held entitled to deposit, apparently without any decision as to whether the transfer was binding upon the landlord or not. In *Bungshidhar Haldar* v. *Kedar Nath Mondal* (22), *Benodini Dassi* v. *Peary Mohan Haldar* (23), *Kunja Behari Mondal* v. *Shambhu Chandra Roy* (24) and *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmad* (25), purchaser of a part of a non-transferable occupancy holding was held entitled to come in under section 310A of the Civil Procedure Code of 1882.

On the other hand in *Srimati Nissa Bibi* v. *Radha Kishore Manikya* (26), and *Prosunno Kumar Middar* v. *Bama Churn Mondal* (27), it was held that transferee of non-transferable occupancy holding could not come in under section 244 or 311, Civil Procedure Code of 1882. Again in *Nalini Behari Roy* v. *Fulmani Dasi* (12) the purchaser of a non-transferable occupany holding was held to be not entitled to come in either under section 244 or 311, Civil Procedure Code or section 170, clause 3, Bengal Tenancy Act. In this case on which the opposite party places very great reliance, but the authority of which has been greatly weakened by the Full Bench decision to which I shall refer immediately the judgment proceeds on the basis that each of the above sections contemplates an interest of the same nature, namely, one which is not valid against the landlord.

All the above cases, however, were decided before the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2) and it may be urged that in some respects the law has been altered by that decision.

It is necessary, therefore, to see the state of the authorities since the Full Bench decision, which both parties before us have accepted as a starting point. In *Sahdeo Singh* v. *Kuldip Singh* (5), the purchaser of part of a non-transferable holding was held entitled to deposit under section 170, Bengal Tenancy Act. *Ahmadullah Chowdhury* v. *Harkaru Saha* (4) is to the same effect. In *Ahmadullah Chowdhury* v. *Harkaru Saha* (4) the purchaser of the whole of a non-transferable occupancy holding was held entitled to deposit under section 170. On the other hand the opposite party relies on *Mahanti Lal Sahu* v. *Harkissen Jha* (14), but as I have already observed, that case was remanded for the trial of the question whether the land was transferable or not and the point whether the interest of the transferee was valid as against the landlord and what effect the question of the validity had on section 170 was not gone into. In *Kali Charan Mahto* v. *Sheo Narain Singh* (28), the Court held that the purchaser of a non-transferable occupancy holding cannot come in either under section 170 of the Bengal Tenancy Act or under section 310 A, Civil Procedure Code of 1882, but that he can come in as a representative of the judgment-debtor, under section 244. This decision to some extent favours the petitioner, also as does *Abdul Rahman Sarkar* v. *Promode Behary Dutta* (29), where the purchaser of a non-transferable occupancy holding was held not entitled to come in under Order XXI, rule 89, of the present Civil Procedure Code. The learned Judges in *Abdul Rahman's* case (29) considered *Ahmadullah Chowdhury* v. *Harkaru Saha* (4), but they did not expressly dissent from it. In my opinion, this last case still stands good for the proposition that though the

(20) 18 C. W. N. lxxii (72).
(21) 9 C. W. N. 134.
(22) 1 C. W. N. 114.
(23) 8 C. W. N. 55.
(24) 8 C. W. N. 232.
(25) 7 C. L. J. 282.
(26) 11 C. W. N. 312.
(27) 3 Ind. Cas. 461; 13 C. W. N. 652.
(28) 18 C. W. N. ccxix (219).
(29) 28 Ind. Cas. 182; 20 C. W. N. 40; 2. C. L. J. 108.

transfer of a non-transferable holding is not binding upon the landlord, it is not a bar to the transferee's paying in money under section 170, Bengal Tenancy Act.

The effect of the Full Bench decision, therefore, is that so far as the transfer of a whole non-transferable holding is concerned the case of *Nalini Behari Roy* v. *Fulmani Dasi* (12) has been overruled and *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) has been affirmed. The transferee has rights both before and after the sale inspite of the landlord's and the auction purchaser's right of re-entry.

In this Court the case of *Rameshwar Singh* v. *Raghunandan Khawas* (1) is in favour of the opposite party but my respectful opinion is that the correct rule has been laid down in the Calcutta High Court that the purchaser of a non-transferable occupancy is entitled to make a deposit under section 170, Bengal Tenancy Act.

With regard to the transfer of a portion of a non-transferable occupancy holding the two authorities since the Full Bench decision are both in the transferee's favour in the matter of section 170, Bengal Tenancy Act.

Indeed under the Full Bench decision, the transferee of a part is in much stronger position than the transferee of the whole. The Full Bench have decided that the landlord can re-enter at any moment as against the transferee of the whole, but that in respect of a part, he can only re-enter if the transfer effects a surrender or abandonment. If as generally happens in the case of a transferee of a part, there is no abandonment or surrender by the recorded tenant, the landlord's right of re-entry does not arise. The cases, therefore, which are in favour of the transferee of the whole, apply with stronger force to a transferee of a part. And the conclusion which I arrive at is that in spite of some conflict of opinion before the Full Bench decision there is a very substantial preponderance of opinion in favour of the view than unless there is clear provision to the contrary as in Order XXI, rule 89, of the Civil Procedure Code of 1908, the right of a transferee by sale particularly a transferee of part of a non-transferable occupancy holding to avoid the sale both before and after the sale has taken place is independent of the validity of his interest as against the landlord.

I am of opinion, therefore, on a consideration of the whole case that the petitioner is entitled to come in under sections 170 and 171, Bengal Tenancy Act.

Indeed on principle, i see no reason why the landlord should not be compelled to receive payment from a transferee in the petitioner's circumstances. A landlord is only interested in receiving his rent. If a transferee is allowed to acquire a mortgage lien under section 171, the landlord's position is in no way worse than if the recorded tenant had mortgaged the holding himself to the transferee. Why then if the landlord is bound to accept a deposit from a mortgagee by private contract should he be allowed to refuse payment from a mortgagee who acquires his lien by operation of law? In either case an outsider is thrust upon the landlord against his will.

Again the petitioner's position as defined by the Full Bench also contemplates that he should be allowed to come in under section 170 of the Bengal Tenancy Act. Section 3 0A, Civil Procedure Code of 1882 was withdrawn from operation, in rent sales in Bengal and Bihar in 1907. Order XXI, rule 89, which requires that the transferee should have an interest which gives him a title as against the landlord would also not protect him. The Full Bench, however, has held him to be competent on the ground of material irregularity and fraud to attack the sale under Order XXI, rule 90, the terms of which are wider than those of Order XXI, rule 89. If he is a person entitled to come in under Order XXI, rule 90, why is he not entitled to pay up before the sale and thus to avoid the chance of further litigation. But then the opposite party says that by withdrawing the money, the landlord will be held to have accepted the petitioner as a tenant. I do not think there is any estoppel in this matter. Indeed clause 4, section 170 of the Eastern Bengal and Assam Tenancy Act was expressly added for the purpose of making this clear.

After all the object of giving the auction-purchaser the power to avoid encumbrance and other interests is not so much to facilitate his obtaining physical possession of the land as to improve his security for rent. So long as this security is not impaired there seems to be no reason why he should

be permitted to interfere with the tenant's right of transfer, and if he gets his rent from the transferee he can, unless the land is being used for a purpose contrary to that of the original tenancy, have no ground of complaint. Generally speaking the right of transfer subject to the safe-guards against sub-division of the holding tends rather to enlarge than to cut down the landlord's security.

In this connection it is interesting to note how the Legislature in India has protected transferees from the earliest times. The firstenactment with this object was section 13, Regulation VIII of 1819, which directed that money paid by an under-*raiyat* to protect a superior *putni taluk* from sale should be considered as a loan made to the proprietor of the tenure preserved from sale by such means and the *taluk* so preserved should be the security of the person or persons making the advance, who were to be considered to have a lien in the same manner, as if a loan had been made upon a mortgage. The principle was apparently based upon salvage liens in England.

We next find that in the Sale Law of 1845, a personal remedy was given to persons other than recorded co-sharers who are interested to pay the revenue to protect their interest.

In the Revenue Sale Act of 1859 the same provision was made with the addition that if the depositor already holds a lien the amount paid by him shall be added to that lien.

Act X, 1859, which was the first Rent Code, contains no provision for payment of rent by transferees and encumbrancers, but the Rent Act of 1865 extended the provisions of section 13 of Regulation VIII of 1819 to payments made by under-tenure-holders for the preservation of the superior tenure.

We finally come to Act VIII of 1885, when the elaborate provisions of Chapter XIV were enacted for further safe-guarding not only the interests of landlords but also of those claiming rights created by the tenant without the landlord's consent.

The Act, in my opinion, classified interests into protected interests, encumbrances, and interests other than those falling under the above two heads. It does not follow that because it prescribed a special procedure for annuling encumbrances it completely swept away the privilege conferred by Act VIII (B. C.), 1865, on persons "interested in protecting the under-tenures." In my opinion, section 170, Act VIII, 1885, merely re-affirmed the provisions of section 6 of the Act of 1865. We have seen that an unregistered transferee of a part of a tenure had up to 1885 been held to be entitled to acquire a mortgage lien in the under-tenure by payment of the arrears before sale. What reason is there for supposing that this privilege was taken away by the Act of 1885, and if the privilege still exists in respect of tenures then it must also exist in respect of holding for section 170 makes no difference between the two classes of tenancy.

It may be that the landlord in the present case would have been entitled before suing the recorded tenant, to eject the petitioner from the land, and if so, the petitioner's interest would be capable of description as one voidable before the sale, but that is no reason why it should not also fall under the category of interests voidable on the sale. The landlord not having availed himself of his right of ejectment the petitioner is entitled to protect himself under section 170 whether the landlord desires him to stay in the land or not.

The result is that I would make the rule absolute on the following grounds:—

(1) The language of section 170 of the Bengal Tenancy Act is perfectly clear and includes the interest of the petitioner, and if the Legislature had meant that interest means encumbrance it would have said so.

(2) For the same reason interest does not mean "interest valid against the landlord." Section 6, Act VIII (B. C.), 1865, on which section 170 appears to have been modelled makes no such limitation.

(3) The balance af authorities in the Calcutta High Court before the Full Bench decision is in the petitioner's favour and since the Full Bench decision while all in the Calcutta High Court are in his favour, there are none against him in this Court with the exception of *Sri Rameshwar Singh* v. *Raghunandan Khawas* (4), which might possibly be distinguished on the ground that it relates to the purchaser of a whole holding who is in a

worse position with regard to the landlord than the purchaser of a part of a holding.

(4) The policy of the Legislature has always been in case of the transferee, so far as is consistent with the maintenance of the landlord's security for rent.

BY THE COURT.—The order of the Court is that the application is dismissed with costs. Hearing fee three gold *mohurs*.

*Rule discharged.*

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1405 OF 1915.

April 5, 1917.

*Present*:—Mr. Justice Tudball.

CHATTAR—DEFENDANT -- APPELLANT

*versus*

CHOTE AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Joint family—Alienation—Sale, suit to set aside, by minor member—Consideration, major portion of, for legal necessity.*

Certain joint family property was sold by the mother and the adult brother of a minor member of a joint Hindu family and it was found that a major portion of the consideration was for legal necessity. On a suit by the minor member to set aside the sale:

*Held*, that in justice of the case the sale should stand on payment by the defendant-vendee to the plaintiff the amount which was not required for legal necessity. [p. 270, col. 2.]

Second appeal against the decision of the District Judge, Aligarh, dated the 28th September 1915.

FACTS.—During the minority of the plaintiff, Murli his brother and *Musammat* Radha his mother sold a portion of the family property for Rs. 1,000 to the defendant-appellant Chatter in 1911. The plaintiff, on attaining majority, brought this suit for joint possession of the property sold on the ground, among others; that the sale was not for a valid family necessity and the consideration was fictitious. He also offered to pay any sum of money that might be found by the Court to be binding on him. The defence was that Murli as manager of the family sold the property for valid legal necessity and that the plaintiff also benefited by the transaction; that the defendant after the purchase spent Rs. 600 on a well and the plaintiff could not eject the defendant without paying this sum also as this was spent on improvement.

The Court of First Instance found that out of the sale consideration Rs. 852 was for *bona fide* legal necessity of the family and the rest was not binding on the plaintiff. The Court ordered that the sale-deed be cancelled and the plaintiff be given possession of the property sold on payment of Rs. 852. The Court allowed nothing for improvement. The lower Appellate Court upheld this decree. The defendant then came in appeal to the High Court.

Mr. *Gulzari Lal*, for the Appellant, submitted that accepting the findings of the Courts below the sale transaction should not have been cancelled. A large portion of the consideration was for a valid family necessity and a very small portion was found not to be binding on the plaintiff. The Courts below should have upheld the sale and should have ordered the defendant to pay back to the plaintiff the portion of the sale consideration not binding on him. He referred to a case of the Madras High Court reported as *Rukmani Sundarammal* v. *Muthammal* (1) and to *Thalagara Rammanne* v. *Kalagare Gangayya* (2) and submitted that it was only just and equitable that the defendant should keep the property.

He further submitted that the Courts below were wrong in not allowing compensation for improvements. He referred to section 51 of the Transfer of Property Act and *Narayana Aiyar* v. *Sankaranarayana Aiyar* (3). In any event the Courts below should not have allowed the plaintiff to take possession of the property without ordering a further payment of Rs. 600 on account of the improvement.

Mr. *Nehal Chand*, (for Mr. *Panna Lal*), for the Respondents, submitted that the Courts below were right in setting aside the sale. When a portion of the sale consideration was not binding on the plaintiff it would be unfair to deprive the plaintiff of the family property. The defendant had only a right to be re-imbursed to the extent of the sum of money advanced for legitimate family necessity and which was binding on the plaintiff.

(1) 26 Ind. Cas. 489; (1915) M. W. N. 8.
(2) 26 Ind. Cas. 178; 27 M. L. J. 132.
(3) 24 Ind. Cas. 940; 1 L. W. 369.

CHATTAR *v.* GHOTE.

As regards compensation for improvements the defendant was not entitled to anything. He knowingly constructed a well at considerable expense on land, in which he had no title. If such compensations were allowed one may easily be improved out of his property.

He submitted that the principles of the following cases can be applied in the present case; *viz.*, *Vinayakrao* v. *Vidyashankar* (4), *Tejpal* v. *Ganga* (5).

Mr. *Gulzari Lal*, not called to reply.

JUDGMENT.—This is a defendant's appeal and the facts out of which it has arisen are as follows:—On the 24th of February 1911 when the plaintiff was about 14 years of age, he and his brother Murli constituted a joint Hindu family and *Musammat* Radha their mother was also alive and a member thereof. The property which is now in suit together with other properties was mortgaged usufructuary to certain mortgagees. These mortgages were old and of the time of their ancestor. On the aforementioned date Murli, the elder brother and the mother *Musammat* Radha, executed a sale-deed of the property now in dispute for the sum of Rs. 1,000. The money was required to the extent of Rs. 852-8 as found by the Court below for family necessity. It was partly utilised to pay off old mortgages and release other properties and partly to pay off other debts and the expenses of the present plaintiff's marriage. According to the findings of the Courts below, the defendants have failed to prove that Rs. 147-8-0 out of the full Rs. 1,000 was for family necessity whatsoever. The defendant vendee who is the appellant before me, then started to build a well on which he claims to have spent the sum of Rs. 600. The present suit was instituted in the year 1915 by the plaintiff to set aside the sale and to recover possession of the property on the ground that his brother and his mother had no necessity whatsoever to sell the property that it was not for family necessity or benefit that it was sold, and that the sale should be set aside. The plaintiff is but a youth still being between the ages of 18 and 19 and in his evidence he simply admitted that he and his brother Murli, one of the vendors were really fighting this case and wanted to get back the property. The Court of First Instance gave a decree to the plaintiff for possession of the property conditional on his paying Rs. 852-8-0 only to the defendant vendee. The defendant appealed and his contention was that he had established that Rs. 147-8-0 was also taken for family necessity. He further contended that before he was ejected he should be re-imbursed the expenditure which he had incurred in building the well. The Court below dismissed the appeal and upheld the decree of the Court of First Instance. The defendant comes here in second appeal and it is urged before me that as by for the greatest portion of consideration was found to be for family necessity, the Court in view of the circumstances of the case, ought not to have decreed possession of the property to the plaintiff but ought to have maintained the sale conditional on the defendant paying to the plaintiff the sum of Rs. 147-8-0 or his share thereof. In any case it is urged that the plaintiff is entitled, under section 51 of the Transfer of Property Act to compensation for the well which he has built upon the property and which is an improvement. Reliance is placed upon a decision of the Madras High Court in the cases reported as *Rukmani Sundarammal* v. *Muthammad* (1) and *Narayana Aiyar* v. *Sankaranarayana Aiyar*(3). The only difficulty in the case seems to me to be to decide what relief in the circumstances should be given to the plaintiff. Whether he should be handed over the property and if so whether the defendant is entitled to compensation for the improvement he has made or whether the sale should be allowed to stand and if so on what compensation to the plaintiff. On a consideration of all the facts of the case it seems to me that to do real justice between the parties, the sale should be maintained in view of the fact that so much as Rs. 852-8-0 out of the Rs. 1,000 was for family necessity and to that extent the sale was binding upon the plaintiff. It is obvious from the plaintiff's own statement that the suit is merely a suit brought by him and his brother to rob the defendant although they have had the benefit of the latters money, and I think that the justice of the case will be met by holding that the sale should stand and by decreeing to the plaintiff sum of Rs. 147-8-0. This will obviate the necessity of deciding the

(4) 9 Bom. L. R. 404.
(5) 25 A. 59; A. W. N. (1902) 192.

question as to whether the defendant is entitled to compensation for the well that he has built. I, therefore, allow the appeal and modify the decree of the Court below. I direct the defendant to pay into Court the sum of Rs. 147-8-0 to the credit of the plaintiff within a period of two months from to-day's date. If this be done then the plaintiff's claim for possession of the property and the avoidance of the sale-deed, shall be dismissed. If on the other hand the defendant does not pay this money into Court then the decree of the Court below for possession of the property shall stand conditional on the payment of Rs. 852-8-0 without any further compensation to the defendant on account of the well. If the plaintiff do fail to pay this sum of Rs. 852-8-0 within the period of two months after the expiry of the two months allowed to the defendant, then his suit shall stand dismissed with costs in all Courts. The parties will receive and pay costs in proportion to success and failure.

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1342 OF 1915.

March 20, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Smither.

HAJRA SARDARA AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

*versus*

KUNJA BEHARI NAG CHOUDHURY—PLAINTIFF—RESPONDENT.

*Adverse possession against lessee when adverse against lessor—Trespasser in possession of demised land—Lessor, right of—Ejectment.*

The possession of a trespasser of land let out on lease does not become adverse as against the lessor until the termination of the lease. [p. 273, col. 1.]

The mere fact that a trespasser has been in actual possession of land let out on lease for twenty years is no reason why he should not be ejected from the land by the lessor, unless it is proved that the trespasser had taken a *bona fide* settlement from a third person whom he believed, in fact, to be the landlord and entitled to let out the land. [p. 273, cols. 1 & 2.]

**Appeal against the decree of the District Judge, 24-Pergannahs, dated the 6th of January 1915, affirming that of the Munsif, Basirhat, dated the 30th of January 1913.**

FACTS of the case appear from the judgment.

Dr. *Dwarka Nath Mitter* and Babu *Satindra Nath Mukherjee*, for the Appellants.—The plaintiff's case is that he has purchased the lands and he wants to eject the defendants on the ground that they are trespassers or to get a fair and equitable rent assessed upon the lands. Both the Courts have assessed fair and equitable rent but have not allowed the plaintiff a decree for ejectment.

My contentions are as follows.

These lands formed a part of *danga patta* lands and not *banjar patta* lands, and whatever these might be, the defendants are in possession for more than fifty years, and have been paying rent to other persons as landlords hence the plaintiff's right is extinguished by adverse possession.

The adverse possession of the defendants against the lessees would be adverse against the lessors. The defendants have been in possession of these lands for a period of over 20 years at least and that possession is adverse to the lessors just as it is adverse to the lessees.

Refers to *Prosunnomoyi Dasi* v. *Kali Das Roy* (1), *Gobinda Nath Shaha Chowdhry* v. *Surja Kanta Lahiri* (2).

[FLETCHER, J.—In the case in *Gobinda Nath Shaha Chowdhry* v. *Surja Kanta Lahiri* (2), there was surrender and that case can be distinguished from the present one.

Sir *Rash Behari Ghose* (with him Babus *Mahendra Nath Roy*, *Bipin Behari Ghose, II*, *Biraj Mohan Mozumdar*, *Narendra Chandra Bose*, *Janendra Nath Sirkar* and *Satyendra Nath Mitter*), for the Respondent, referred to the cases reported as *Davis* v. *Kazee Abdool Hamed* (3), *Womesh Chunder Goopto* v. *Raj Narain Roy* (4), *Kishwar Nath Sahi Dev* v. *Kali Sankar Sahai* (5).

[FLETCHER, J.—What have you got to say regarding your cross-objection?]

On the findings arrived at by the lower Courts the plaintiff is entitled to get a decree for ejectment. Reads portion of the

(1) 9 C. L. R. 347.
(2) 26 C. 460; 13 Ind. Dec. (N. S.) 897.
(3) 8 W. R. 55.
(4) 10 W. R. 15.
(5) 10 C. W. N. 343.

judgment of the lower Appellate Court and refers to *Beni Kumar's* case.

Dr. *Dwarka Nath Mitter*, in reply: I rely on the observation made in *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (6). The landlord cannot eject the defendants who have been in possession for the last 20 or 25 years at least.

[FLETCHER, J.—But you have been found to be a trespasser.]

Still under the ruling in *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (6) I am not liable to be ejected.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 1 to 3 from a judgment of the Second District Judge of the 24-Pergannahs, dated the 6th January 1915, affirming the decision of the Munsif of Basirhat. The suit was brought by the plaintiff for a declaration of his *ganti* right to certain *chur* lands. In *kismat patta*, there were two portions—the *bower patta* and the *danga patta*. The *danga patta* belonged to a certain number of *zemindars* and had been divided amongst them. The *bower patta* belonged to certain *zemindars* who are now represented by the defendants Nos. 5 to 53. The first lease that was granted of this property appears to have been in the Bengali year 1268. That lease of the *bower patta* was granted to one Arun Chunder Battacharjee. The lease in its terms excluded 321 *bighas* of land. Arun in his term granted an under-lease to two persons named Jasimuddin and Gorai Mandal on the 20th *Falgun* 1271 *B. S.*, corresponding to same date in March 1865. On the 10th April 1901, an intermediate lease was granted to one Dhara Nath Roy Choudhury. Then a rent suit was brought by Dhara Nath to recover rent from Jasimuddin and Gorai Mandal. That suit was decreed and in the sale in execution on the 29th July 1902 Dhara Nath Roy purchased the interest of Jasimuddin and Gorai. Dhara Nath Roy surrendered his *ijara* right in favour of Arun's son, the present defendant No. 4, on the 19th June 1903 and sold his *darganti* right to one Pramoda Sundari. Then a suit for rent was brought against Pramoda Sundari in the year 1908 and a decree was passed and the defendant No. 4 purchased the tenure. On the 14th July 1909, the defendant No. 4 sold his right purchased in execution, to the plaintiff. When the plaintiff went to take possession in October or November 1909, he was resisted and the result was that the present suit was started in the month of August 1911.

The first point that was raised in this appeal was as to whether the plaintiff had established that the land sued for in this case was a portion of the land included in the lease to Arun. The question, it strikes me, is eminently a question of fact. But whether it is a question of fact or not, the decisions both of the primary Court and also of the lower Appellate Court show conclusively that this land is, in fact, a portion of the land let out to Arun and that the 321 *bighas* which might have been *bower patta* originally bad, on the date of the lease to Arun, became part of the *danga patta*.

The next argument was on the question of limitation. The appellants before us, according to the findings of both the lower Courts, were for twenty years and upwards in possession of this land and the question that was raised in this appeal was whether the possession of the defendants was adverse as against the lessor during the subsistence of the under-lease. If it was not, it is quite clear, on the facts, that the present suit was brought within time. The decisions in this Court on the point are numerous. But the decisions in favour of the appellants when one reads the cases closely are few and they consist, as far as I can see, amongst others, of the decision in the case of *Prosunnomoyi Dasi* v. *Kali Das Roy* (1), a decision of Mr. Justice Princep and Mr. Justice Field. That case has frequently not been followed in this Court. In my own experience while forming a number of a Bench of this Court certainly on one occasion that decision was not followed. The other case referred to is the case of *Brindabun Chunder Sircar Chowdhry* v. *Bhoopal Chunder Biswas* (7). That decision also seems to support the argument of the appellants. The other cases that Dr. Dwarka Nath Mitter for the appellants has cited in

(6) 2 C. L. J. 125 at p. 138.

(7) 17 W. R. 377.

support of his argument do not, when closely read, support the proposition he put forward, because in every one of those cases the Court was deciding a case where the property had been let out to common tenants and the Court drew attention in the course of its judgment to the difference between a case where the property was let out to common tenants and a case where the property was let out in *ijara*. I do not think that those other cases cited by Dr. Dwarka Nath Mitter support the proposition that he wished to make. As against that, there is a large body of authority commencing with the case of *Davis* v. *Kazee Abdcol Hamid* (3), which is followed by the decision in *Womesh Chunder Goopta* v. *Raj Narain Roy* (4), down to the latest case cited to us, namely, the case of *Kishwar Nath Sahi Dev* v. *Kali Sankar Sahai* (5). All these cases decided clearly that where the property was let out in lease, the possession of a trespasser did not become adverse as against the lessor until the termination of the lease. That, I think, is not only established by those cases but is also correct in principle. The difficulties of holding that the possession of a trespasser during the continuance of the lease could be adverse as against the lessor are serious, as has been pointed out in more than one judgment. I think that the learned District Judge in the Court of Appeal below was clearly right when he held that the plaintiff's suit was not barred by adverse possession. I think, therefore, that the appeal fails and must be dismissed with costs.

The other question is the question raised on the cross-objection to the appeal, namely, that, on the findings in this case, the learned Judge ought not to have settled a fair and equitable rent as against the appellants but ought to have passed a decree for ejectment. The learned Judge has found that the appellants are trespassers. He has also found that the case that the defendants set up that they *bona fide* held the land under a person whom they believed to be the owner thereof, is not a true case. The only reason for which the learned Judge thought that the defendants ought not to be ejected was that they had been in actual possession of the land for some twenty years and that, therefore, it was not equitable that they should be ejected. But if a person has been in actual possession for twenty years and there are no special circumstances such as have been laid down in the cases as to a person taking a settlement *bona fide* from a person whom he believes to be entitled to the land, the mere fact that he has been there for twenty years is no reason why he should not be ejected. On the contrary it is more reasonable that he should be ejected because he has been in possession of another man's property for a considerable number of years. The decree of the lower Appellate Court in this respect has been attempted to be supported by Dr. Dwarka Nath Mitter by two decisions of this Court. But neither of those cases clearly applies to the facts of this case. The first case that has been relied upon is the case of *Ishan Chandra Mitter* v. *Raja Ram Ranjan Chakarbutty* (6) and the remarks that are relied on are to be found at page 138. They run as follows:—"In a case like this where the tenant encroaches not in his character as tenant but asserts a hostile title against the entire interest of his landlord, the rule laid down by this Court in the case of *Wali Ahmed* v. *Tota Meah* (8) would be applicable, namely, that if a tenant encroaches on the adjoining waste lands of the landlord, his possession of the lands encroached upon can only commence to be adverse when a title adverse to the landlord is asserted or the landlord becomes aware of the encroachment." The present case is clearly distinguishable from that rule, because the encroachment in this case was not an encroachment on the adjoining land of the landlord. These lands do not belong to the persons who are the landlords of the other lands said to be held by the defendants. The only other class of cases is that class where a person has taken a *bona fide* settlement from another person whom he believed to be, in fact, the landlord and entitled to let out the land. The learned Judge in the lower Appellate Court has found that the case that the defendants set up that they *bona fide* held the land under a person whom they believed to be the owner thereof was not a true case. The equity that they set up as to long possession which satisfied

(8) 31 C. 397,

the learned District Judge is no ground, in my opinion, why they should be permitted to be in possession of the land which the learned Judge of the lower Appellate Court has found they are holding possession of as trespassers. I think we ought to allow the cross-objection of the plaintiff-respondent and in lieu of the decree made by the learned Judge settling a fair and equitable rent of the property, we ought to direct that the defendants-appellants before us be ejected from the land in suit. The cross-objection is, therefore, allowed with costs.

SMITHER, J.—I agree.

*Cross-objection allowed.*

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ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 170 OF 1915.
November 15, 1916.
*Present*:—Mr. Justice Tudball and
Mr. Justice Rafique.
*Babu* RAM PRASAD—DEFENDANT—APPELLANT
*versus*
THE COLLECTOR OF ALIGARH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Land Acquisition Act (I of 1894), ss. 9, 25—Failure to make claim for compensation, effect of—District Judge, power of—Compensation—Interest, whether should be awarded.*

Where an appellant omits to make a claim within the meaning of section 9 of the Land Acquisition Act, the District Judge is justified in refusing to award anything more than the amount awarded by the Collector under section 25 of the Act. [p. 275, col. 1.]

Interest should be allowed on compensation awarded under the Land Acquisition Act, unless there is special reason to the contrary. [p. 275, col. 2.]

First appeal from the decision of the District Judge, Aligarh, dated the 9th February 1915.

Mr. *S. K. Dar*, for the Appellant.

Messrs. *Ryves* and *Jang Bahadur Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings under the Land Acquisition Act. The present appellant was one of several claimants. Notice was duly issued to him under section 9 of the Act. The Collector made an award and he asked for a reference to the District Court. The reference was made. The property which is in dispute before us consists of a plot of land on which there were certain buildings. Compensation was awarded by the Collector for the land at a certain rate per yard and for the building in a lump sum. The appellant claimed before the District Judge a much enhanced value both for the land and the buildings. In so far as the buildings are concerned, the District Judge held that as the appellant had not put in a claim before the Collector in accordance with section 9 of the Act, he under section 25 of the said Act was not empowered to grant any sum greater than that allowed by the Collector. In regard to land the District Judge increased the rate to Rs. 1-8 0 per yard and enhanced the amount of compensation accordingly. No order was passed as to interest by the District Judge even on the excess amount awarded to him. The Collector had omitted to award the statutory allowance of 15 per cent. and this the District Judge has granted. There were two sets of interests, namely, (1) those of the appellant and (2) those of Raja Datta Prasad of Mursan. The appellant held a perpetual lease of the land from the Raja at an annual rent of Rs. 24. Out of the total amount of compensation for the land the Collector had awarded to the Raja a sum of Rs. 600. Both these parties were before the District Court and the District Judge on the Raja's objection increased the sum from Rs. 600 to Rs. 800. The appellant comes here and raises four points. In regard to compensation for the building he contends that the Court below should have gone into his claim and decided it and that the Court was not barred by the terms of section 25 of the Act from enhancing the amount awarded by the Collector. The decision on this point depends on the construction of the petition filed by the appellant in the Collector's Court on the 4th of May 1914. Section 9 of the Act orders a notice to issue to all persons interested inviting them to come forward on the date fixed and to state, *first*, the nature of their respective interests in the land and *secondly*, the amount and particulars of claim for compensation for such interests. In regard to the building the appellant in clause (4) of the petition of the 4th of May

1914 stated that this building was occupied by certain tenants on certain rent, but failed, however, to state the amount which he claimed as compensation for this building. He placed no valuation upon the building. Section 25, clause (1), lays down certain limits outside which the District Court upon a reference cannot go in making an award. The amount to be awarded by the District Court cannot exceed the amount claimed by the person interested in pursuance of the notice given to him under section 9. Similarly the amount to be awarded by the Court can not be less than that awarded by the Collector. Clause (2) of section 25 says that when the applicant has omitted to make such a claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector. The appellant put forward no claim, in fact he did not fix the amount of his claim for the building, and if the District Court acting under section 25 had treated clause (4) of his petition of the 4th of May 1914 as a claim within the meaning of section 9, then that claim was an unlimited one and the Court could have awarded him any sum it pleased. It is quite clear that the appellant omitted to make a claim within the meaning of section 9, and the Court below was justified in refusing to award anything more than the amount awarded by the Collector for the building. This portion of the appeal must, therefore, fail.

The next point taken is that the Court below failed to decide the question of the area of the land. According to the appellant, the area of the land was 1 *bigha* 6 *biswas*, whereas according to the Collector it is 1 *bigha* and 1 *biswa*. The point was raised in the Court below and an issue was actually framed on it; but there is no decision on the issue at all. The appellant claims that the correct area should be found as he is entitled to compensation at the rate of Rs. 1-8-0 per square yard for the correct area. We think that this plea is sound and we must send back the record to the Court below with directions to come to a finding on the issue as to what the correct area of the land in dispute is.

The next point relates to the question of interest. On appellant's behalf it is urged that possession was taken on the 15th of July and compensation was not deposited until the 29th of July, and that he is entitled to interest at six per cent. per annum on the sum allotted to him for that period. He also claims that the Court below should have granted him interest on the excess amount awarded by it over and above the amount awarded by the Collector at the same rate. The District Judge in its judgment makes no mention of the question of interest, and it seems that he did not exercise his discretion in the matter under the section. We think that ordinarily interest should be allowed unless there is special reason to the contrary. The appeal will, therefore, be allowed on the question of interest.

There is a fourth matter which is one concerning the lessor and the lessee of the land. The appellant urges that the Court below had no right whatsoever to increase the sum of Rs. 600 awarded to the Raja by the Collector as the value of his interests without any reason. The Raja's interests may easily be valued at twenty five years' purchase of the annual rent which comes to him, that is Rs. 24. It is a fair valuation. The learned District Judge has given no reason for enhancing the sum of Rs. 600 to Rs. 800. No matter to what amount the total market-value of the property might increase, the lessor who has given a perpetual lease at a fixed sum retains the stationary right, the value of which never increases if it does not decrease. The chance of re-entry by the lessor and the chance of the lessee dying without heirs are such that they may be well disregarded. In our opinion the valuation of the Raja's interests at Rs. 600 was a fair and proper one and should not have been increased. At the same time it must be remembered that the Collector omitted to award the statutory allowance of 15 per cent. The District Court has ordered that amount to be entered in the decree. The Raja is, therefore, entitled to Rs. 600 plus 15 per cent. thereon, that is, to a total sum of Rs. 690. On this point, therefore, the appeal must be allowed. Out of the total compensation awarded to the appellant for the land by the Court below, the Raja will get

Rs. 690 including 15 per cent. statutory allowance.

On return of the finding of the Court below on the issue remitted, ten days will be allowed for objections. The case will then be put up when the subject of costs will be dealt with.

The cross-objection filed on behalf of the Collector raises simply a point which arises between the appellant and the Raja. It is a matter with which the Government has no concern. The cross-objection is, therefore, disallowed.

*Appeal accepted in part; Case remanded.*

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PATNA HIGH COURT.
FIRST CIVIL APPEAL NO. 432 OF 1914.
May 15, 1917.
*Present*:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.
*Mahant* KRISHNA DAYAL GIR—
PLAINTIFF—APPELLANT
*versus*
*Gosain* LALDHARI GIR—DEFENDANT—
RESPONDENT.

*Hindu Law*—Wakf—Mahant, *power of, scope of—Removal of* mahant, *whether can be effected through surrender.*

The head of a religious or charitable institution has no power to bargain away his office or alter the constitution of the institution of which he is in charge. [p. 280, col. 1.]

Where the right to remove a *mahant* had never rested with the plaintiff in the past:

*Held*, that he could not acquire that right or take it out of the hands of the Court or other lawful authority by inducing the *mahant* for the time being to agree to surrender that right to him. [p. 280, col. 2.]

Appeal from a decision of the second Subordinate Judge, Gaya.

Messrs. *H. L. Nandkedyar*, *Atul Chandra Dutta*, *Kailashpati*, *S. N. Palit* and *Gobardhan Misra*, for the Appellant.

Messrs. *S. Sinha Chandra Sekhar Baner* and *L. N. Sinha*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The appellant in this case Krishna Dayal Gir of Bodh Gaya is the *mahant* of a *math* or monastery of the Hindu sect of Girs, one of the well-known seven Saivite orders. The *math* is close to the celebrated Buddhist temple at Bodh Gaya, of which by a strange anomaly the appellant is superintendent. The respondent is *mahant* of a *math* of the same sect at Bakrour, a village which is a mile or two away on the other side of the river Phalgu.

The appellant alleges that the Bakrour *math* is a *madhi* of, that is subordinate to, the *math* at Bodh Gaya, that the *mahant* of Bodh Gaya is the "*malik*" of all the property of the Bakrour *math* and that he is entitled to appoint and, for good cause shown, dismiss the *mahant* of Bakrour, that as the respondent has taken to immoral ways and is ruining the property of the Bakrour *math*, he dismissed him in May 1912 but the respondent refused to give up possession. On these allegations the appellant claims the removal of the respondent and possession of the Bakrour *math* and its property. The respondent denies all the material allegations of the appellant. He admits only that the *mahant* of Bodh Gaya takes a leading part in the election of the *mahant* of Bakrour.

The Subordinate Judge dismissed the suit. He found that it was not proved that the *math* at Bakrour was in any way subordinate to the *math* at Bodh Gaya or that the respondent had taken to immoral ways or had wasted the property of his *math*. He found that two *iqrarnamas* of 1897 and 1900 on which the appellant relied had been obtained by undue influence and that a compromise between the parties in 1906 and a decree founded thereon were not binding on the respondent.

The respondent has produced a large number of documents beginning from the time of Bhabhut Gir, the first known *mahant* of Bakrour (Exhibits O to O 16, S, I, J, K, N, M, L, G, F, P, R, Q, B and W, I give them in chronological order), which show that the institution at Bakrour has always been known as a *math* or *asthan* not as a *madhi*, and has always managed its own affairs independently, that the head of the institution has always been called a *mahant* and has dealt with the property of the *math* uncontrolled by outsiders. One of these documents (Exhibit S) refers to the election of *mahant* Phul Gir, the fourth in descent from Bhabhut Gir, by the *mahant* of Bodh Gaya *and other mahants*, and it is common ground that on the death of a

KRISHNA DAYAL GIR *v.* LALDHARI GIR.

*mahant* of Bakrour his successor must be chosen from the *chelas* or disciples of the deceased.

Tilakdhari Gir, the last *mahant* but one of the Bakrour *math*, died in 1897 and was succeeded by his disciple Kali Charan Gir who was then about twenty years of age. This young man in November 1897 executed an *iqrarnama* in favour of the appellant, in which he admitted that the Bakrour *math* was subordinate to the *math* at Bodh Gaya and that on the death of a *mahant* of Bakrour it was the custom for his disciples to ask the *mahant* of Bodh Gaya to appoint a successor, accordingly on the death of Tilakdhari Gir that procedure was observed and the appellant decided to appoint him, Kali Charan, on condition that he executed an *iqrarnama* in favour of the appellant regarding the management of the institution *as had always been done*. The executant then goes on to undertake that he will manage the property of the *math* in consultation with the appellant and will not waste or damage the same and he agrees that if he wastes the property, his acts shall be void and the appellant may take proceedings against him. It is also provided that if the executant initiates any disciple who is not qualified *according to the custom of the Bodh Gaya math*, the appellant may dismiss that disciple. In conclusion it is stated that with the approval of the appellant the executant has borrowed Rs. 4,000 from Gosain Ram Gir. This man was a fellow-disciple with the appellant of Hem Narain Gir, a former *mahant* of Bodh Gaya, and it is significant that on December 29th, 1898, Kali Charan Gir gave him a power-of-attorney in which he again admitted that the Bakrour *math* was subordinate to the Bodh Gaya *math*, and, after stating that on the advice of the appellant he had decided to give a power-of-attorney to Ram Gir, went on to give him extraordinarily wide powers with reference to the *math* and its property, undertaking that he would not remove him or interfere with him in any way and depriving himself Kali Charan of all power to interfere with the property of the *math*. Those documents speak for themselves. The Subordinate Judge found that the *iqrarnama* was obtained by undue influence, as indeed it probably was. On the one side was an inexperienced youth ready on any terms no doubt to accept the coveted position of *mahant*, and on the other was the most influential *mahant* in the province anxious as it would appear to extend his sway over the Bakrour *math*, and able probably by his position to carry the day against any obnoxious aspirant to the *gaddi*. I do not stop to consider further the question whether it is proved that this *iqrarnama* was procured by undue influence, for it is obviously not binding on any successor in the office of *mahant*. If, as I am satisfied, the *math* at Bakrour had never been in any way subordinate to the *math* at Bodh Gaya, the execution of the *iqrarnama* was a most improper proceeding. It was obviously intended to transfer all authority in the Bakrour *math* to the appellant.

Kali Charan Gir died in July 1900 and was succeeded by the respondent. On this occasion the respondent executed in favour of the appellant an *iqrarnamah* which went even further than that executed by Kali Charan Gir. It tied down the respondent much more firmly to the Bodh Gaya *math* besides repeating all the damaging admissions contained in the earlier document. Amongst other things it provided that the respondent should have no power to sell or mortgage any of the property of the *math* or give any *zar-i-peshgi* lease or give any other kind of lease for a term exceeding seven years. The execution of this *iqrarnama* was even more improper than the execution of the document of 1897. It appears from the evidence of the respondent that he executed the *iqrarnama* in circumstances similar to those in which the earlier *iqrarnama* was executed. He must have known that he had little or no chance of being appointed *mahant* if he did not execute the *iqrarnama*. I believe his statement that the appellant said to him that if he did not execute the *iqrarnama*, another disciple of Kali Charan would be appointed. Kali Charan had left heavy debts behind him and the respondent was in a difficult position. He even had to borrow Rs. 500 from the

appellant for his needs. The appellant has not come forward to explain the circumstances in which the *iqrarnama* was executed or to contradict the allegations of the respondent. In my opinion the execution of the *iqrarnama* was obtained by the appellant by the exercise of most improper influence which the respondent could not resist, and I agree with the Subordinate Judge that it is not binding on him.

More extraordinary proceedings were to follow. In 1905 the appellant brought a suit against the respondent making allegations against him not unlike those contained in the plaint in the present suit. Some evidence was taken and then there was a compromise on which a decree was passed. Two petitions were filed, one by the appellant, the other by the respondent. The former is a short document in which the appellant said that as the respondent had apologised and admitted his fault and withdrawn his denial of the two *iqrarnamas* and had agreed to pay the appellant Rs. 1,550 and interest, he, the appellant, had forgiven him and decided to retain him in the office of '*madhidar*.' The petition put in by the respondent is much longer. It begins with a statement that the respondent had for the purpose of preparing his defence made enquiries as to the powers which the Bodh Gaya *math* had over the Bakrour *math* and had put in his defence on the strength of statements which had been made to him. In paragraph 3 it is stated that on an inspection of the documents filed by the appellant he, the respondent, had come to know that he had been misled by his informants, and that in fact the *mahant* of the Bodh Gaya *math* had always had power to appoint control and remove the *madhidar* of Bakrour, and the respondent was satisfied that he could not meet that evidence and could not succeed in the case and would be put to unnecessary and useless expense in defending it, therefore, he had asked pardon of the appellant who had been pleased to say that if the respondent withdrew his defence he would be pardoned. The respondent went on to say that if he did anything contrary to the *iqrarnama* the appellant might dismiss him and remove him from the *math*, and he prayed that the suit might be disposed of according to his petition. This petition appears to contain several misstatements of fact. The appellant does not appear to have produced any documents in that case showing that the Bakrour *math* was subordinate to the Bodh Gaya *math*. In the present case he has certainly produced none. His Counsel suggested that he had not produced them in the present case because he thought it safe to rely upon the *iqrarnamas*. But Counsel for the respondent pointed out that the order sheet in the previous case did not disclose the existence of any such documents, and he offered to submit to an adjournment of the hearing of this appeal for two or three months to enable the appellant to produce such documents or to show that he had produced such documents in the former case. The offer was not accepted. There can be no doubt that the appellant has not and never had any such documents. The respondent has described the circumstances in which the compromise was effected. He says that he had been implicated in more than one criminal case which he attributed to the appellant, that while the civil suit was going on the appellant sent for him and threatened to have him sent to jail and harassed in other ways if he did not compromise the case. Two of the appellant's men Ram Chariter and Jaipal Gir got the compromise drafted. Respondent signed it but was not allowed to read it over or show it to any one. The respondent alleges that neither Ram Chariter nor Jaipal Gir was there when the appellant told him to compromise the case. The appellant has not come forward to give his version of the affair. No one can explain how the false allegations in the compromise about the documentary evidence came to be inserted. The respondent's petition of compromise is not signed by Fazilat Hossain who was his Pleader in the case, but by a junior Vakil named Abdul Shakur. Fazilat Hossain says that he was not even consulted about the compromise. The appellant's petition of compromise is signed by his agent Jaipal Gir. This man is admittedly alive but has not been called as a witness. He held a decree against Kali Charan Gir in execution of which he tried to sell the property of the *math* in the hands of the respondent in 1909, a curious proceeding on the part of a man who had on behalf of the appellant alleged

that the property of the *math* was being wasted by the respondent. The respondent was committed to the Court of Session on a criminal charge brought by Baldeo *kahar* but he had been honourably acquitted more than a year before the compromise. He speaks of another criminal case instituted by a *kaharin* but there is no proof that any such cause was ever instituted. It is not proved that there was any connection between the criminal cases and the making of the compromise, but it may well be that the respondent believed that Baldeo's charge had been, as he pleaded in that case, instigated by the appellant and he had no doubt a wholesome fear of the appellant's power for good or evil. Amongst other defences the respondent had pleaded that even if his *iqrarnama* was binding on him it did not give the appellant power to dismiss him on the case put forward by the appellant. It seems to me that on that plea alone the appellant's case was bound to fail and he must have known it. The *iqrarnama* gave power to dismiss only in the event of unsuitable *chelas* being initiated. It is noticeable that a clause in the compromise is intended to remove all possible doubt on that point. All the circumstances suggest that the respondent was unable in any way to resist the appellant. I am of opinion that the compromise was the result of pressure improperly exerted by the appellant. The respondent's petition of compromise is obviously not the petition of a free agent. It was designed to make the appellant's hold over the respondent still stronger than it already was.

The appellant contends that any defences that there may be in the compromise are cured by the decree which was passed on it and that the respondent is estopped from denying the appellant's power to dismiss him. We have been referred by Counsel for the appellant to a number of cases in which the question for decision was how far a decree obtained against a *mahant* or *shebait* is binding on the institution and on his successor-in-office, and to cases in which it has been held that a decree on a compromise is as binding as a decree passed after a contest. Such cases appear to have no bearing on the present case. Here we have a compromise whereby the head of a religious institution gives away or sells its rights and renders himself and the institution subordinate to the *mahant* of another institution who had no business to interfere with him. The respondent had no authority whatsoever to enter into the agreement embodied in the *iqrarnama* and compromise. The decree passed on it by the improper consent of the parties does not make the agreement lawful. The compromise ought never to have been sanctioned by the Court.

In *Raja Vurmah Valia* v. *Ravi Vuramah Kunhi Kutty* (1) it was held by the Privy Council that in the absence of a proved custom the assignment by the *urallers* (managers) of a *pagoda* of the right of management thereof was beyond their legal competence under the Common Law of India, and in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (2) it was held by the same Tribunal that a sale by hereditary trustees of a religious endowment of their hereditary right of management and a transfer of the endowed property were null and void. In *Gajapati* v. *Bhagavan Doss* (3) the defendant on his appointment by the plaintiff as *mahant* of a *math* had executed a document whereby he undertook to render accounts to the plaintiff. The Court said:—

"We think the defendant's undertaking...to furnish accounts cannot operate to alter his status so as to render himself liable to dismissal for not furnishing accounts. If he was not by the terms on which he held his office liable to render accounts, he could not, by any voluntary promise on his part, impose on himself an obligation which had no legal existence. The obligation to render accounts does not appear to form part of the usage of the institution, nor does it appear that the provision...for rendering accounts was ever acted upon until the demand before suit. No instance of a *zemindar* having ever dismissed the head of this *math*, or having

(1) 1 M. 235; 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156 (P. C.).

(2) 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

(3) 15 M. 44; 5 Ind. Dec. (N. S.) 380.

appointed a *chela* other than the one nominated by the head of the *math*, is proved. It is urged that it was open to the *zemindar* to appoint any *chela* at his discretion. In this case it is not necessary to determine the precise nature of the *zemindar's* right of appointment. It is sufficient to observe that he did appoint the defendant and his right of appointment is a qualified right and does not necessarily involve the power of dismissal. It was for the plaintiff to prove his right to dismiss the defendant and we agree with the District Judge that he has failed to do so."

In *Prayad Das* v. *Mohunth Kriparam* (4) it was held that the head of a *math* could not transfer the right of management to another person or even transfer his rights to the *mahant* of a superior *math*.

These cases illustrate the rule that the head of a religious or charitable institution has no power to bargain away his office or alter the constitution of the institution of which he is in charge. In *Lakshmanaswami Naidu* v. *Rangamma* (5) the Court declined to give effect to a decree passed on a compromise whereby the judgment-debtor had agreed that his office in a certain temple might be sold in satisfaction of the decree. That was a very strong case for the Court was actually executing the decree.

The last case to which I shall refer is that of *Great North-West Central Railway Company* v. *Charlebois* (6). A company had entered into a contract which was *ultra vires*, and a consent judgment had been obtained on the contract in an action in which the question of *ultra vires* was not raised or discussed. Their Lordships of the Privy Council said:—

"It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. If the legality of the Act is one of the points substantially in dispute, that may be fair subject of compromise in Court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract.....Such a judgment cannot be of more validity than the invalid contract on which it is founded."

The right to remove the *mahant* of the Bakrour *math* has never rested with the appellant in the past and he cannot acquire that right or take it out of the hands of the Court or other lawful authority by inducing the *mahant* for the time being to agree to surrender that right to him. The Court is, in my opinion, bound to uphold the rights of the head of the *math*.

Lastly I am of opinion that the appellant has failed to prove by any satisfactory evidence that the respondent is living an immoral life or has wasted the property of the *math*. On this, having examined the evidence, I have nothing to add to what the Subordinate Judge has said.

The length to which the appellant is prepared to go is shown by the contention advanced on his behalf that the appellant is entitled to a decree merely because leases have been granted for more than seven years in contravention of the compromise.

I would dismiss this appeal with costs.

*Appeal dismissed.*

(4) 8 C. L. J. 499.
(5) 26 M. 31.
(6) (1899) A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35

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PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL NO. 2024 OF 1913.
April 9, 1917.
*Present*:—Mr. Justice Chevis and
Mr Justice Leslie Jones.
THE FIRM OF BUTA MAL-LACHMAN DAS—PLAINTIFF—APPELLANT
*versus*
SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Principal and agent—Power-of-attorney, construction of—"First production," effect of—Attorney, whether bound to produce document every time power delegated is sought to be exercised—Revocation.*

One G. held a contract from the defendants for certain work to be done for them. After some negotiations with the plaintiffs he wrote to the defendants' agent on the 15th October 1910, stating that he was giving a power-of-attorney to plaintiffs to sign for all payments on his behalf and saying that such power-of-attorney was to hold good till the work was finished. Thereupon the defendants' agent informed the plaintiffs that all payments due to G.

will be made to them on production of *G.'s* power-of-attorney in their favour. *G.* executed the power-of-attorney on the 18th of October, authorising the plaintiffs to recover all sums due to him from the defendant on the contract.

Plaintiffs, having made certain advances to *G.*, claimed payment from the defendants under the terms of the power-of-attorney, but were met by the plea that nothing was due to *G.* at the time when the power-of-attorney was produced:

*Held*, (1) that the power-of-attorney was in fact an assignment in the plaintiffs' favour and the defendants' agent should have ceased to make payments to *G.* after it was first produced; [p. 282, col. 2.]

(2) that according to the terms of the agreement, the power-of-attorney could not be cancelled till the work was finished and the accounts finally settled and that, therefore, a letter from *G.* dated the 1st January 1911 to the defendants' agent cancelling the power-of-attorney did not exempt the defendants from the liability created under the agreement; [p. 283, col. 1.]

(3) that the defendants were consequently liable for all payments made to *G.* after the date of the first production of the power-of-attorney. [p. 282, col. 2.]

**First appeal from the decree of the District Judge, Simla, dated the 28th July 1913, dismissing the claim.**

Bakhshi *Tek Chand*, for the Appellant.

The Government Advocate, for the Respondents.

JUDGMENT.—In the autumn of 1910 Mr. G. H. Geyer, trading as Messrs. Geyer and Co., held a contract from Government for work on the Simla Hydro-electric Construction Scheme. The work was to be done at Basantpur, some miles from Simla. Mr. Geyer had but little financial backing, and approached plaintiffs' firm for assistance. The result was that on 15th October 1910 Geyer wrote to Mr. Aikman, Superintending Engineer, the letter Exhibit D1 printed on page 20 of the paper book, stating that to facilitate handling of cash at the site he was giving a power-of-attorney to plaintiffs to sign for all payments on his behalf, and saying that such power-of-attorney was to hold good till the work on the scheme was finished and accounts between himself and Government finally settled, and adding that plaintiffs would be glad to hear from Mr. Aikman that he agreed that all payments should be made to them as attorneys of Geyer and Co. The letter ends by saying that the writer was anxious to settle the matter the same day as plaintiffs were to start shops to supply his coolies with food. Mr. Aikman wrote to plaintiffs the same day, saying: "on production of Messrs. Geyer and Co.'s power-of-attorney in your favour all payments due to them will be made to your firm on their behalf" (see Exhibit-D2, page 20).

On 18th October 1910 Geyer and Co. entered into an agreement with plaintiffs (Exhibit P-III, pages 3 and 4) agreeing to give them a power-of-attorney authorizing them to draw from the Executive Engineer, Simla, all sums due; plaintiffs were to open shops and supply the coolies with food at certain rates; plaintiffs were to get no payments till 15th December 1910 and after that were to be paid fortnightly "as the Executive Engineer has agreed to measure and pay fortnightly." Interest was to be charged at 9 per cent. per annum.

The same day he executed a power-of-attorney (see Exhibit P-4, page 5) in plaintiffs' favour, authorizing them to recover all sums due to him from Government on the contract. The power-of-attorney winds up by saying that it can be cancelled only after all payments for work have been finally settled.

Plaintiffs say they advanced to Geyer and Co. in cash and provisions Rs. 12,800, out of which they have recovered Rs. 3,000. Plaintiffs sue Government for the balance Rs. 9,800 *plus* Rs. 1,319-7-0 interest with costs and future interest.

Defendant's main plea is that the power-of-attorney was never produced till 2nd May 1911, when nothing was due to Geyer and Co. Plaintiffs allege that the power-of-attorney was produced in the end of October 1910 and again in December 1910.

The issues framed were:—

(1) Did plaintiffs show the power-of-attorney to Captain Battye, Executive Engineer, at the end of October 1910 or at the beginning of December or not till 2nd May 1911?

(2) What was owing to the firm of Geyer and Co. on the date when plaintiffs first showed their power-of-attorney to the Secretary of State's agent?

(3) Do P-1 and P-2 make defendant liable for all the money owing at any time from Geyer and Co. to plaintiff, or only to such amount as defendant owed Geyer and Co. on the date on which the power-of-attorney was first shown to Captain Battye and subsequently.

(4) In view of plaintiffs' *laches* in suing defendant No. 3 (Mr. Geyer, now dead) and now giving up the claim against him, does the suit not lie?

(5) Is P4 improperly stamped, and if so what stamp should it bear?

The learned District Judge holds that Mr. Aikman's letter only pledged Government to pay such sums as might at any time be due to Geyer and Co., when the power-of-attorney was produced. He holds that it was produced on 19th December 1910, but that nothing was then due to Geyer and Co., that as plaintiffs were only attorneys and not assignees, payment to the principal is equivalent to payment to the attorney and absolves defendant from liability to the plaintiffs. So the District Judge dismissed the suit, allowing defendants half costs.

A claim for interest on a sum of Rs. 3,000 forms a portion of plaintiffs' claim. This will be discussed later on in this judgment.

The first question to consider is, what constitutes "production" of the power-of-attorney. The District Judge says such a power may be used in one of two ways; either the original or a certified copy may be handed over to the person who is to act upon it for him to keep in his own possession, or the attorney may keep the power and produce it from time to time as occasion demands. The power-of-attorney was never made over to defendant's agents for them to keep. Nor was it produced on frequent occasions. We fail, however, to see when once the power-of-attorney had been produced, the defendant's agents should not have acted on it from that time. The District Judge holds that a production at any given time could only bind defendants as regards sums due to Geyer and Co. at the time of that production, leaving them free to pay to Geyer and Co. any sums which might become due on any later date. We cannot agree with this. Messrs. Geyer and Co.'s letter Exhibit D-1 clearly shows that the power-of-attorney spoken of was one to hold good till the work on the scheme was completed and payments were finally settled. The power-of-attorney itself shows the same. So it should have been clear to the defendant's agents that plaintiffs were financing Geyer and Co. on the security of all sums due to the latter from Government and that the power-of-attorney was in fact an assignment in plaintiffs' favour. Mr. Aikman's reply to Exhibit D-1 led plaintiffs to suppose that Government agreed to such an assignment, and so plaintiffs secured the power-of attorney and commenced to finance Geyer and Co., believing that on production of the power-of-attorney defendant's agent would for the future make all payments to them and not to Geyer and Co. It would obviously be unfair to plaintiffs to say on one day when the power was produced, "Nothing is due at this time to Geyer and Co." and to say at a later production, "Nothing is due to-day to Geyer and Co., because we paid him up-to-date yesterday." We hold that the defendant's agents should have ceased to make payments to Geyer and Co. after the power-of-attorney was first produced.

The next question is, when was the power-of-attorney first produced. Plaintiffs say it was produced in the end of October 1910. On this point we have the oral evidence of Badri Das plaintiff (page 31), and of Rechpal Singh (page 32), who say it was shown to Captain Battye, Executive Engineer, in his house at Basari. The former says "we said we had come to show him the *mukhtarnama*; he said, 'very good, keep the *mukhtarnama* yourselves.' The latter says: "The *mukhtarnama* was given into the Sahib's hand. The Sahib read it. The Sahib said, "when the time for payment comes I will remember and you shall be paid." This oral evidence is not at all convincing in our opinion. Badri Das speaks of the power being again shown early in December, but here again there is only his oral evidence. Captain Battye says he first heard of the existence of the power-of-attorney at the end of October 1910, but never saw the contents of the document till 2nd May 1911. He says that on December 19th Panna Mal saw him in his office and showed him some papers saying he had a power-of-attorney, on which Captain Battye told him if he wished to be paid he should take the power-of-attorney to the office and get it examined. Captain Battye says he then thought the power was in vernacular, which he cannot read. Without impugning Captain Battye's veracity, the question still remains how far his memory may be trusted as to minute details. In his letter of the

30th December 1910 to Geyer and Co. (pages 15 and 16) Captain Battye says "on December 19th Panna Mal returned and produced the power-of-attorney."

This was a letter written only eleven days after the 19th December, and we think we must accept it as written at a time when Captain Battye's memory was fresh. It seems clear to us that the document was produced on 19th December 1910, and that if Captain Battye did not then take the trouble to read it, it was not plaintiffs' fault. We consider that after this production defendant's agents should have stopped making payments to Geyer and Co. Yet payments were made on 20th December, 16th January, 30th and 31st January 1911. Captain Battye was no doubt in a difficult position. He had to get the work finished somehow or another before the beginning of the next Simla season. Geyer was in financial difficulties. Captain Battye says he explained to Panna Mal on 19th December that if he (Panna Mal) seized the money due to Geyer and Co., he would cut his own throat, and advised him to help the contractor through a difficult time. So to prevent the breakdown of the contract Captain Battye continued to make payments to Geyer and Co., but he did so at his own risk, for he knew or should have known that if plaintiffs would not recover from Geyer and Co., they would claim from Government repayments of sums paid to Geyer and Co., in defiance of Mr. Aikman's undertaking after the production of the power-of-attorney. Captain Battye's letter to Geyer and Co., dated 17th January 1911 (page 17), shows that he knew that Geyer and Co. owed plaintiffs Rs. 11,000. Yet we find him making payments to Geyer and Co. on 30th and 31st January. As to the letter from Geyer and Co. to Captain Battye, dated 5th January 1911 (page 21), cancelling the power-of-attorney, the terms of the power show that it could not be cancelled till the work was finished and accounts finally settled, so Captain Battye could not act on this. And it does not appear that Captain Battye did act on it, for in subsequent letters to plaintiffs we find Captain Battye making no mention of any such cancellation, but telling them that they have been misinformed as to Geyer and Co.'s contract with Government having been cancelled.

Then it is argued on behalf of defendant that plaintiffs broke their agreement with Geyer and Co. We can find no proof that they broke down in their undertaking to supply food for the coolies. What apparently plaintiffs did was to refuse to supply Geyer and Co. with cash to an unlimited extent, and in this we think they acted with common sense. They had never agreed to finance Geyer and Co. to an unlimited extent.

Then it is argued that the payments made to Geyer and Co. on the 20th December 1910 and 31st January 1911 were not sums due, but advances. From a departmental view these payments may be called advances, as the strict rule is to pay when the bills have been passed but there is nothing to show that work to the extent to which payments were made had not been done, so these payments we regard as payments made for work done but paid in advance of settlement of work bills.

The whole trouble is due to Messrs. Geyer and Co.'s peculiar methods of doing business. But we cannot see that this relieves Government of the necessity of reimbursing the plaintiffs who clearly were led into financing Geyer and Co., on the undertaking given in Mr. Aikman's letter.

We hold then that defendant is liable to pay plaintiff whatever sums plaintiffs advanced to Geyer and Co. up to an extent not exceeding payments made after 9th December 1910 by defendants to Geyer and Co. We already know the latter payments.

They were (see page 34)

| | | Rs. | a. | p. |
|---|---|---|---|---|
| Paid on 20th December 1910 | ... | 4,000 | 0 | 0 |
| Paid on 16th January 1911 | | 5,056 | 15 | 6 |
| Paid on 30th January 1911 | | 2,229 | 3 | 11 |
| Paid on 31st January 1911 | | 4,000 | 0 | 0 |
| GRAND TOTAL | ... | 15,286 | 3 | 5 |

These payments are more than sufficient to cover the whole of plaintiffs' claim.

But paragraph 9 of the plaint, in which plaintiffs say Rs. 9,800 principal is still due to them, was traversed by defendant, and yet no issue on the point was framed, and so

LACHHMAN PRASAD v. SARNAM SINGH.

plaintiff has still to prove that Rs. 9,800 is due to him. There must be a remand on the issue, *what principal sum is due to the plaintiffs.*

As to interest the agreement between plaintiffs and Geyer and Co. provides that plaintiffs are not to be paid till 15th December 1910, and that any sums then due are to carry interest at 9 per cent. We think, therefore, that plaintiffs should get interest on each sum advanced at the rate of 9 per cent. per annum from date of actual advance or from 15th December 1910, whichever date is later, till date of institution of suit, and thereafter at 6 per cent. per annum till date of payment.

As to the claim for interest on the Rs. 3,000, this sum of Rs. 3,000 was advanced by plaintiffs to Geyer and Co. on Captain Battye's guarantee that it would be refunded next month, "if necessary by deductions from their bills," see letter of Captain Battye dated 29th October 1910 (page 6). Yet the money was not paid till 2nd May 1911. This should have been deducted from the December pay bills, which were apparently payable on or before 15th December 1910 (see clause 5 of the agreement, foot of page 3), though apparently the bills were actually paid on 10th and 12th December 1910 (see foot of page 33). We think plaintiffs are entitled to interest from 15th December 1910 to 2nd May 1911 at 9 per cent. per annum on the sum of Rs. 3,000.

We now remand for enquiry on the issue, what sum is due to the plaintiffs as principal.

Return to be made within four months.

*Appeal accepted; Case remanded.*

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## PRIVY COUNCIL

APPEAL FROM THE ALLAHABAD HIGH COURT.

April 26, 1917.

*Present*:—Viscount Haldane, Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

LACHHMAN PRASAD, SINCE DECEASED (NOW REPRESENTED BY NARAIN PRASAD AND OTHERS) - APPELLANT

*versus*

SARNAM SINGH AND OTHERS— RESPONDENTS.

*Hindu Law—Mitakshara—Joint family—Mortgage by member—Property to extent of mortgagor's interest, whether can be made liable—Equity arising out of representation of authority.*

Where the property of a Hindu joint family is mortgaged by one of the members, not being the head of the family for an antecedent debt or proven necessity of the joint family, the general law is that the mortgage is not valid at all, even to the extent of the mortgagor's interest. [p. 285, col 1.]

It is possible, however, that exceptions to this general rule may arise from special circumstances, *e g*, from a representation or undertaking by the mortgagor that he had power to mortgage the joint property. [p. 285, col. 2.]

*Mahabeer Pershad* v. *Ramyad Singh*, 12 B. L. R. 90; 20 W. R. 192, discussed.

Appeal from a decree of the Allahabad High Court, dated December 11th, 1912, affirming that of the Subordinate Judge, Bareilly.

FACTS of the case are sufficiently set out in their Lordships' judgment. Three members of a joint family (the first three defendants) mortgaged the joint property to plaintiff, who brought a suit on his mortgage. The Subordinate Judge, on the authority of *Chandradeo Singh* v. *Mata Prasad* (1), held that the mortgage was invalid and dismissed the suit and his decision was confirmed on appeal by the High Court. Hence this appeal.

Messrs. *J. M. Parikh* and *J. K. Roy*, for the Appellant.

Respondents did not appear at the hearing.

Mr. *Parikh*, for the Appellant.—The recent judgment of the Board in *Sahu Ram Chandra* v. *Bhup Singh* (2) precludes me from questioning the principle of *Chandradeo Singh* v. *Mata Prasad* (1), but I submit that relief can be granted in equity against the mortgagor's share: *Mahabeer Pershad* v. *Ramyad Singh* (3).

[VISCOUNT HALDANE.—That case was decided on the ground that the father and the eldest son had in effect made a misrepresentation which they had to make good. Here there are no such special circumstances as to create an estoppel.]

The case is discussed by this Board in *Madho Parshad* v. *Mehrban Singh* (4), where

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.
(2) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498 (P. C.).
(3) 12 B. L. R. 90; 20 W. R. 192.
(4) 17 I. A. 194; 18 C. 157; 5 Sar. P. C. J. 586; Rafique & Jackson's P. C. No. 121; 9 Ind. Dec. (N. S.) 105 (P. C.).

it was said that the Judges deciding it justly considered that it was contrary to equity and good conscience that the mortgagors should keep the security and the money. As to representation, there is just as much evidence of it here as there was there.

[VISCOUNT HALDANE.—I am not at all sure the Board gave the weight of their authority to that Bengal case.]

The mortgage here is voidable only, not void. If the other side had not opposed, plaintiff would have got a decree.

JUDGMENT.

VISCOUNT HALDANE.—In this case no difficult question of law arises, and their Lordships are prepared to intimate at once the advice which they will tender to His Majesty upon the appeal.

It is a suit with regard to a mortgage made on the 21st September, 1885, by three Hindus subject to the Mitakshara Law, who joined in borrowing Rs. 1,200 on the security of the property of the joint family of which they were the heads. There is nothing special in the terms of the mortgage, which do not go beyond what is stated. It is contended that although according to the decisions of this Board, that mortgage is *prima facie* invalid, as being for neither an antecedent debt nor for any proven necessity of the joint family, it still may be held to be valid on the doctrine laid down by the High Court of Calcutta in the case of *Mahabeer Pershad* v. *Ramyad Singh* (3). There, the head of a joint family and his son, who was of age, united in attempting to raise money. There was a younger son, also a member of the joint family who was not of age and who did not, and could not, concur. The mortgage was declared bad, but the learned Judges who decided the case thought themselves at liberty to put a condition into the decree which in effect determined that an implied representation or undertaking given by the martgagors that they had power to charge the joint family property and would make good the representation by partition or otherwise, should receive effect, and accordingly they, in substance, ordered by their decree a partition of the property so that the separate shares to be obtained under the partition of the father and the son should be made payable to the mortgagees. Whether that particular case was rightly decided or not, it is not necessary to consider here, because the learned Judges proceeded upon the footing that there had been the representation referred to. On looking at the facts, their Lordships agree with the observation of Mr. Parikh that there was very little, if any, evidence of such a representation, but that there was such a representation was the basis of the judgment, and, unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now, whatever may happen where there are special circumstances such as there were in the case referred to, that is not the general law. The general law is quite plainly laid down by Lord Watson in delivering the judgment of this Board in the case of *Madho Parshad* v. *Mehrban Singh* (4), where he says, at page 196, this:

"Any one of several members of a joint family is entitled to require partition of ancestral property and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution."

Now these are the principles which govern this and all other cases of the kind, and, according to these principles, there can be no doubt that the present mortgage is void. There were no such special circumstances as the learned Judges seem to find in the first case above quoted entitling them to impose terms upon the

plaintiffs, and, whether Lord Watson approved that case or not, which is not quite clear, he at all events said that it had no application which would affect the operation of the principles which he laid down as above quoted.

The result is that the mortgage in the present case is bad and the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with such costs as the respondents, not having appeared before this Board, may be entitled to.

*Appeal dismissed.*

Solicitor for the Appellant: Mr. *E. Dalgado.*

Solicitors for the Respondents: Messrs. *Pyke, Franklin* and *Gould.*

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## PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

April 24, 1917.

*Present*:—Viscount Haldane, Lord Atkinson, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

KAWAL NAIN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

BUDH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Mitakshara—Joint family—Partition, suit for, dismissed, though right to partition admitted—Status, whether joint or several.*

A member of a Hindu joint family instituted a suit for partition. The suit was dismissed on the ground that though he had a legal right to partition, he had in the Judge's opinion no proper motive for exercising that right. Thereafter he mortgaged his share in the family property, and on the mortgagee suing on his mortgage he claimed to be still joint:

*Held*, that notwithstanding the judgment the mortgagor had become separate from the date of his suit and that the mortgage of his share was valid. [p. 287, col. 1.]

Appeal from a decree of the Allahabad High Court, dated April 10, 1913, reported as 19 Ind. Cas. 430, reversing that of the Subordinate Judge, Saharanpur.

FACTS of the case are sufficiently set out in their Lordships' judgment. The suit for partition filed by Prabhu Lal was not only instituted but dismissed before the mortgage, which was in fact intended to provide funds for an appeal. Such appeal was not, however, proceeded with, a compromise being effected, under which Prabhu Lal did in fact become separate. When a suit was brought on the mortgage, he and the other members of the family, who were joined "as a precautionary measure", set up that they were joint and the mortgage invalid. The Subordinate Judge decreed the suit, but the High Court (Richards, C. J., and Banerji, J.) dismissed it on the ground that at the date of the dismissal of the suit for partition the mortgagor was joint.

Mr. *De Gruyther, K. C.*, for the Appellants. —The only question is whether the mortgagor was joint or separate when he executed the mortgage. I contend that from the date of instituting his suit for partition he was separate: *Girja Bai* v. *Sadashiv Dhundiraj* (1) which was decided subsequent to the High Court judgment under appeal. It is immaterial that by an erroneous judgment the suit for partition was dismissed: the filing of that suit was unequivocal intimation of plaintiff's desire to separate, and he became separate from April 6, 1889. The Subordinate Judge in dismissing the suit said: "It appears that the plaintiff is now thinking of wasting the family property, and having found no other means, he has instituted this suit without there being any actual cause of action. I must admit that the plaintiff has certainly a share in the joint ancestral property equal to that of his father, and he can also get the property partitioned under the Hindu Law: but this admission does not warrant the institution of a suit in Court without the accrual of any cause of action."

[SIR WALTER PHILLIMORE.—He has confused "cause of action" with motive.]

[SIR JOHN EDGE.—You sat down under the judgment.]

[VISCOUNT HALDANE.—The learned Judge may be wrong but he has delivered a judgment and you have to show that you are not bound by it. He has refused to give you partition.]

The only refusal is a refusal to divide by metes and bounds. The Sub-Judge admitted that Prabhu had one-fifth share and could get the property partitioned under

(1) 37 Ind. Cas. 321; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 151.

Hindu Law. He does not say that Prabhu did not unequivocally express his intention to separate. I submit that his filing the suit was such an unequivocal intimation. The High Court went wrong by regarding the question as being whether actual physical partition had taken place. They had not this Board's judgment before them.

[SIR W. PHILLIMORE.—They do not seem to have applied their minds to the question whether separation can be effected by volition].

JUDGMENT.

VISCOUNT HALDANE.—This is an appeal from a judgment of the High Court at Allahabad which reversed a judgment of the Subordinate Judge of Saharanpur. The question which arose was whether a mortgage of certain interests in land was valid, as contended by the appellants, who were the successors-in-title of the original mortgagee. The land had been the property of a joint family subject to Mitakshara Law, and the controversy turned on whether the respondent Prabhu Lal, the mortgagor, had separated from the joint family before executing the deed, and so rendered himself competent to make a valid hypothecation of the interest which had come to him as a member of the joint family.

Prior to the mortgage, which was dated the 28th August 1890, the respondent Prabbu Lal had, on the 6th April 1889, commenced a suit for partition. By his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so, the judgment of the Judicial Committee in the recent case of *Girja Bai* v. *Sadashiv Dhundiraj* (1) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the co-sharers assent. A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not.

These considerations are sufficient to dispose of the only serious question raised by the present appeal. Had their Lordships' judgment in the case just referred to been delivered before and not after the judgments now under review, that of the High Court would probably have been different. The Subordinate Judge thought himself bound to examine a number of transactions from which he drew the inference that the members of the joint family had assented to the severance contended for, although a complete partition had not been carried out. It was not necessary for him to find so much in order to establish the severance, but the result at which he arrived was right. The High Court, in reversing his decision, proceeded on the footing that no agreement for severance had been established, and that it was necessary that the existence of such an agreement should be shown. This is plainly contrary to the principle as subsequently laid down by this Board in the other case. It has been argued that the suit for partition, commenced by the plaint of 1890, was dismissed and that the plaint was, therefore, of no effect. Their Lordships cannot assent to this argument. It is true that in the suit of 1890 the Subordinate Judge dismissed the claim disbelieving the case put forward in support of it, namely, that the father, who was head of the joint family, had refused to supply his son Prabhu Lal with the funds required to maintain him, and had otherwise illtreated him. The High Court says that, while this disbelief was no valid ground for dismissing a claim for partition, it still shows that on the date when the suit was dismissed the family remained joint. It will, however, be observed that the judgment in that suit proceeded on the ground that owing to the age of the father he might have other children and that in consequence the property could not be divided or the plaintiff's share fixed. But, while this was obviously wrong, the judgment on its face concedes that the plaintiff had a right to partition, although no cause of action for an actual partition was regarded as having accrued. It cannot be said that the plaint did not amount to such an expression of intention as to satisfy the conditions of the law as now settled.

NAGESHWAR SHUKUL *v.* JASODRA.

Their Lordships have thought it necessary to examine the argument for the appellants in the present appeal with the more care because the respondents have not been represented at the Bar. But they are satisfied that the High Court has given a decision which cannot stand. They will, therefore, humbly advise His Majesty that this appeal should be allowed and the decree of the Subordinate Judge restored. The respondents must pay the costs here and below. But their Lordships desire to point out that as the personal remedy under the mortgage is probably barred by limitation, the liberty to apply for a personal decree, which is given by the decree in accordance with Order XXXIV of the Code of Civil Procedure and section 90 of the Transfer of Property Act in the event of the proceeds of a sale proving insufficient, must be subject to the right of the respondents to raise any such defence to the personal claim, such as one based on limitation, which may prove open to them.

*Appeal allowed.*

Solicitors for the Appellants: Messrs. *Barrow Rogers & Nevill.*

Solicitor for the Respondents: Mr. *Douglas Grant.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 29 OF 1917.

April 3, 1917.

*Present*:—Mr. Lindsay, J. C.

NAGESHWAR SHUKUL—PLAINTIFF—APPLICANT

*versus*

*Musammat* JASODRA AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage suit—Stranger to mortgage—Proper parties.*

Where a prior mortgagee of an entire property brought a suit against his mortgagor and the subsequent mortgagee of a portion of the property, and the applicants sought to be made parties to the suit on the allegation that they were the owners of the whole property and had executed the subsequent mortgage:

*Held*, that the applicants were not strangers, but proper parties, to the suit.

*Thakur Maharaj Singh* v. *Lachhman Das*, 24 Ind. Cas. 871; 1 O. L. J. 261, distinguished.

Civil revision against the order of the Probationary Munsif, Gonda, dated the 6th February 1917.

Babu *Lachhman Das*, for the Applicant.

Babu *Hargobind Das*, for the Opposite Party.

JUDGMENT.—The applicant here had brought a suit on a mortgage in the Court of the Probationary Munsif of Gonda. That suit was filed against two defendants, one *Musammat* Jasodra and another named Dasrath. The plaintiff's case was based upon a mortgage executed in his favour by *Musammat* Jasodra, but in the fifth paragraph of his plaint he alleged that the second defendant in the suit, Dasrath, was impleaded as a subsequent mortgagee of a portion of the property affected by *Musammat* Jasodra's mortgage. After the case had been filed an application was made on behalf of two persons Baij Nath and Gomti Prasad asking to be made parties to the suit. In their application to the Court they stated that they were the owners of the property which *Musammat* Jasodra had professed to mortgage and they further stated that they had mortgaged a portion of the property to the defendant No. 2, Dasrath. They, therefore, asked to be made parties to the suit and this application was accepted. The learned Counsel for the plaintiff-applicant asks this Court to hold that the Munsif was wrong in adding these two men as parties and in this connection he relies upon a ruling reported as *Thakur Maharaj Singh* v. *Lachhman Das* (1), where, following several other rulings mentioned in the judgment, it was held that in a mortgage suit a stranger to the mortgage cannot be impleaded as a defendant inasmuch as a paramount title cannot be drawn into controversy in an action brought upon a mortgage. The facts of that case, however, are clearly distinguishable from those of the case before me.

Here the applicant-plaintiff had actually made Dasrath a party to the original suit. It is clear, in fact it is admitted by the applicant's learned Counsel, that the mortgage made in favour of this defendant No. 2 was executed by one of the applicants, namely, Baij Nath. In these circumstances it can hardly be said that Baij Nath is a stranger to the suit. I am unable to interfere in revision, as it appears to me that the Court below has not committed any illegality or irregularity. The application fails and is dismissed with costs.

*Revision rejected.*

(1) 24 Ind. Cas. 871; 1 O. L. J. 261.

EMPEROR *v.* KIKABHAI RANCHHODDAS.

[BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 490 OF 1916.
January 12, 1917.
*Present*:—Mr. Justice Batchelor and
Mr. Justice Heaton.
EMPEROR—PROSECUTOR—APPELLANT
*versus*
KIKABHAI RANCHHODDAS—
ACCUSED—RESPONDENT.

*Bombay District Police Act (Bom. Act IV of 1890), s. 61 (b)—Vehicle, bicycle whether is—"Drive", meaning of.*

A bicycle is a vehicle within the meaning of the word as used in clause (*b*) of section 61 of the Bombay District Police Act, 1890, and it is a vehicle "driven" by the man who rides it.

*Taylor* v. *Goodwin*, (1879) 4 Q. B. D. 228; 48 L. J. M. C. 104; 40 L. T. 458; 27 W. R. 489, relied upon.

Criminal appeal by the Government of Bombay, from an order of acquittal passed by the Honorary Magistrate, first Class, Surat, in S. C. No. 109 of 1916.

Mr. *S. S. Patkar*, (Government Pleader), for the Crown.

JUDGMENT.—In these appeals, which are brought by the Government of Bombay, the only question for decision is whether a bicycle is or is not a vehicle within the meaning of the word as used in clause (*b*) of section 61 of the Bombay District Police Act, Bombay Act IV of 1890. That clause provides a penalty for any person who "drives a vehicle of any description" otherwise than on the left side of the street along which he is travelling. The learned Magistrate has thought that a bicycle is not a vehicle. We are clearly of the contrary opinion. A bicycle is a carriage and is, therefore, in our opinion a vehicle.

We further think that no difficulty is created by the use of the word 'drive', and that a bicycle may be said to be a vehicle driven by the man who rides it. That is the view which was accepted in *Taylor* v. *Goodwin* (1), where it was contended that the person propelling the bicycle drives it, inasmuch as he guides the machine and regulates its pace. Mr. Justice Mellor in giving effect to that argument observed: "I think the word 'carriage' is large

(1) (1879) 4 Q. B. D. 228; 48 L. J. M. C. 104; 40 L. T. 458; 27 W. R. 489.



PUBLIC PROSECUTOR *v.* SHAMSUDIN SAHIB.

enough to include a machine such as a bicycle which carries the person who gets upon it, and I think that such person may be said to 'drive' it. He guides as well as propels it, and may be said to drive it as an engine-driver is said to drive an engine"

The decisions of the Magistrate must, therefore, be reversed and the cases must be remanded to him in order that they may be retried and decided in accordance with law.

*Order reversed.*

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MADRAS HIGH COURT.
CRIMINAL APPEALS NOS. 490 TO 500 OF 1916.
March 13, 1917.
*Present*:—Justice Sir William Ayling, KT.,
and Mr. Justice Napier.
THE PUBLIC PROSECUTOR—APPELLANT
IN ALL
*versus*
SHAMSUDIN SAHIB AND OTHERS—ACCUSED
—RESPONDENTS.

*Madras Town Nuisances Act (III of 1889), s. 3 (5)—Prosecution by Sanitary Inspector, legality of—Use of charge-sheet forms—Complaint—Police report—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (h), 190 (1) (a), 200.*

A Sanitary Inspector, not empowered to exercise the powers of a Police Officer, can initiate proceedings under the Madras Town Nuisances Act. [p. 290, col. 1.]

He cannot put in a charge-sheet or submit a Police report to the Magistrate, but the mere use by him of a printed form appropriate to offences under the District Municipalities Act for embodying the substance of his complaint will not render the prosecution illegal when the document was treated as a complaint under section 190 (1) (*a*) of the Criminal Procedure Code and the complainants examined under section 200. [p. 290, col. 1.]

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Bench of Magistrates, Erode (Coimbatore Division) in Bench Cases Nos. 227 to 237 of 1916, respectively.

The Public Prosecutor, for the Government.

JUDGMENT.—These are appeals by Government against acquittals of several

accused persons who were charged before the Bench Magistrates of Erode with offences under the Towns Nuisances Act III of 1889, section 3 (5). The ground of the acquittal is as stated in the order "that the Chief Sanitary Inspector is not competent to prosecute for offences under the Act." We think that what the Bench really meant was that the Sanitary Inspector had no power to put in a charge-sheet, that is, make a Police report of the facts as provided in section 190 (1) (*b*) of the Criminal Procedure Code and they seem to have held that the proceedings in these cases were initiated in that manner. They are in error in this matter, but their error has been induced by the user by the Sanitary Inspector of a printed form headed "Charge-sheet of individuals prosecuted" which form is appropriate to offences under the District Municipalities Act in cases where the Governor-in-Council has under section 282 (4) empowered a "servant of the Municipalitiy" to "exercise the powers of a Police Officers."

Admittedly the Sanitary Inspector is not so empowered. If the Magistrate who took the case on his file had accepted this document as a Police report, the proceedings would have been contrary to law, but it is clear that he treated the document as a complaint under section 190 (1) (*a*) and examined the complaint under section 200, the substance of the complaint being reduced to writing and signed by the complainant as required by the same section. This appears on the document itself. The Code does not require a complaint to be in any particular form and this document is an "allegation in writing to a Magistrate with a view to his taking action" within the definition of complaint in section 4 (1) (*h*) of the Code. The proceedings were, therefore, properly instituted and we must reverse the acquittals and direct the Magistrates to take the cases on their file and dispose of them according to law.

*Appeals allowed; Acquittals set aside.*

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL BAIL APPLICATION No. 169 OF 1916.

December 13, 1916.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

HARCHAND JHAMATMAL—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Criminal Procedure Code* (*Act V of* 1898), *ss.* 497, (1), 498—*Bail—High Court, power of.*

The power of a High Court to direct admission to bail under section 498 of the Criminal Procedure Code is unfettered and in no way limited by the provisions of section 497 (1) of the Code; but the High Court will not grant bail in non-bailable offences except when special circumstances are disclosed. [p. 291, col. 1.]

Application against the order of the Sessions Judge, Hyderabad.

Mr. *F. J. De Verteuil*, for the Applicant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

PRATT, J. C.—This is an application under section 498, Criminal Procedure Code, to release on bail the applicant who is now under trial in the Sessions Court of Hyderabad, for an offence of rape. The Sessions Judge refused the bail.

The discretion of the Court in the matter of bail under section 497, Criminal Procedure Code, is limited and in accordance with sub-section (1) of that section the Court shall not release the accused on bail if there appear reasonable grounds that he has been guilty of a non-bailable offence.

The power given by section 498 is not so limited. The Calcutta High Court in the case of *Ashraf Ali* v. *Emperor* (1) has said that the extended powers to the High Court under this section are not to be used to get rid of the very reasonable and proper provision of section 497, Criminal Procedure Code. If this case implies that the power of a High Court in the matter of bail is limited by section 497 (1) we must respectfully differ. The section imports no such limitation and we think it was intended that the jurisdiction of

(1) 27 Ind. Cas. 839; 42 C. 25; 16 Cr. L. J. 215.

the High Court should be left unfettered. We think the rule accepted by the Bombay High Court in the case of *Emperor* v. *Nensi Hansraj* (2) is an appropriate one in regard to applications in the High Court and that is that bail should not be taken in non-bailable cases except in special circumstances. What those special circumstances are is a matter which does not permit of precise definition and the discretion given under section 498 is one that should be exercised according to the exigencies of each case.

In the present case the Rule was granted as it appeared from the Sessions Judge's order that he based his refusal of bail solely on the fact that the accused had been committed for trial and had not considered the evidence himself. We do not desire at this stage to say anything which might have the effect of pre-judging the case, and, therefore, we shall merely observe that after hearing the Counsel for the defence and the Public Prosecutor for Sind and considering the evidence in this case as summarised in the order of commitment we do not think that the case is one which invites the application of section 497 (1), Criminal Procedure Code, or that there are special circumstances justifying the exercise of the extended powers under section 498.

We accordingly discharge the Rule.

CROUCH, A. J. C.—I agree that the High Court when passing orders under section 498, Criminal Procedure Code, is not limited by the restrictions imposed by section 497 (1) on a Court before which a person accused of a non-bailable offence is brought; but that when bail has been refused by the Sessions Court it should not be granted by the High Court unless special grounds are disclosed. I consider that in this case no special grounds have been disclosed.

*Bail refused; Rule discharged.*

(2) 8 Bom. L. R. 420; 3 Cr. L. J. 499.

## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 836 OF 1916.
CRIMINAL REVISION PETITION No. 680 OF 1916.

April 12, 1917.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

*In re* VENKATARANGA JOSIAR—ACCUSED—PETITIONER.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 403 (4)—*Acquittal by second class Magistrate—Offence, different, constituted by same facts—Subsequent charge before first class Magistrate—Previous acquittal, whether operates as bar—Penal Code* (*Act XLV of* 1860), *ss.* 406, 409.

The accused was charged under section 406 of the Penal Code and was tried and acquitted by a Magistrate with second class powers. He was subsequently charged on the same facts under section 409 and was brought before a Magistrate with first class powers to take his trial:

*Held*, that the subsequent charge being with relation to an offence which the first Magistrate could not try, *vide* section 403 (4) of the Criminal Procedure Code, the previous order of acquittal with respect to the minor offence for which the accused had already been tried was no bar to the subsequent proceedings. [p. 291, col. 2; p. 292, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the proceedings of the Court of the Sub-Divisional, first class Magistrate, Madura Division, in Calendar Case No. 30 of 1916, in Calendar Case No. 565 of 1915, on the file of the Stationary second class Magistrate, Madura Town.

Mr. *P. N. Krishnaswami Aiyar* for Mr. *P. R. Narayanaswami Aiyar*, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.—In this case the first point for consideration is whether the charge under section 409 of the Penal Code against the accused Venkataranga Josiar can be proceeded with inasmuch as he had been previously tried by a Magistrate with second class powers upon the same facts for an offence under section 406 of the Penal Code and acquitted.

We think section 403, sub-section 4, Criminal Procedure Code, applies; it states that if a person has either been acquitted or convicted of an offence but the same facts disclose an offence which could not be tried by the first Magistrate, then the previous acquittal or conviction is no bar to fur-

ther proceedings for a more serious offence. The words of the sub-section are "A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed if the Court by which he was first tried, was not competent to try the offence with which he is subsequently charged." Then the illustrations (*f*) and (*g*) make it perfectly clear that if the subsequent charge is with relation to an offence which the first Magistrate could not try, then the previous order of acquittal or conviction with respect to the minor offence for which the accused has already been tried, is no bar to subsequent proceedings.

In the exercise of our powers of revision and for other reasons we quash the proceedings.

V.R.P.

*Petition allowed*; *Conviction set aside.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 129 OF 1916.

September 28, 1916.

*Present*:—Mr. Hayward, J. C., and Mr. Fawcett, A. J. C.

WALI MAHOMED *wd. Hafiz* ALI MAHOMED—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Apprehension, reasonable.*

To justify an order of transfer under section 526 of the Criminal Procedure Code, the apprehension of not receiving a fair and impartial trial must be a reasonable apprehension in the opinion of the Court, and not such as would merely appear reasonable to the accused, [p. 293, col. 2.]

*Crown* v. *Mahomedshah*, 1 S. L. R. 8; 9 Cr. L. J. 251, dissented from.

*Juggan* v. *Emperor*, 22 Ind. Cas. 996; 36 A. 239; 15 Cr. L. J. 212; 12 A. L. J. 399, relied upon.

Mr. *T. G. Elphinston*, for the Applicant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is an application for transfer of a criminal case pending before the Sub-Divisional Magistrate, Tando, Sub-Division of the Hyderabad District. The applicant Wali Mahomed was City Magistrate of Hyderabad and has been charged with bribery and corruption, and it appears his case was specially referred for trial before the European Sub-Divisional Magistrate in charge of the Tando, Sub-Division, Hyderabad District.

It has been urged on behalf of the applicant that he is under reasonable apprehension that he will not receive a fair and impartial trial before the Magistrate. Several minor reasons have been urged but the main grounds advanced have been that his Pleader was unduly checked in cross-examination; that the papers of the preliminary departmental enquiry were not allowed to be shown in cross-examination to the witnesses called by the prosecution; and that the applicant's Pleader was only grudgingly given permission to submit arguments against a charge being framed by the Magistrate.

Now it has not been established to my satisfaction that the cross-examination was unduly checked, for it has been stated and not denied that the Magistrate was equally strict with the Pleader for the prosecution in requiring explanations as to the relevancy of the questions put. It cannot be admitted that such an attitude is improper as it is the duty of every Magistrate to check prolix or irrelevant examination or cross-examination of witnesses and to prevent all unnecessary prolongation of trials. But the Magistrate must be careful in performing that duty to avoid all appearance of leaning to one side or the other or of denying the accused person full opportunity for developing his defence. For denial of such opportunity would afford good ground for setting aside the proceedings on appeal.

With regard to the refusal to allow the papers of the departmental enquiry in original to be placed before the witnesses in the course of cross-examination it has not been shown that any questions arising out of these papers were excluded by the Magistrate. And though it might perhaps have been better if the papers had been called for and read out in original to the witnesses. Yet the relevant portions appear to have been brought to the attention of the witnesses from the copies which had been

obtained and there would appear to be no reason why the original papers should not be demanded and if necessary hereafter put on the record should the accused be called to enter upon his defence. Should the demand be refused this again might be a proper matter for consideration on appeal.

With regard to the grudging permission given to submit arguments against the framing of a charge it is not necessary to consider whether such arguments can be submitted as of right because whether grudgingly or not the permission was given and the charge has not yet been framed by the Magistrate. Should full opportunity not be afforded for such arguments, that again might be a proper matter for consideration on appeal.

It has been assumed in arguments that the real question to be considered is whether the applicant is actually under apprehension of not receiving a fair and impartial trial; that is to say it has been assumed that the apprehension required to justify transfer is such apprehension as would appear reasonable to the applicant and in support of that reference has been made to the case of *Crown* v. *Mahomedshah* (1). But the apprehension to be established appears to me rather to be an apprehension reasonable in the opinion of the Court as pointed out in the case of *Juggan* v. *Emperor* (2). No such reasonable apprehension has, in my opinion, been established upon the matters so far brought to the notice of this Court. It has not, in other words, been made so to appear that a fair and impartial enquiry or trial cannot be had in the Court of the Sub-Divisional Magistrate, Tando, Sub Division of Hyderabad District, so as to justify an order of transfer under section 526, Criminal Procedure Code.

FAWCETT, A. J. C.—I concur, I do not think the allegations urged in support of the application for transfer really give the applicant reasonable grounds to apprehend that he will not have a fair trial before the Magistrate, which in various reported cases is the test that has been adopted in deciding with an application for transfer under section 526, Criminal Procedure Code.

(1) 1 S. L. R. 8; 9 Cr. L. J. 251.

(2) 22 Ind. Cas. 996; 36 A. 239; 15 Cr. L. J. 212; 12 A. L. J. 399.

But I entirely agree with my learned brother that, though no doubt such a reasonable apprehension may be a circumstance to be taken into consideration by the High Court, still it is not in itself decisive. The section does not say a transfer may be ordered in any case where it is made to appear to the accused that a fair and impartial enquiry or trial cannot be had but where that is made to appear to the High Court; and, therefore, what is contemplated is that the Court itself should be satisfied on that point and that the real test is not what the accused may reasonably or unreasonably have been led to think about it.

*Application rejected.*

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## LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 303 OF 1916.

October 31, 1916.

*Present*:—Sir Charles Fox, KT. Chief Judge.

P. L. T. A. KASI CHETTY—

COMPLAINANT—APPLICANT

*versus*

V. V. KASI CHETTY – ACCUSED—

RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 181 (2)—Property subject of offence—Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Jurisdiction.*

Where accused was entrusted with a railway receipt for goods in one district with instructions to take delivery of the goods at their destination in another district and sell them on complainant's account and accused did so sell them and misappropriated the sale proceeds:

*Held*, (1) that the offence was triable within the jurisdiction of the Court where the goods were sold and the money was received and misappropriated; [p. 294, col. 2.]

(2) that the property which was the subject of the offence in the case was not the railway receipt but the money received on sale of the goods. [p 294, col. 2.]

Mr. *Lentaigne*, for the Applicant.

Mr. *Keith*, for the Respondent.

ORDER OF REFERENCE.

The Police of Pegu sent accused Kasi Chetty up for trial under section 406, Indian Penal Code, for committing criminal breach of trust. After the examination of two witnesses and when the third witness was being examined the Counsel for the accused raised the question of jurisdiction under sections 179 and 181, Criminal Procedure Code, stating that according to the evidence

*In re* NARAINAH VENKATESH.

of two principal witnesses the rice was sent from Waw Railway Station to Rangoon by the complainant's clerk; that the accused under instructions from the complainant took delivery of the rice in Rangoon, sold it to traders in Rangoon, and misappropriated the sale proceeds in Rangoon after making false report that they were robbed by a Chinaman.

The Pleader for the prosecution contended that the accused was entrusted with the *tanza i.e.*, railway receipts in Pegu to take them to a Chetty Firm in Rangoon and sell them or rather the rice after taking delivery of it from the Railway Company and pay the proceeds to another Chetty Firm in Rangoon for safe custody.

As I have said above the complainant through his clark sent some rice bags by rail from Waw to Rangoon, and then give the railway receipt to the accused in Pegu to go to Rangoon and sell the rice to a certain Chetty Firm *i.e.*, to S. A. R. M. Firm in Rangoon and to deposit the proceeds with A. I. V. R. P. Firm also in Rangoon.

There is no doubt that the Rangoon Courts have jurisdiction to try the case against the accused. The question whether the Pegu Courts have also jurisdiction is a difficult one as there is no direct authority either for or against this question.

The question is whether the railway receipts which the accused received in Pegu can be held to be the property which is the subject of the offence. It will be remembered that the money which the accused is alleged to have dishonestly misappropriated is not the property which the accused received from the complainant at Pegu. It is the sale proceeds of the rice bags, which he took delivery of in Rangoon with the railway receipts he received at Pegu.

As it is doubtful whether this Court has jurisdiction to enquire into or try this case because this case raises some nice questions of law the proceedings will be submitted to the High Court for decision under section 185, Criminal Procedure Code, whether the railway receipts which the accused received in Pegu are within the meaning of the words "any part of the property which is the subject of the offence" in section 181 (2), Criminal Procedure Code, so as to give this Court jurisdiction to enquire into or try the offence.

Submit proceedings accordingly with this report.

ORDER

Fox, C. J.—It appears to me to be quite clear on the complainant's own evidence that the property which is the subject of the offence is the money which was received by the accused on sale of rice. No part of the property was received in Pegu and consequently the Magistrate at Pegu has no jurisdiction to enquire into the offence in the Pegu District. The money was admittedly received in Rangoon and if it was misappropriated the offence was committed in Rangoon.

This case is transferred under section 526 of the Code of Criminal Procedure to the Court of Eastern Sub-Divisional Magistrate, Rangoon for enquiry

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## BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 314 OF 1916.

January 24, 1917.

*Present*:—Mr. Justice Batchelor and Mr. Justice Heaton.

*In re* NARAINAH VENKATESH HULGAR—APPLICANT.

*Criminal Procedure Code (Act V of 1898), s. 437—Discharge of accused—District Magistrate, power of, to order further enquiry, limits of.*

A District Magistrate should not exercise his powers under section 437 of the Criminal Procedure Code promiscuously, whenever he forms a different estimate of the witnesses, whom he has not seen, from that which was formed by the Magistrate who did see them. [p. 295, col. 1.]

A District Magistrate should not order a further enquiry merely upon the strength of his own appreciation of the evidence in a case where the accused has had a perfectly fair trial reaching a lawful conclusion, and the Trial Magistrate's discussion of the evidence has been apparently quite reasonable. [p. 295, col. 2.]

Mr. *Binning* (with him Mr. *R. A. Jahagirdar*), for the Applicant.

Mr. *S. S. Patkar*, (Government Pleader), for the Crown.

JUDGMENT.—The Rule here must, in my opinion, be made absolute.

MOHAMMED HOSAIN *v.* FARLEY.

The accused was prosecuted in respect of a very serious offence, an offence punishable under section 377 of the Indian Penal Code. After a perfectly fair and normal trial the accused was discharged by the Trial Magistrate who found it unnecessary on the evidence to call upon the accused to enter upon his defence. The order of discharge was made so far back as the 21st of June. In the following August the District Magistrate directed that further inquiry should be made into the case by the Sub-Divisional Magistrate, and against that order this Rule was obtained.

There is no doubt that the District Magistrate has jurisdiction to make the order for further inquiry which he has made. But it is important for us now to see whether in making that order he exercised his judicial discretion properly or improperly. For it is obviously an exceedingly serious thing that a man on the same set of facts should twice be exposed to a prosecution of so grave a character as this. The limits within which the discretion to order a further inquiry should ordinarily be exercised are stated in the Full Bench decision in *Queen-Empress* v. *Chotu* (1), a decision which shows that those limits are rather strictly confined. I do not think that in conferring this special power upon the District Magistrate the Legislature ever intended that the power should be exercised promiscuously whenever the District Magistrate, who has not seen the witnesses, forms a different estimate of their value from that which was formed by the Magistrate who did see them. Yet in substance that is all that has happened here. The District Magistrate prefers his own appreciation of the evidence to that of the Trial Magistrate. We are not trying this man over again, but at the same time I am bound to say that the reasons given by the District Magistrate in support of his own view as to the weight of the evidence are certainly not convincing to me. The main reason which appears to have influenced the District Magistrate is that, as he says, "I cannot believe readily that a deliberately false case of this disgusting kind should have been concocted." Now it is familiar knowledge to all connected with the administration of the criminal law that this kind of offence is very often chosen by people who are bringing a maliciously false charge. In the present case it is also noteworthy that the little boy's mother is admittedly a woman of bad character so that there would be nothing repugnant in supposing that she had instigated her son to bring this charge without good reason.

I need not consider the reasoning of the District Magistrate in further detail, because the ground upon which I would make this Rule absolute is that the District Magistrate was wrong in ordering a further inquiry merely upon the strength of his own appreciation of the evidence in a case where the accused had had a perfectly fair trial reaching a lawful conclusion and the Trial Magistrate's discussion of the evidence had, as here, been apparently quite reasonable.

*Rule made absolute.*

(1) 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465.

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## CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 157 OF 1916.

September 22, 1916.

*Present*:—Mr. Justice Chowdhury and Mr Justice Newbould.

MOHAMMED HOSAIN—COMPLAINANT

*versus*

FARLEY - ACCUSED.

*Railways Act (IX of* 1890*)*, *ss.* 68, 69, 113, 120, 122—*Travelling without ticket, whether offence—Intent to defraud—"Railway", whether includes railway carriage—Railway servants, duty of—Penal Code (Act XLV of* 1860*)*, *s.* 323.

The main and primary purpose of sections 68 and 69 of the Indian Railways Act is to prevent persons from travelling in fraud of the Company without having paid the necessary fare, and the obligation to show the ticket, when required, is subsidiary only to such primary purpose. [p. 296, col. 2.]

Section 68 prohibits travelling without a pass or ticket, but so to travel without intent to defraud is not a criminal offence. [p. 296, cols. 1 & 2.]

But a person so travelling is liable under section 113 of the Railways Act to pay on demand by any Railway servant an excess charge, which is somewhat in the nature of a penalty. [p. 296, col. 2.]

There is no provision in the Railways Act for ejecting passengers except in certain circumstances, such as are specified in section 120 of the Act. [p. 296, col. 1.]

MOHAMMED HOSAIN *v.* FARLEY.

The expression "railway" in section 122 of the Railways Act does not include a railway carriage, and the section does not, therefore, apply to the case of a passenger travelling in a railway carriage. [p. 296, col. 2.]

Railway servants are public servants and they must act within the four corners of their statutory powers. [p. 296, col. 2.].

Ticket collectors and checkers are expected to conduct themselves with restraint and self-control. [p. 297, col. 1.]

**Criminal Reference made by the Sessions Judge, Noakhali, dated the 5th September 1916, against the order of the Sub-Divisional Magistrate, Noakhali, dated June 26th, 1916.**

FACTS.—The complainant arrived at the F Railway Station just when the train was about to start, and having no time to buy a ticket, he got into the train without one. The accused, travelling ticket-checkers, asked him to show his ticket, whereupon he explained the circumstances to them and offered to pay the fare and the penalty. This the accused refused to accept and at the next stoppage asked complainant to get out and buy a ticket. On his refusal to do so, he was forcibly ejected and beaten by the accused. The latter were convicted by the Sub-Divisional Officer of Noakhali under section 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 25 each. The accused then moved the Sessions Judge of Neokhali who made a reference to the High Court under section 438 of the Criminal Procedure Code.

Babu *Bhagirath Chandra Das*, for the Complainant.

Babus *Manmatha Nath Mukerjee* and *Prabhat Chandra Dutt*, for the Accused.

JUDGMENT.—We think the Magistrate was right in convicting the accused under section 323 of the Indian Penal Code.

There is no provision in the Railways Act for ejecting passengers except in certain circumstances, such as are specified in section 120. Section 122 of the Railways Act of 1890 is not applicable to this case. The term "railway" as defined in section 3, clause (4), excludes railway carriage. The term "rolling stock" as defined in section 3, clause (10), includes it. There is no provision corresponding to section 3, sub-clause (10), in the old Acts of 1854 and 1879. Section 68 prohibits travelling without a pass or ticket, but so to travel without intent to defraud is not a criminal offence. Here there is a distinct finding that there was no fraudulent intent. Section 113 provides that a person so travelling shall be liable to pay on demand by any railway servant an excess charge. This section corresponds to sections 31 and 32 of Act IV of 1879. It is to be noticed that there was no provision in the Act of 1879 for payment of an excess charge, which is somewhat in the nature of a penalty. Taking that provision in connection with the fact that travelling in a railway carriage without a ticket, but without fraudulent intent, has not been made punishable, we think that the Magistrate has taken an entirely correct view of the law. *Pratab Daji* v. *Bombay Broda* v. *& Central India Railway Co.* (1) was a civil case which arose out of a claim for damages for wrongful detention and removal of a passenger. It was decided under the old Act, which has since been amended and altered. The expression "railway" in section 122, as already stated, does not include a railway carriage. In addition to the definitions, a comparison of section 120 and section 122 leads to the same conclusion. Railway servants are public servants. They are to act within the four corners of their statutory powers. It was held in *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, (2), by Lord Esher, M. R., that no one had any right to lay hands forcibly on a passenger in the absence of some legal authority to do so. Lindley, L. J., and Lopes, L. J., agreed in that view and held that the Company's servants were not justified, in the absence of any by-law or regulation, in laying hands on a passenger.

The main and primary purpose of sections 68 and 69 of the Indian Railways Act is to prevent persons from travelling in fraud of the Company without having paid the necessary fare, and that the obligation to show the ticket, when required, is subsidiary only to such primary purpose. Travelling without a ticket is not a criminal offence, as has been repeatedly held in this Court. It is the frequent practice of ticket-checkers to take money and issue tickets

(1) 1 B. 52; 1 Ind. Dec. (N. S.) 34.
(2) (1888) 21 Q. B. D. 107; 60 L. T. 89; 57 L. J. Q. B. 564; 36 W. R. 716; 52 J. P. 611.

to passengers, who may have got into a train in a hurry, without tickets, as appears from the evidence. In this case the complainant was perfectly willing and offered to pay the fare together with any excess that might be chargeable. Under the circumstances, it would be absurd to hold that the ticket-checkers concerned were legally justified in committing the acts charged against them. The least that can be said about the acts complained of is that they were extremely high-handed. The complaint was that the accused had abused the complainant and got him out by force and kicked him and given him a beating, that he was kept confined the whole night and was released the next day. The learned Magistrate has found the two accused guilty under section 323 of the Indian Penal Code, and gave them his benefit of his doubt as regards the charge under section 342. The learned Magistrate has also found that the injuries on the person of the complainant were caused by voluntary blows and that those blows were given by the accused with their fists. It is clear that the accused used more force than was necessary for the purpose of removal. The learned Sessions Judge says that, although it is not a case of trespass as defined in the Penal Code, it is at least a civil trespass, and that the owners are entitled to use their common law rights. This is due to his having overlooked the position of a Railway Company and its servants. He has overlooked the fact that they as such cannot, in a case like this, claim common law rights. Where is there again a "common law right" to inflict blows on a man with fists if he refuses to move?

Ticket collectors and checkers are expected to conduct themselves with restraint and self-control. We are disposed to think that they have been leniently dealt with in this case, and refuse the reference. The judgment of the Magistrate, we may add, is characterized by great ability and care.

*Conviction upheld.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 42 OF 1916.

April 18, 1916.

*Present*:—Mr Stuart, J. C.

BANSI DHAR—ACCUSED—APPLICANT

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss.* 110, 367—*Evidence—Appellate Court, duty of—Judgment, nature of Findings to be supported by reasons—Evidence, examination of.*

It is the duty of an Appellate Criminal Court to show by its judgment that it has duly weighed and examined the evidence against the accused, has appreciated the points both for and against him, and has brought a judicial mind to bear upon the case. Its findings must be supported by reasons, however brief they may be. [p. 298, col. 1.]

Where the judgment of a District Magistrate was, "It is obvious that if one quarter of the evidence for the prosecution is true, and I see no reason to doubt that it is, the appellant is a most proper person to be bound over under section 110, Criminal Procedure Code."

*Held*, that it was no judgment at all and could not stand. [p. 298, col. 1.]

Criminal revision against the order of the District Magistrate, Sitapur, dated the 27th March 1916, upholding that of the Deputy Magistrate, Sitapur, dated the 27th February 1916.

Mr. *St. George Jackson*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application in revision against an order of the District Magistrate of Sitapur passed on appeal from an order of a Magistrate under which the applicant was directed to furnish security for good behaviour under section 110, Code of Criminal Procedure. In revision I am not disposed to question the findings of a Court of Appeal as to the value of evidence, and had the District Magistrate arrived at a finding stating which of the witnesses he believed on the one side or the other, I should not have been inclined to interfere with such a finding in revision, because the reasons given were brief. But in this particular case it is difficult to see that there is a finding at all. The learned District Magistrate says: "It is obvious that if one quarter of the evidence for the prosecution is true, and I see no reason to doubt that it is, the appellant is a most proper person to be bound over under section 110, Criminal Procedure Code." Had the District

Magistrate stated that he found that certain witnesses for the prosecution were telling the truth specifying who those witnesses were I should take no exception to his conclusions. But I cannot regard the finding in question as satisfactory. A case similar to this came before Mr. Justice Tudball in February of this year, *Sarwan* v. *Emperor* (1). Mr. Justice Tudball stated therein: "The law gives a person in the position of the present applicant a right of appeal to the District Magistrate. He is in simple justice entitled to have the evidence in the case against him duly weighed and examined, and it is the duty of the District Magistrate to show by his judgment that he has done so; has appreciated the point both for and against the appellant and has brought a judicial mind to bear upon the case."

As the appeal has, in my opinion, not been properly tried it must be re-tried according to law, and while setting aside the order of the District Magistrate I consider it advisable that the hearing of the case should be sent to another Court. I accordingly direct that the hearing of this appeal be transferred to the Court of the District Magistrate of Lucknow.

*Cause remanded.*

(1) 33 Ind. Cas. 647; 14 A. L. J. 279; 17 Cr. L. J. 167.

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 155 OF 1916.

September 4, 1916.

*Present*:—Mr. Mittra, Officiating, A. J. C.

RAMKARANLAL—ACCUSED—APPLICANT.

*versus*

EMPEROR—PROSECUTOR—RESPONDENT

*Penal Code (Act XLV of 1860), s. 277—Public place—Public well—Spitting into well—Offence.*

A place is a public place if people are allowed access to it, though there may be no legal right to it. So, a well is a public well if people are allowed to use its water. [p. 298, col. 2.]

*Reg.* v. *Wellard*, (1884) 14 Q. B. D. 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox. C. C. 559; 49 J. P. 296, relied upon.

Accused voluntarily spitted into a well, the water of which was used for drinking purposes:

*Held*, that he was guilty of an offence under section 277 of the Penal Code, although the degree to which his act rendered the water less fit for drinking might be small. [p. 299, col 1.]

*Empress* v. *Pandia Mahar*, 3 C. P. L. R. 92, distinguished.

*In re Punni Besoyi*, 1 Weir 231, relied upon.

Criminal revision against the order of the District Magistrate, Chhindwara, dated the 15th May 1916, confirming the conviction and reducing the sentence passed by the Tahsildar and Magistrate, 2nd class, Chhindwara, on the 6th April 1916.

The Hon'ble Mr. *M. R. Dixit*, for the Applicant.

Mr. *G. P. Dick* (Standing Counsel), for the Crown.

JUDGMENT.—The applicant has been convicted of an offence under section 277, Indian Penal Code, for spitting into a well. There was a complaint made by one Punaram against the applicant's son of spitting into the well. This annoyed the applicant and he himself spat into the well.

It has been proved that the well belongs to Pahlad Patel who allows the public to use the water for drinking purposes. As held in *Reg.* v. *Wellard* (1), a place is a public place if people are allowed access to it, though there may be no legal right to it. So, a well is a public well, if people are allowed to use its water. It has been found that the well is the source of drinking water in the plague camp. This disposes of the first contention raised on behalf of the applicant.

It is urged that a stray act of expectoration, however, objectionable, is not an offence under section 277, Indian Penal Code. The case of *Empress* v. *Pandia Mahar* (2) is relied upon for the applicant. There it was held that the expression "corrupt or foul" is used in a literal sense in the sense of physical defilement. A person of low caste who draws water from a public well, was accordingly held not to have committed an offence under section 277. This case does not help the applicant in the least. Nobody will deny that a tumbler of water is fouled by a stray act of expectoration and is rendered less fit for

(1) (1884) 14 Q. B. D. 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox. C. C. 559; 49 J. P. 296.

(2) 3 C. P. L. R. 92,

drinking. It may not be possible to prove by chemical or bacteriological examination that the water is contaminated in the well by such an act, but I think the water is rendered less fit for drinking purposes, though the degree to which it is rendered less fit might be small. The case of *Punni Besoyi, In re* (3) appears to support the view taken by the lower Courts. There the accused fished with basket nets in a tank, the water of which, was used for drinking. "The use of the baskets caused a slight disturbance of the mud and so made the water rather less fit for drinking. But the damage done was very slight." The conviction was upheld by the Madras High Court.

There is no doubt the accused "voluntarily" fouled the water. The conviction seems to me to be correct. The application is, therefore, dismissed.

*Application dismissed.*

(3) 1 Weir. 231.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 12 OF 1917.

March 6, 1917.

*Present*:—Mr. Lindsay, J. C.

KHUSHAL AND ANOTHER—ACCUSED —APPLICANTS—APPELLANTS

*versus*

EMPEROR—COMPLAINANT—OPPOSITE PARTY —RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 110 (d) -Extortion and mischief—Habitually bringing false claims in Civil Courts—Offence.*

Section 110 (*d*) of the Criminal Procedure Code does not apply to the case of a person who has the reputation of habitually bringing false claims in the Civil Courts. [p. 300, col. 1.]

A person who brings a claim in the Civil Court which he knows to be false, commits an offence punishable under section 209 of the Penal Code, but he does not by so doing commit an offence either, if he succeeds, of extortion, or if he fails, of attempting to commit extortion. [p. 300, col. 1.]

*Ganeshi* v. *Empress*, 25 P. R. 1884 Cr., relied upon.

Criminal revision against the order of the District Magistrate, Kheri, dated the 21st December 1916; upholding that of the Magistrate, Kheri, dated the 23rd November 1916.

Mr. *St. George Jackson*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision of an appellate order of the District Magistrate of Kheri upholding an order passed by a first class Magistrate under section 110 of the Code of Criminal Procedure in respect of the two applicants Khushal and Tika Ram. It appears that notice was issued to these two persons to show cause why they should not be made to furnish security for their good behaviour. It was stated in the notice that the charges against them were (1) that they were habitual receivers of stolen property (2) that they habitually committed mischief and (3) habitually committed extortion. There have been placed before me certain papers which were prepared previous to the institution of these proceedings. From these papers it appears that a report was made by the Manager of the Court of Wards to the Deputy Commissioner of the Kheri District in which it was stated that these two accused now before me had brought six false suits against tenants of the village in which they lived. The village I am told is in one of the Court of Wards' estates. It appears that three of the suits so instituted were dismissed by the Subordinate Judge: three others which were referred to the Manager of the Court of Wards as arbitrator were dismissed by him. The Manager seems to have come to the conclusion that all these suits were false and it was on his suggestion that criminal proceedings were initiated against the present two applicants. It appears to have been thought that the best way to deal with the accused was to put forward these six instances of suits which were brought and were dismissed, in order to make out a case of habitual extortion against these applicants and it was this incident of the bringing of these suits which led to the charge of habitually committing extortion. The Deputy Magistrate has held that, it having been proved that these six suits were instituted and that they were dismissed apparently on the ground that they were all false, he is entitled to find that the two applicants are habitual extortioners. The learned District Magistrate in his order in appeal has endorsed that opinion.

In my judgment both the Courts below are

wrong. A case quite similar to the present one is reported in the Punjab Record for 1884 [see *Ganesh* v. *Empress* (1)]. In that case it was pointed out by Plowden, J., that section 110 could not be made to apply to the case of the accused, even if it were granted that such an accused had the reputation of habitually bringing false claims in the Civil Courts. As was pointed out by the learned Judge a person who brings a claim in the Civil Court which he knows to be false, commits an offence punishable under section 209 of the Indian Penal Code, but he does not by so doing commit an offence either, if he succeeds, of extortion, or if he fails, of attempting to commit extortion. As the learned Judge points out the proper way to deal with a person, who is on sufficient grounds supposed to have brought a false claim, is to prosecute him under section 209. It is quite clear to me, therefore, that so far as the charge of habitual extortion is concerned the present case cannot stand. Then it seems there was also a charge of habitually committing mischief. As regards this the evidence is very meagre and it seems as if the Magistrate who tried the case thought that no sufficient evidence had been given to support this particular charge. The Magistrate observes with respect to some of the witnesses who gave this vague evidence about the habitual commission of mischief that they were interested witnesses, and it appears to me that he was not disposed to put much reliance on their statements. As regards the story that the accused are habitual receivers of stolen property. I have examined the evidence very carefully. It seems to me that this charge cannot be supported on the evidence which was led before the Magistrate. A number of witnesses who spoke about this reputation of the applicants admitted that their opinion was based upon the facts that several years before the present proceedings were brought a man had been arrested at the house of these accused who had afterwards been run in for theft. It was apparently supposed that he had come there for the purpose of disposing of stolen property which these accused were ready to purchase. Another similar instance is described by some of the other witnesses: taken altogether the evidence on this point seems to me to be practically worthless. I might add in conclusion that after having perused the note made by the District Magistrate with respect to this case before it came into Court it was not proper for him to try the appeal, he ought to have had it transferred to another Court for disposal. I allow the application, set aside the order of the District Magistrate and direct that the applicants be discharged.

*Revision accepted.*

(1) 25 P. R. 1884 Cr.

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PATNA HIGH COURT.

CRIMINAL REVISION No. 103 OF 1917.

May 10, 1917.

*Present*—Mr. Justice Jwala Prasad.

PUNIT MAHTON—1ST PARTY—PETITIONER

*versus*

SIRAJULHAQ AND ANOTHER—2ND PARTY—OPPOSITE PARTY.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 145—*Crops, dispute as to—Jurisdiction—Attachment.*

The right to make collections or to appropriate the crops or produce of a village or shares in a village comes within the purview of section 145 of the Criminal Procedure Code. [p. 301, col 2.]

A Magistrate has jurisdiction under section 145 of the Criminal Procedure Code to pass an order restraining the disputing parties from interfering with the crops stored in the threshing floor or to attach such property. [p. 302, col. 2.]

Criminal revision from an order of the Magistrate, Behar (Patna).

Messrs. *Ashgar* and *Lakshmi Kanta Jha*, for the Petitioner.

Messrs. *Krishna Sahai* and *Amir Hossain*, for the Opposite Party.

JUDGMENT.—This application arises out of an order under section 145 of the Code of Criminal Procedure whereby the property in dispute has been declared to be in possession of the second party. The property in dispute is said to be 5 *dams* 16 *kauris* share in a village called Sapao Nuawan, *Tauzi* No. 1162/4.

The first party claimed possession over the aforesaid share by virtue of a certain *amaldastak* dated the 5th of *Chait* 1323, corresponding to 25th of March 1916, granted to him by one Muhammad Kasim and *Musammat* Zobaida the proprietors of

that property. The second party claimed possession over $10\frac{1}{2}$ *dams* share which they said belonged to the aforesaid two persons, by virtue of an *amaldastak* and *patta* dated the 3rd of June 1916. The 5 *dams* odd claimed by the first party is included in the $10\frac{1}{2}$ *dams* claimed by the second party.

The Magistrate's finding is in the following words: "My finding is that the second party was given the *theka* of $3\frac{1}{2}$ *dams* share for one year *i e.*, 1324 under the *amaldastak* and of 7 *dams* under the registered *patta* for seven years and was put in possession by the registered proprietors." Just previous to the above finding the Magistrate held that the evidence of possession adduced by the first party was not at all reliable, and did not prove the possession claimed by that party.

The first question raised by the applicant is that the orders of the Magistrate is *ultra vires* inasmuch as it relates to a certain share of paddy crops which is a moveable property and not an immoveable property and that section 145 does not apply to moveable property.

I was a member of the Bench that issued the Rule on the appplication of the petitioner and I understood that the proceedings under section 145 were instituted in respect of the paddy crops stored in the *khalian* and not in respect of any immoveable property. This impression found support in the first paragraph of the judgment of the Court below where it was stated that "there existed a dispute likely to cause a breach of the peace between the parties aforenamed with regard to the appropriation of the share of the paddy crops of 5 *bighas* 16 *kauris* interest in village, etc."

The dispute, no doubt, came to light on account of the crops stored in the *khalian* and the Police reported that there was a danger of a breach of the peace. The report sets out the history of the dispute and is clear from that report that the dispute between the parties was regarding the collection of rents of the share belonging to the owners from whom both parties claimed to have the disputed share in lease. Upon the Police report of the 2nd of March 1917 the Magistrate issued an order under section 144 of the Code of Criminal Procedure and fixed the 20th of March for the hearing of any cause that might be shown by the parties. On the 20th of March the parties filed written statements and upon a consideration of the written statements and the report of the Police the Magistrate came to the definite conclusion that the dispute really related to the possession of the share of the proprietors from whom each party claimed to hold a lease. The Magistrate, therefore, passed the following order:—Heard parties. This is a dispute about immoveable property. Draw proceedings under section 145, Criminal Procedure Code, and serve on all concerned". From the aforesaid order of the Magistrate it is clear that the dispute was regarding the possession of 5 *dams* 16 *kauris* share of Muhammad Kasim, and *Musammat* Zobaida in village Sepao Nuawan. It is clear that whatever may have been the reason for instituting the proceeding under section 144 and whatever may have been the manner whereby the Magistrate came to know of the dispute between the parties the proceeding actually was instituted under section 145 in respect not of the crops in dispute between the parties but in respect of the possession of the aforesaid 5 *dams* 16 *kauris*.

I, therefore, hold that the Magistrate had jurisdiction to take action under section 145 of the Code of Criminal Procedure.

The second contention of the learned Counsel for the applicant is that the proceeding is without jurisdiction inasmuch as it relates to a share of village and does not relate to the entire village or to any specific lands in the village which could be demarcated or delineated by means of boundaries. This contention is probably based upon the expression used in section 145, namely, "concerning any land or water or boundaries thereof". The above expression is to be read with clause 2 to section 145 which says that land or water includes among other things crops or other produce of land, and the rents or profits of any such property. There is to my mind, therefore, no doubt that the right to make collections or to appropriate the crops or produce of a village or shares in a village properly comes within the purview of section 145.

PUNIT MAHTON *v.* SIRAJUL HAQ.

I am fortified in this view by the decision in *Abhayessari Debi* v *Shidhessari Debi* (1) where it was distinctly held that a dispute as to the right to collect rents was a dispute concering tangible immoveable property within the meaning of section 145 of the Criminal Procedure Code. This decision followed the earlier decision in *Pramatha Bhusana Deb Roy* v. *Doorga Churn Bhattacharji* (2). The contention that these decisions apply only to a dispute regarding the collection of rent in respect of an entire village and not of a share or shares of a particular village does not appear to me to be sound, particularly in a case where the share in dispute is separate from the other shares in the village and where each party claims to be in exclusive possession and not in joint possession of the share. It appears from the evidence of witness No. 1 on behalf of the petitioner himself that the collection of this share is quite separate from the other shares in the village. The witness referred to above is the *patwari* of the village and there is no reason why his evidence should not be accepted regarding the mode of collection in the village as a matter of fact nothing has been shown on behalf of the patitioner to the contrary.

I, therefore, hold that the Magistrate had jurisdiction to initiate proceedings under section 145 of the Code of Criminal Procedure in respect of the dispute as to the possession of the share in question.

The next contention of the learned Counsel on behalf of the petitioner is that the Magistrate had no jurisdiction to direct the attachment of the crops which were not standing on any portion of land situated within the share in dispute but were at the time that the order was passed stored in the threshing floor. It appears that it appeared to the Police that there was danger of a breach of the peace regarding the crops stored in the *khalian* and the Police reported to the Magistrate for action being taken under section 144 of the Code of Criminal Procedure and in the meantime the Police kept watch over the crops so that they may not be removed by either party.

(1) 16 C. 513; 8 Ind. Dec. (N. S.) 339.
(2) 11 C. 413; 5 Ind. Dec. (N. S.) 1035.

The Magistrate on the 7th of March on the report of the Police passed the following order "* * * in the meantime the Police to see that no breach of the peace takes place." On the 9th of March the Magistrate passed an order for the issue of notices under section 144 on the parties.

In these two orders the Magistrate did not make any direction regarding the crops. On the 20th of March when the Magistrate finally passed his order for taking proceedings under section 145 instead of section 144 the Magistrate made the following order as regards the crops: "Under clause 4 to section 145, Criminal Procedure Code, I attach the subject-matter of dispute and direct the Police concerned to keep the paddy standing thereupon in charge of a responsible person." The order of attachment of the Magistrate only related to the subject-matter of dispute *i. e.* 5 *dams* 16 *kauris* share and not to the crops in question. As regards the crops his direction was that the Police should keep the paddy standing on the property in dispute in charge of some responsible person. From the summary of the proceedings taken in connection with the crops and the orders passed by Magistrate referred to above I think that there was no order by the Magistrate attaching the crops. Under section 144 the Magistrate had power to direct any person to abstain from a certain act; and thus, in my opinion, the Magistrate had in this case power to order the parties to refrain from interfering with the crops in any way. I think that the order restraining the disputing parties from interfering with the crops implied that the Police should see that the crops were not in any way removed by any body. The action of the Police and of the Magistrate in keeping the crops in charge of a responsible person, therefore, appears to be within the powers vested by sections 144 and 145.

The last contention of the learned Counsel is that the crops should be directed to be placed in the *khalian* where they were found as the *khalian* is not in dispute but is outside the village.

When by the final order under section

145 possession has been declared to be with the second party, the crops being the profits of the property in dispute belong to the second party. The first party is found not to be in possession of the share in dispute and cannot, therefore, claim the crops in question. The order of the Magistrate making over the crops to the second party was also, therefore, a proper order after the adjudication of possession of the disputed property in favour of the second party.

I, therefore, decline to interfere with the order made by the Magistrate and I dismiss this application.

*Application dismissed.*

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## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 952 OF 1916.

January 10, 1917.

*Present*:—Justice Sir George Knox, KT.

MATHURA PRASAD—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code* (*Act XLV of* 1860), *s.* 408—*Criminal misappropriation—Retention of money entrusted to servant—Offence—Proof.*

The retention of money by a servant or clerk for fifteen months after its receipt raises a very serious doubt of *bona fides* against him, but the mere retention is not conclusive proof of criminal misappropriation or criminal breach of trust. [p. 304, col. 2.]

*Emperor* v. *Kadir Baksh*, 8 Ind. Cas. 687; 8 A. L. J. 88; 33 A. 249; 11 Cr. L. J. 699, distinguished.

Criminal revision from an order of the Sessions Judge, Allahabad, dated the 4th December 1916.

Messrs. *C. Dillon*, *U. S. Bajpai* and *Ram Narain*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—Mathura Prasad has been convicted of an offence under section 408, Indian Penal Code. He appealed from the Court of first Instance to the Court of the Sessions Judge of Allahabad, who dismissed the appeal. He comes here in revision. Speaking generally the findings of the Court below are accepted in revision; but there is nothing to prevent this Court from going into the evidence if occasion arises to doubt the findings arrived at by the Courts below upon the facts before them. In the present case the judgment of the learned Sessions Judge does not give one much help in determining the case, and the Assistant Government Advocate very properly laid before me the judgment of the Joint Magistrate who has gone very fully into the evidence before him. But on hearing that judgment it seemed to me that there was reason to apprehend that the learned Joint Magistrate had relied for his decision of the case rather upon the weakness of the defence than upon the completeness of the prosecution. Briefly put, the facts are as follows: On the 21st of May 1915 Mathura Prasad, who was at the time *sarbarakar* of an estate known as Chilonda Estate, received certain moneys handed over to him by Parmeshar Dial who in turn had received them from a Pleader called Gajadhar Prasad as costs which had been given in a case in favour of the Chilonda Estate. The Chilonda Estate forms part of an endowment founded by Rani Gomti Bibi. This fact is admitted by the accused. It is also admitted by him that the moneys in question were not deposited in the treasury of the estate until the 12th of September 1916. There is evidence which has not been contravened that in the interval between the 10th of April 1916 and the 12th of September 1916 Sardar Santokh Singh, who is a Deputy Superintendent of Police in the Criminal Investigation Department, while engaged in investigating into another case quite apart from the present and in no way connected with it found that these moneys had been received by Mathura Prasad and had not at the time when he was investigating, namely, on the 16th of April 1916, been deposited in the treasury of the estate. The evidence against the accused consists of statements made by Sardar Santokh Singh the Investigating Officer, Gajadhar Prasad the Vakil who had paid the money in the first instance to Parmeshar Dial, and Parmeshar Dial who paid the money over to Mathura Prasad, Gaya Prasad, *siaha nawis* of the estate, Budhu Lal who swears to the deposit of Rs. 115-7-0 in the treasury of the estate on the 12th of September 1916, and Inspector Piare Nath Bannerji who investigated the present case. Nothing further of any importance so far as the

prosecution is concerned was elicited from these witnesses. The Joint Magistrate considered that a *prima facie* case had been made out against Mathura Prasad and called upon him for an explanation. He says that he took these moneys to the treasurer on the 16th of October 1915 and the treasurer told him that Babu Gaya Prasad, who apparently is the manager of this endowed estate, had given verbal orders that no money of *Mauza* Chilonda should be deposited. He goes on to say that he deposited the money in the custody of the treasurer Murli Dhar. In this matter he is supported by the evidence of Murli Dhar that the money was returned to him in January or February 1916 and that he finally deposited the money on the 12th of September 1916. He gives certain reasons for not having deposited the money between the 21st of May, 1915 and 16th of October 1915, namely, that he had to get in the revenue, and that in July 1915 his brother became very ill, and was again ill in April 1916 and died on the 5th of June 1916. I may at once say that in this part of the case I agree with the learned Joint Magistrate that the explanation given of the delay between the 21st of May 1915 and the 16th of October 1915 is very flimsy. But the first question in every criminal case is is the Court satisfied that the prosecution have placed beyond reasonable doubt the offence with which they have charged the accused, what the prosecution in the present case say is sufficient to establish an offence under section 408, Indian Penal Code, is that the accused being a servant was entrusted with this Rs. 115-7-0 and that he retained the money in his possession for more than a year. No evidence has been put forward pointing to a distinct act or acts of criminal breach of trust in respect of this money. In fact it was contended on behalf of the prosecution that there was no necessity for the prosecution to prove the actual mode of criminal breach of trust or criminal misappropriation, and in support of this contention they put forward the case of *Emperor* v. *Kadir Baksh* (1). The case, however, put forward differs in one very marked respect from the case before me. Kadir Bakhsh was a peon entrusted with summonses to witnesses and with diet money per witness. He returned the summonses unserved but not the money. Now the course of procedure for peons entrusted with the serving of summonses is laid down by definite rules which are well-known. There is a rule definitely saying that a peon of this kind returning summonses unserved must deposit with a *nazir* the money which he received for this purpose and which has not been paid out. The learned Judges who decided the case of *Emperor* v. *Kadir Baksh* (1) rely in their judgment upon the provisions of section 114 of the Indian Evidence Act. It is true that a Court may presume the existence of a fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Its terms are very wide and as regards private business one cannot omit from consideration what is known to be too often the practice regarding moneys received on account of a private firm. In the present case the estate is a private estate. No attempt has been made on the part of the prosecution to prove that any rule of the estate, or any contract, express or implied, lay between the estate and Mathura Prasad regarding the time and the manner in which all such moneys were to be deposited. It is easy to say that they should be deposited without delay, but that must be a matter of proof as much as any other matter of fact in the case. Retention of moneys for fifteen months after receipt undoubtedly raises a very serious doubt of *bona fides* against an accused, but the mere retention is not conclusive proof of criminal misappropriation or criminal breach of trust. In the present case it is alleged that there were moneys due to Mathura Prasad, and there is evidence that something like Rs. 300 had been paid to him at any rate one month before the deposit of this Rs. 115 to re-pay the moneys due. This matter should have been more worked out by the prosecution, and it ought to have been shown how long these moneys had been due to him. Unfortunately there is nothing on the record to show whether these debts due to him were of long standing or merely of yesterday. The accused from the very first opened his hand and said "I was paying the money

(1) 8 Ind. Cas. 687; 8 A. L. J. 88; 33 A. 249; 11 Cr. L. J. 699.

in within four months, but the treasury refused to take it on the ground that it had received orders from the manager not to receive moneys of the Chilonda Estate." The prosecution knew what they had exactly to prove, that the witnesses whom they put forward should depose to the procedure in this private estate regarding the time when moneys had to be deposited. They could without any difficulty have sent for the manager Gaya Prasad and put him into the witness-box and definitely ascertained whether he admitted or denied such orders having been issued. It is quite within the bonds of possibility that if Gaya Prasad were sent for now and examined as a witness in the case, he might on oath affirm that there were such orders in existence and why they had been issued. There is nothing on the record on which beyond probability a Court should infer that no such orders had ever been given and that there were no reasons for issuing such orders. Again, there was more than one opportunity in which the prosecution might have asked the witnesses produced by them on these points which must have been well known. But no such question was asked. It is a matter of experience which cannot be overlooked that procedure regarding deposit of moneys and dealing with moneys in private firms is often very lax and loose. Of course whether Gaya Prasad's evidence was to be believed could only be arrived at when his evidence were on the record and was open to consideration. He was not sent for in the present case, and it is contended that it was not for the prosecution to produce him but it was for the accused to have called him in defence. I have carefully considered this point. Looking to the present case where there is no evidence before me that the accused disposed of this money or attempted to dispose of it in some way other than that in which he was bound to do, the burden, in my opinion, still rested upon the prosecution to place before the Court beyond reasonable doubt that the evidence was sufficient to be conclusive proof that criminal breach of trust had been committed. As I said at the beginning of this judgment, the prosecution relied upon the bare retention which has been challenged by the defence, the latter having given a certain amount of evidence to show that the retention was not for sixteen months as alleged by the prosecution, coupled with the weakness of the explanation given by the accused. I think there is room for doubt, and the accused must be given the benefit of that doubt. I accordingly set aside the conviction and sentence. The fine, if paid, will be refunded. The bail-bond is discharged.

*Conviction set aside.*

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PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE NO. 232 OF 1917.

May 28, 1917.

*Present*:—Mr. Justice Chevis.

MEWA SINGH—CONVICT—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 457—Burglary—Accused found along with others in possession of stolen property—Benefit of doubt.*

The accused was charged with an offence under section 457, Indian Penal Code. The evidence showed that two burglaries were committed in village B., that tracks of four men were followed from a place near the village, but later on they changed into the tracks of a mare and two men. A short distance further on the mare's tracks went off in one direction and the men's tracks were followed to village D., when the accused was arrested along with certain others in possession of certain bundles which were found to contain the stolen property:

*Held*, that the mere fact that the accused was with the party in village D. did not prove that he was one of the burglars and that the case against him being doubtful he was entitled to an acquittal. [p. 306, col. 2.]

Appeal from the order of the Additional Sessions Judge, Sialkot (at Gujranwala), dated the 17th February 1917, convicting the appellant.

Mr. *Zafrulla Khan* and Mian *Muhammad Sharif*, for the Appellant.

JUDGMENT.—This judgment will cover the connected appeal of Juman (Criminal Appeal No. 382 of 1917) who with Mewa Singh has been convicted in this case under section 457. By reason of previous convictions, Juman has been sentenced to ten years' rigorous imprisonment and Police surveillance after release. Mewa has been sentenced to one year's imprisonment as it is his first conviction.

The evidence clearly proves that two burglaries were committed one night in

MEWA SINGH *v.* EMPEROR.

Bhond village, and jewelry was stolen from one house and clothes, *ghee*, etc., from the other. The tracking party followed the tracks of four men from a place near the village where some half eaten melons and an earthen pot were lying. Later on the tracks altered to the tracks of a mare and two men. Later on the mare's tracks went off in one direction, and the party followed the foot tracks to Dhoda village, where some men were found seated in a garden, with some bundles. The tracking party, having got assistance, captured Buta Singh and Sardara, and (according to the evidence) Mewa Singh also, and Hari Singh went off to the *thana* and brought back the Police, but before the Police arrived Mewa Singh had escaped. In the bundles the Police found property which was identified as part of that stolen in the burglaries.

Buta Singh and Sardara were tried and convicted. Now Juman and Mewa Singh have been also tried and convicted, and both have appealed.

Juman was not found in the garden by the tracking party, but there is ample evidence that he had been in Dhoda village that morning. If he and Mewa Singh as well as Buta Singh and Sardara were all concerned in the burglaries, then it must have been their tracks which were traced from near Bhond village. But here I find a difficulty which the learned Sessions Judge seems to have overlooked. After a time the thieves got hold of a mare. Whether a fifth man brought the mare, or whether the mare had been left tethered somewhere is not clear, but the evidence of Kesar, *Sansi* (see page 75), is that when the party passed him there were four men, two riding, one of whom was Buta Singh, and two walking, one of whom was Juman. So apparently no fifth person had joined the party. Later on the mare leaves the party, and the trackers now follow the footsteps of three men into Dhoda village (see the evidence of Kheru, page 50 of the Session's record). So it appears that one of the four thieves went off elsewhere with the mare, and we have no evidence on the record, as far as I can discover, to show that the fourth man ever entered Dhoda village. So we must not assume that of a party of four men in Dhoda all four were thieves.

As regards Mewa Singh, the learned Sessions Judge has made a slip in saying that Kesar says he recognized Mewa Singh. Kesar says he recognized Buta Singh and Juman, but not the other two. Hari Singh says Kesar also named Mewa Singh, but this appears to be a bit of embroidery on Hari Singh's part.

There is plenty of evidence to show that Mewa Singh was with Juman, Sardara and Buta Singh in Dhoda village, but the only witness who swears to having seen him with the others at any other place is Roda, P. W. No. 8, who lives a mile from Bhond, and says that the evening before the burglary Juman, Buta Singh and two others came to his well. He says it was one watch after nightfall, and it was a dark night, but he professes to recognize Mewa Singh as one of the other two, though he had never seen him before. This is not at all convincing. As I have pointed out, one of the four thieves went off with the mare, and so there is no proof that more than three of the four entered Dhoda village. So the mere fact that Mewa was with the party in Dhoda is no proof that he was one of the burglars. He may have joined the other three in Dhoda village. No doubt he was caught in the garden, and was named in the first report. But of the three men caught he alone escaped before the Police arrived, and I fancy the Dodha men procured his escape because they knew he was innocent. Had the Dhoda men really interfered in force they could presumably have secured the escape of Buta Singh and Sardara as well.

I think the case as against Mewa Singh extremely doubtful and I shall accept his appeal.

As to Juman there is, I consider, ample evidence that he was with the thieves both on the way to Dhoda village and also in the village, though he was lucky enough or shrewd enough not to be caught with the others in the garden. The defence evidence is worthless. I shall dismiss his appeal.

The appeal of Mewa Singh I accept and reversing conviction and sentence I acquit him and order him to be released.

*Appeal accepted.*

EMPEROR *v.* HASHIM ALI.

ALLAHABAD HIGH COURT.

CRIMINAL (GOVERNMENT) APPEAL No. 193 OF 1917.

April 12, 1917.

*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

EMPEROR—APPLICANT

*versus*

*Mulla* HASHIM ALI—OPPOSITE PARTY.

*U. P. Municipalities Act (II of* 1916), *ss.* 2 (2), 185, 186—"*Building*", *meaning of—Notice under s.* 86, *whether necessary before conviction under s.* 185—*Erection of building after lapse of sanction—Prosecution.*

The issuing of a notice by the Board under the provisions of section 186 of the U. P. Municipalities Act is not a condition precedent to the institution of a prosecution under section 185. [p. 308, col. 2.]

In a case in which a person allows a sanction by the Municipal Board to erect a building to lapse and then proceeds to set up the building without giving fresh notice or submitting any fresh application to the Municipal Board, a prosecution for an offence against the Act is a more appropriate remedy than an order for the demolition of the building. [p. 308, cols. 1 & 2.]

A tin-roofed shed erected in front of a shop is a "shed" and also a "roofed structure" within the meaning of the definition of the word "building" in section 2, clause (2), of the Municipalities Act. [p. 308, col. 1.]

Criminal appeal by the Local Government against the acquittal order of the Special Magistrate, 2nd class, Lalitpur, dated the 14th of December 1916.

FACTS appear from the judgment.

Mr. *E. Ryves* (Government Advocate), for the Crown.—Notice under section 186 of the U. P. Municipalities Act is not a condition precedent to a prosecution under section 185 of the Act. The powers conferred on the Board by these two sections are not interdependent. It is just possible that a building may be quite unobjectionable and still it may contravene the provisions of section 185. If the view of the Magistrate is upheld it is tantamount to holding that a Municipal Board cannot prosecute for a seemingly clear breach of the law without first giving a notice to demolish a building which may otherwise be unobjectionable. In this case the Board had given sanction for the erection of the shed in question but that sanction was allowed to lapse. The erection was made after one year without notice or any fresh application to the Board.

Mr. *Sital Prasad Ghose*, for the Opposite Party, supported the judgment of the Magistrate and contended that the erection of a tin shed did not come within the definition of "building." A tin shed erected in front of a shop was a merely temporary shelter and not a permanent shed or roofed structure.

Mr. *E. Ryves* was not called upon to reply.

JUDGMENT.—This is an appeal which the Local Government have felt it their duty in the public interests to file against the order of a Special Magistrate sitting at Lalitpur, who has acquitted one Mulla Hashim Ali on a prosecution alleging against him an offence under section 185 of the Municipalities Act (Local Act II of 1916). The allegation against Hashim Ali was that he had erected a tin roofed shed in front of a certain shop, of which he was the tenant, within the limits of the Municipality of Lalitpur and that he had done this without obtaining the sanction of the Board. The case was defended upon various grounds in the Court below. It was suggested that as a matter of fact sanction had been obtained by one Chaube Chaturbhuj, the owner of the house. We have found it necessary to look into the evidence on this point. We think it is clear that on the 30th of July 1915, the Municipal Board of Lalitpur passed a resolution which had the effect of conveying to Chaube Chatarbhuj their sanction to the erection of a shed of this description on the locality in question. Under the Municipalities Act itself, as well as under the bye-laws, such a sanction would remain in force for one year. The case for the prosecution is that the building in question was erected after the expiration of one year. The accused endeavoured to prove that the erection had actually been commenced and completed on the 27th of July 1916, or just within one year. It has been necessary for us to examine the evidence on this point, but we agree with the learned Magistrate that the defence evidence is unreliable. The statement of the conservancy *darogha* is corroborated by one of his own subordinates and by the fact that he actually reported the construction of this building on the 6th of August 1916. It may be taken as a satisfactory proof that the shed had in fact been erected on the 5th of August 1916. It was also suggested in the Court below, as well as here, that the construction in ques-

tion was not a "building" within the definition contained in section 2, clause (2) of the aforesaid Act We think there can be no doubt that it was a "shed" and also a "roofed structure," within the meaning of that section. As a matter of fact Chaube Chatarbhuj had applied for sanction as already stated, but the sanction had lapsed. So far everything we have said is in agreement with the view taken by the learned Magistrate. The reason why the trial in that Court ended in an acquittal is that the learned Magistrate felt himself troubled by a curious question of law. He refers to the provisions of section 186 of the Municipalities Act, according to which the Board "may at any time," in a case like the present, by issuing a written notice, require any person in the position of Hashim Ali to demolish a building set up by him without the sanction of the Board, or in contravention of the terms of such sanction granted to him. The learned Magistrate has taken the view that, by reason of these provisions, it was absolutely necessary for the Municipal Board to issue a notice requiring Hashim Ali to demolish this building before they prosecuted him for having erected it. There is really nothing in the terms of sections 185 and 186 of the Municipalities Act to support this view. The powers conferred on the Board by these two sections are intended to be used in the alternative, according as the necessities of a particular case may require. A building may be quite unobjectionable in its nature and yet its erection without the previous sanction of the Board may be an offence against the law. To hold that a Municipal Board cannot vindicate its authority against such a breach of the law, without first ordering the demolition of an otherwise unobjectionable building, is to place a forced and illiberal construction on the Statute and would lead to consequences not desirable in the public interests. In the present case, for instance, the Municipal Board had shown that it was ready to sanction the erection of a shed on the locality in question, and had actually granted sanction for the purpose, but there had been a contravention of the law on the part of Hashim Ali, in that he had allowed that sanction to lapse and then proceeded to set up this shed without giving fresh notice or submitting any fresh application to the Municipal Board. In such circumstances as this, a prosecution for an offence against the act was a more appropriate remedy than an order for the demolition of the building. We are quite satisfied that the issuing of a notice by the Board under the provisions of section 186 of the Municipalities Act is not a condition precedent to the institution of a prosecution under section 185. The reason given by the learned Magistrate, therefore, for acquitting the accused in this case is unsatisfactory and his view of the law mistaken. We must set aside the order of acquittal, and in lieu thereof we record the conviction of Mulla Hashim Ali for an offence under section 185 of the United Provinces Municipalities Act. We think that under the circumstance it would be quite sufficient for us to sentence him to pay a fine of Rs. 5 (rupees five) and we order accordingly.

*Order set aside.*

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## PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE No. 1851 OF 1916.

April 28, 1917.

*Present*:—Mr. Justice Chevis.

KAKU—COMPLAINANT—PETITIONER

*versus*

HARNAMAN *alias* HARI DAS AND OTHERS—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), s. 145, scope of—Order of ejectment, whether competent—Magistrate, whether can decide claims to hold possession and reap crops—Irregularity—Jurisdiction—Revision—High Court, power of interference of.*

The scope of section 145 of the Criminal Procedure Code is merely a determination of actual possession for the purpose of preventing a breach of the peace pending a decision on the merits in a civil dispute. [p. 309, col. 2.]

The section does not provide for eviction by the Magistrate or for a decision by him of any claims to a right to hold possession or to reap crops. [p. 309, col. 2.]

Clause (1) of section 145 is imperative with regard to the necessity of serving an order in writing on the parties. The mere omission to record such an order gives the Chief Court power to interfere in revision. [p. 309, col. 2; p. 310, col. 1.]

Where the proceedings under section 145 of the Criminal Procedure Code are irregular and the Magistrate has acted without jurisdiction, the Chief Court can interfere in revision. [p. 310, col. 2.]

KAKU *v.* HARNAMAN.

Where the lands in question were attached to a *dera* and there being two rival claimants to the *mahantship*, each claiming to be in possession through his tenants, the Magistrate passed an order directing the men of one of the parties to leave at once and not to re-enter or interfere with the crops under penalty of a prosecution under section 188, Indian PenalCode:

*Held*, that the order was bad inasmuch as the Magistrate had neglected to come to any clear finding on the one point on which a decision was really necessary, the date of forcible possession, and had passed orders for which the section gave no authority whatever. [p. 310, col. 1.]

It is not sufficient for a Magistrate to come to a general finding that certain fields are in the possession of one party and certain others in the possession of the other and that the latter has taken wrongful and forcible possession. The date of such forcible possession must be determined and unless there is a finding that the forcible possession occurred in the case of all the fields at the same time, there must be a finding as to the date of possession with regard to each field separately. [p. 310, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Magistrate, 1st class, Ludhiana, dated the 27th September 1916, ordering the petitioner to give up possession of the fields in dispute at once.

Mr. *Nanak Chand*, Bakhshi *Tek Chand* and Munshi *Abdul Hai*, for the Petitioner.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This judgment will cover the connected Revisions Nos. 1852 and 1853 of 1916.

In the first place I note that one of the respondents Sawan Singh has not been served, and has left the country on active service. He was, however, only holding a part of the land as a tenant at-will, and his tenancy having now terminated it is unnecessary to consider him as a party.

These cases arise out of proceedings which purport to be under section 145, Criminal Procedure Code.

The lands in question are attached to a *dera* in village Rayan. The late *mahant* died in May 1915, and Hari Das and Biram Das are rival claimants to the *mahantship*. As the Magistrate relates in his order of 31st August 1916, since the *rabi* of 1916 there has been trouble, one set of men claiming to be in possession as tenants of Hari Das and another lot claiming to hold as tenants of Biram Das. The order of 3 st August 1916 deals with claims to standing crops, holding that claims by Biram Das's tenants to crops are untenable except those of Daya Singh, Attar Singh and Partap Singh who are to get the crop of certain fileds. By a later order dated 27th September 1916, the Magistrate deals with the question of possession. Apparently the Magistrate found some fields in possession of one party and some in possession of the other. The Magistrate says: "These cases should really be split up into the number of claimants for each separate piece of land, but this process would have taken a little time." So the Magistrate treats the case as a whole, and decides it in favour of Hari Das's followers, saying, "it is obvious that Biram Das's men, wherever they have gained actual possession, have done so by force." So the Magistrate passes an order that Biram Das's men are to leave the fileds at once and on no pretence to re-enter or interfere with the crops under penalty of prosecution under section 188, Indian Penal Code.

The Magistrate seems to me to have lost sight of the scope of the provisions of section 145, which briefly may be said to be merely a determination of actual possession for the purposes of preventing a breach of the peace pending a decision on the merits of the civil dispute.

The section first requires an order in writing by the Magistrate (see clause 1), which must be served on the parties (see clause 3). Then the Magistrate is required, *without reference to the merits of the rival claims*, to decide which party was in possession *at the date of the above order*, though if he finds a party was forcibly and wrongfully dispossessed within two months next before such date he may treat the party so dispossessed as in possession at such date (see clause 4). Having so decided the Magistrate is to issue an order declaring such party to be entitled to possession until evicted in due course of law, and forbidding all disturbance of such possession until such eviction.

Nowhere does the section provide for eviction by the Magistrate, or for decision by him of any claims to a right to hold possession or to reap crops.

In these cases no written order was ever passed under section 145 (1), though clause (1) is imperative on this point. I should not, however, have thought it neces-

sary to interfere on this ground alone, had I found that this was the only flaw in the proceedings, though I consider that the mere omission to record such an order gives me the power to interfere. But here I find that the Magistrate has neglected to come to any clear finding on the one point on which a decision is really required, and has instead passed orders for which the section gives no authority whatever. In such a case it is not sufficient to come to a general finding that certain fields are in possession of one party and certain fields in possession of the other and that the latter has taken wrongful and forcible possession. The date of such forcible possession must be determined, and unless there is a finding that the forcible possession occurred in the case of all the fields at the same time, there must be a finding as to date of possession with regard to each field separately. For the possession as regards one field might date back to more than two months prior to institution of these proceedings, while the reverse might be the case with regard to another field. Nowhere does the section provide for eviction. So even if there had been a proper written order passed as required by clause 1, and had the Magistrate found that Biram Das's men had taken forcible possession within two months of that order, all that he could have done would be to pass an order declaring Hari Das's men to be *entitled* to possession, and forbidding disturbance of possession of Hari Das's men. The section does *not* provide for ejecting the party wrongfully in possession and for putting in the party who is declared to be entitled to possession.

Nor does the section make any provision for the decision of any dispute as to standing crops [see *Arju Mea* v. *Arman Mea* (1).] All that the Magistrate has to do is to look to the fact of possession. He cannot usurp the functions of the Civil Courts, and determine any claims on the merits.

So the Magistrate has erred both in passing an order for possession, and also in passing an order as to who is entitled to crops.

(1) 7 C. L. J. 369; 7 Cr. L. J. 336.

The first necessary thing is to pass a written order, as required by clause (1). This gives a date on which to work. The next thing to do is to peruse the written statements, and take evidence as required by clause 4. The parties must be given due opportunity of producing evidence and all evidence produced must be recorded. This may in some cases involve time and trouble, but the provisions of the law are imperative. It appears to me that though the Magistrate has in this case taken a good deal of trouble, spending three evenings on the spot, he has taken a wrong view of the procedure required. In one place he writes: "It was imperative that one party should be turned off the land immediately to save further and more serious trouble." Later on he writes: "In the present cases I have not thought it necessary to make any lengthy enquiry, as very recently the whole matter has been enquired into in detail." As I have already said, section 145 does not provide for turning any body off from the land. And as to the matter of saving "further and more serious trouble", the remedy in such cases is provided for by the second proviso to clause 4, which authorizes the Magistrate to attach the subject of dispute pending his decision.

For the respondents it is urged that this Court has no power at all to interfere with orders passed or purporting to be passed under section 145, and that even a High Court can only do so under its Charter powers [see *Udai Bhan Partab Singh* v. *Ram Samajh* (2) and *Jhingai Singh* v. *Ram Partap* (3)]. On this point the High Courts are not all agreed, but I prefer to follow the view which this Court has always taken, *i.e.*, that where the proceedings are irregular and the Magistrate has acted without jurisdiction, this Court can interfere on revision.

I accept these applications for revision and set aside the orders of the Magistrate. This, of course, leaves it open to the Magistrate to take fresh proceedings if it should still be thought advisable to do so. It is to be hoped that if fresh proceedings are taken,

(2) 37 Ind. Cas. 308; 3 O. L. J. 546; 19 O. C. 136; 18 Cr. L. J. 100.

(3) 1 Ind. Cas. 762; 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382.

the provisions of the section will be observed and that the magisterial action will be confined to those provisions.

*Revision allowed.*

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## BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 353 OF 1916.

January 5, 1917.

*Present*:—Mr. Justice Batchelor and Mr. Justice Heaton

RASUL GULAB KADIA—ACCUSED—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Bombay Prevention of Gambling Act (Bom. Act IV of 1887), ss. 8, 6 (c)—Forfeiture, articles liable to.*

The second paragraph of section 8 of the Bombay Prevention of Gambling Act, 1887, refers back to clause (*c*) of section 6 and the articles liable to seizure and forfeiture are limited to articles of value reasonably suspected to have been used or intended to have been used for the purposes of gaming and found within the premises.

Criminal application for revision from the order of the Sessions Judge, Broach, confirming the conviction and sentence passed by the Sub-Divisional Magistrate, first class, Godhra.

Mr. *T. R. Desai*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.—We think that the convicting Magistrate's order directing the forfeiture of certain gold rings found on a water stand in this house cannot be supported under the Act and must be set aside.

The second paragraph of section 8 of the Bombay Prevention of Gambling Act, 1887, clearly refers back to clause (*c*) of section 6, and the articles liable to seizure and forfeiture are limited to articles of value reasonably suspected to have been used or intended to have been used for the purposes of gaming and found within the premises. Here there is no evidence on the record to suggest the conclusion that the gold finger rings were used or intended to be used for the purpose of gaming. Indeed such evidence as there is points to another conclusion.

The Rule must be made absolute.

*Rule made absolute.*



## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 686 OF 1916.

November 25, 1916.

*Present*:—Mr. Justice Tudball.

JAGESHAR RAI AND OTHERS—APPLICANTS

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 147, 99—Rioting—Private defence of property—Recourse to public authorities—Offence.*

*J. R.* lawfully and legally obtained possession of certain land and sowed certain crops on it. One *B. K.* in bad faith and dishonestly with a party of men went upon the land and commenced to cut the crops for the purpose of removing them or at least damaging them. Information of this was sent to *J. R.* and he in company with a band of men went straight to the spot to protect his property. A fight resulted in which very slight injuries were caused:

*Held*, that *J. R.* and his party were not guilty of rioting, inasmuch as they were acting in the defence of their property, they did not use any more violence than was absolutely necessary for the protection of the property, and they had no time to have recourse to the protection of the public authorities. [p. 312, col. 1.]

*Queen-Empress* v. *Prag Dat*, 20 A. 459: A. W. N. (1898) 117; 9 Ind. Dec. (N. S.) 654, distinguished.

Criminal revision against the order of the Sessions Judge, Gorakhpur, dated the 22nd July 1916.

Messrs. *Satya Chandra Mukerji* and *Jang Bahadur Lal*, for the Applicants.

Mr *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The five applicants have been convicted of the offence of rioting by a Magistrate who sentenced them to terms of rigorous imprisonment and fines. On appeal the learned Sessions Judge maintained the convictions but set aside the sentences of imprisonment and replaced them by sentences of fines only. The applicants urge before this Court that on the findings of fact at which both the Courts below have arrived, they were not guilty of the offence of rioting, but they acted, as they all along pleaded that they did act, in the exercise of the right of private defence and they had no time to have recourse to the protection of the public authorities. The facts are simple. Jageshar Rai lawfully and legally obtained possession of certain land and he sowed on it certain crops, *rabi* of 1915-16. One Bal Kishen in bad faith and dishonestly with a party of men went upon the land

and commenced to cut the crops for the purpose of removing them or at least damaging them. Information of this was sent to Jageshar Rai, and he in company with a band of men went straight to the spot to protect his property. A fight resulted in which, however, very slight damage was done to anybody. It was on these facts that the learned Judge has upheld the conviction of rioting. It is clear to my mind that under the circumstances of this case the convictions cannot be maintained. The very circumstances show that the applicants had no time to have recourse to the protection of the public authorities. The learned Sessions Judge suggests that they had plenty of time to go on to the Police Station and to make a report of theft. It is true that they had ample time to do that, but that would have been of very little use so far as the protection of the property was concerned. The damage and loss would have been completed before the Police could have arrived. The case cannot for a moment be compared to the reported case of *Queen-Empress* v. *Prag Dat* (1) and the other cases which are mentioned in that judgment. Furthermore, it is not a case in which the opposite party were merely ploughing up the land and preparing it for sowing. In the latter case no damage is being done, and there is ample time to have recourse to the protection of the public authorities for the enforcement of their right. In the present case, property was actually being cut and damaged. If the applicants had gone to the Police Station and returned with Police help the damage would have been completed. They clearly did not use any more violence than was absolutely necessary for the protection of the property. I, therefore, accept the application, set aside the convictions and sentences and direct that the fines, if paid, be refunded.

*Convictions quashed.*

(1) 20 A. 459; A. W. N. (1898) 117; 9 Ind. Dec. (N. S.) 654.

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 139 OF 1916.

November 23, 1916.

*Present*:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

GERIMAL SON OF HEMANMAL—ACCUSED —APPLICANT

*versus*

EMPEROR—OPPONENT.

*Criminal Procedure Code (Act V of 1898), ss. 234, 235—Charges, misjoinder of—Trial, legality of—Offences of same kind—Forgery and giving false evidence—"Same transaction," meaning of.*

Where an accused was charged at one trial with four offences, *viz.*, of having abetted an unknown person to fix a false thumb impression purporting it to be of someone else on a summons issued by a Civil Court, and of swearing false affidavits in regard to such service on different dates:

*Held*, that the offences being more than three and being neither of the same kind, nor committed in the course of the same transaction, there was a misjoinder of charges in contravention of the provisions of sections 234 and 235, Criminal Procedure Code, and that consequently the proceedings were illegal and should be quashed. [p. 313, cols. 1 & 2; p. 314, col. 1.]

The expression "same transaction" in section 235 of the Criminal Procedure Code is not applicable to cases in which the offences are separated by distinct intervals of time or place and which require to be proved by distinct evidence. [p. 313, col. 2.]

Application for revision against the order of the Sessions Judge, Sukkur.

Mr. *Lalchand Hassomal*, for the Applicants.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

### JUDGMENT.

PRATT, J. C.—The accused has been tried for four offences in regard to the service of summons on two occasions on one Bungul the defendant, against whom he had filed a suit in the Court of Sub-Judge, Rohri.

The first summons was alleged to have been served on the 21st October 1914, and the charge against the accused was that he had abetted some unknown person to fix a false thumb impression purporting to be Bungul's and thereby committed an offence of abetment of forgery under sections 465 and 109; and that he swore a false affidavit in regard to the service and thereby committed an offence under section 193, Indian Penal Code. The second summons was served on

the 22nd January 1915 and in respect of that service the prosecution alleged that the accused had committed abetment of forgery on that day and that subsequently on the 30th March 1915, he swore a false affidavit as to its service.

The Sessions Judge has acquitted the accused in respect of the two offences in regard to the summons of October 1914, but has convicted the accused in regard to the two offences of forgery and false evidence in respect of the summons served in January 1915.

The first objection raised by Mr. Lalchand in this application is that the trial is bad as there has been a misjoinder of charges in contravention of the provisions of section 234, Criminal Procedure Code. We think this objection must prevail. Under section 234 offences of the same kind up to three in number committed in the course of twelve months can be charged in the same trial. But the offences of forgery and giving false evidence are not offences of the same kind and the number is more than three so that joinder of these offences in one trial is not justified by that section.

The Public Prosecutor refers to section 235, Criminal Procedure Code, and contends that all the four offences were part of the same transaction or that even if the offences in regard to the two summonses be regarded as two separate transactions, yet the joinder of charges for those separate transactions is good under section 234.

We think it quite clear, however, that section 234 refers to offences and not transactions. It does not provide that all offences committed in a year in three different transactions may be tried in one trial. We agree on this point with the decision of the Madras High Court in the case of *Kasi Viswanathan* v. *Emperor* (1).

Then as to the other ground of the Public Prosecutor's argument, can it be said that these four offences all formed part of the same transaction? This is really a question of fact which was considered at some length in the case of *Emperor* v. *Ghulam* (2). The tests stated in that case were proximity of time and continuity of purpose and action. There was a considerable interval of time, an interval of no less than three months, between the service of the two summonses. Nor do we think it can be said that the act attributed to the accused in regard to the service of the second summons is in any way a continuation of the acts which he is alleged to have committed in regard to the service of the first summons. The false service and the false affidavit alleged in regard to the first summons seems to us to be a transaction complete in itself. If the suit had not failed for want of prosecution, no further action on the part of the accused in regard to service would have been necessary. It was only when the case was struck off that it became necessary for the accused to embark on a similar line of conduct. This line of conduct is similar to that which he had adopted in regard to the first service of the summons but it cannot be said to be a continuation of it, for the first summons had been accepted as served and there was nothing further left to be done in regard to it.

We would also refer to the case of *Queen-Empress* v. *Fakirapa* (3), where it was said that the expression "same transaction" is not applicable to cases in which the offences are separated by distinct intervals of time or place and which must be proved by distinct evidence.

We are unable, therefore, to accept the contention that these four offences were committed in the course of the same transaction and can be joined at one trial under section 235, Criminal Procedure Code. That being so, the trial must be quashed for under the ruling of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (4) any such defect amounts to more than an irregularity.

It only remains for consideration whether the case is one in which we should direct a new trial. Under the circumstances of the case we do not think it necessary to adopt this course. The fact that the accused pointed out Bungul to the bailiff on the

(1) 30 M. 328; 17 M. L. J. 141; 2 M. L. T. 177; 5 Cr. L. J. 341.

(2) 1 S. L. R. 73; 8 Cr. L. J. 191.
(3) 15 B. 491; 8 Ind. Dec. (N. S.) 333.
(4) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271 (P. C.).

second occasion rests solely on the testimony of the bailiff himself. Then again as to the affidavit of the 30th, there are many discrepancies between the facts stated in the affidavit of the 30th March and the actual facts of the service on the 27th of January. It has been suggested that these discrepancies are due to mistakes made by the deponent, but if the deponent had a guilty intention he would have been overcautious to make his deposition agree with the facts.

We accordingly reverse the conviction and sentence and make no order as to trial.

HAYWARD, A. J. C.—I concur. There were more than three offences dealt with at the trial, namely, the four offences of abetment of forgery and false evidence in respect of the summons of October and again of abetment of forgery and false evidence in respect of the summons of January. On this account also the trial could not be justified under the provisions of section 234, Criminal Procedure Code. There does not appear to be any authority for holding that the word "offences" used in that section was intended to include groups of offences forming part of the same transactions. The trial could not, therefore, in that view be justified either under section 235, Criminal Procedure Code, nor does there seem sufficient ground for holding that the four offences formed part of one single transaction. Whether they did or not is a question of fact and that question in these particular circumstances ought, in my opinion, to be decided in the negative. The trial could not, therefore, in any view of the case be justified under section 235, Criminal Procedure Code. The result must, therefore, be that the conviction must be set aside. There is the less regret for this conclusion as upon the merits there would not appear to me to be a particularly strong case. The only evidence in respect of the offence of abetment of forgery was that of the bailiff, and in respect of the offence of false evidence the evidence of the bailiff did not agree in material points with the statements in the suspected affidavit of the accused. There would appear to me, therefore, to be no sufficient ground for ordering a re trial under the discretion vested in us under section 439 of the Criminal Procedure Code.

*Conviction set aside.*

## ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 587 OF 1916.

November 17, 1916.

*Present*:—Justice Sir George Knox, KT.

RANGPAL AND OTHERS—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898)*, ss. 54 (1), 537—*Arrest without warrant—Arrest without notifying substance of warrant—Omission, effect of—Penal Code (Act XLV of 1860)*, ss. 147, 149, 333.

The omission to notify the person arrested of the order for his arrest is an irregularity covered by section 537 of the Criminal Procedure Code. [p. 315, col. 2.]

The writing out of a warrant or an order for arrest when the person to be arrested comes within the first clause of section 54 of the Criminal Procedure Code, is a superfluous act but cannot be considered illegal. [p. 315, col. 1.]

Criminal appeal from an order of the Sessions Judge, Ghazipur, dated the 14th July 1916.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *L. M. Banerji* (Government Pleader), for the Crown.

JUDGMENT.—This appeal is presented by nine persons who have been convicted of offences under section 147 and section 333 read with section 149, Indian Penal Code; for the offence of riot, they have each of them been sentenced to three months' rigorous imprisonment, and for the offence under section 333 read with section 149, Indian Penal Code, they have been sentenced each of them to two years' rigorous imprisonment. The sentences are by the order to run concurrently. The facts found by the learned Sessions Judge with the concurrence of the assessors are as follows:—Two persons Raj Man and Bisheshar for whose arrest warrants were out were arrested by the Police and were on their way to the Police Station. Saran, one of the convict appellants, raised an alarm to the effect that his sons were being removed by the Police and called for a rescue party. Some 50 people more or less assembled armed with *lathis* and surrounded the Police. Under Saran's directions an assault was committed upon the Police, a party consisting of a *naib daroga*, constables and *chowkidars*. Raj Man and Bisheshar got released. They also began to use *lathis*. The learned Judge says that there is no doubt about the identification of the nine accused before him as persons who took part in this riot and rescue. The Police received a number

of injuries and one constable received grievous hurt as his thumb was broken. A good deal of time was taken up in arguing the question whether the arrest in the present case was a legal or illegal arrest. It was contended that it was an illegal arrest, inasmuch as (1) the warrants or orders for arrest were illegal, (2) the substance of the warrants or orders was not notified to the persons arrested before they were arrested or at the time of their arrest, (3) that in consequence of these irregularities the Police cannot be held to have been assaulted while in execution of their duty as Police Officers. None of these pleas appear to me to be entitled to weight. The orders for arrest have been read over to me. They were within the power of the officer who gave them. He was not, it is true, an officer in charge of the Police Station, but he was an officer superior in rank and had the same powers as the officer in charge of the Police Station. In the present case one may go further and question whether there was any necessity for any order. The persons arrested came within the first clause of section 54, Criminal Procedure Code, and they might have been arrested without an order from the Magistrate and without a warrant. The writing out of a warrant or an order for arrest was a superfluous act, and because it was a superfluous act, it cannot be considered to be illegal. Some argument was addressed to me to the effect that the prosecution had not proved that the injury to Ram Lachman Singh was an injury caused at the time of the assault upon the Police and in furtherance of the common object of the unlawful assembly, which was the rescue of the two men Raj Man and Bisheshar. So far as I know, and no evidence to the contrary has been read to me, there was no separate assault other than the assault which I have set out as committed upon the Police. It was a fair inference for the learned Sessions Judge to draw in the absence of such evidence that the injury was caused in the scuffle which then took place. If the intention of the defence was to make an interval of time and to raise a doubt whether the injury might not have been caused before such interval or after such interval, they should have drawn attention to the fact in cross-examination. I have heard no cross-examination pointing to that result.

There is a plea taken to the effect that the order for arrest was not shown to Raj Man and Bisheshar which in the course of the argument whittled down to the plea that the substance of the order was not notified to those two men. Even if it were not notified, I am not prepared to hold that that was an omission which could not be covered by section 537 of the Code of Criminal Procedure. I looked and asked when this point was first raised in order to arrive at a decision I was referred to nothing earlier than the Sessions trial. I examined, however, the statements made by the accused before the Committing Magistrate, and in none of those statements did I find any question raised on this point.

The pleas 5, 6, and 7 were not directly argued before me, and no particular stress was laid upon them.

There was a plea that section 333, Indian Penal Code, has no application and that the offence came under section 334, Indian Penal Code. Section 334 is in no way applicable. There was no grave and sudden provocation within the meaning of that expression.

Now comes the question of sentence. What are the facts? A village of Ahirs, and the Ahirs deliberately attacked a large body of Police who were carrying out their duty as public servants. It was a grave offence upon the law, and I agree with the learned Sessions Judge that it called for sentence. Possibly the sentence might have been altered with advantage in the direction of strong security for keeping the peace; but that was not done, and I leave that alone. I take the sentences as they stand, and I think they are not one whit too severe under the circumstances of the case. The appeals are dismissed.

*Appeal dismissed.*

*In re* FAREDOON COWASJI PARBHU.

BOMBAY HIGH COURT.
CRIMINAL APPLICATION FOR REVISION No. 356 OF 1916.
February 14, 1917.
*Present*:—Mr. Justice Batchelor and Mr. Justice Shah.
*In re* FAREDOON COWASJI PARBHU —APPLICANTS

*Criminal Procedure Code (Act V of 1898), s. 439—Acquittal, petition against—Revision—High Court, power of interference of—Jurisdiction.*

A High Court has jurisdiction to interfere on revision with an acquittal, but it should exercise this jurisdiction sparingly, and only where it is urgently demanded in the interests of public justice. [p. 316, col. 2.]

*Faujdar Thakur* v. *Kasi Choudhuri*, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122, relied upon.

By a long established practice of the Bombay High Court, revisional applications against orders of acquittal are not entertained from private petitioners except on some very broad ground of the exceptional requirements of public justice. [p. 316, col. 2]

Criminal application for revision from an order of acquittal passed by the Acting Chief Presidency Magistrate, Bombay, in Case No. 47815 of 1916.

Mr. *Setalvad*, for the Appellants.
Mr. *Jinnah*, for the Opponents.

JUDGMENT.

BATCHELOR, J.—The present petitioners have applied to this Court in revision against an order made by the learned Chief Presidency Magistrate acquitting the opponents, who in the Magistrate's Court had been charged by the petitioners with infringement of the petitioners' copyright in certain calendars under section 7 of the Copyright Act, III of 1914. The sole ground upon which the learned Magistrate has acquitted the opponents is that there was no copyright in the calendars in question, because these calendars had not been registered under Act XX of 1847. It is contended by Mr. Setalvad that that view of the learned Magistrate was erroneous in law. For the purpose of the present argument I will assume that the learned Counsel's position upon this point is indisputable. Upon that assumption we have still to consider whether this Court in the proper exercise of its discretion ought to interfere with this order of acquittal.

Under the law the sole power of appealing against acquitta's is vested in the Government. Substantially this petition does not materially differ from a petition of appeal against an acquittal. By the long established practice of this Court revisional applications against orders of acquittal are not entertained from private petitioners, except it be on some very broad ground of the exceptional requirements of public justice. This rule of practice rests on public grounds of great importance, and so far as can be discovered, has never been departed from by this Court except in two isolated cases; both those cases were cases where the applicant in revision was not a private individual but a Municipality, *i.e.*, a public body, so that the Court cannot be said to have broken in upon the principle of discouraging attempts by private persons to obtain the reversal of orders of acquittal. The whole question of the High Court's interference in revision with orders of acquittal was recently considered by the Calcutta High Court in *Faujdar Thakur* v. *Kasi Choudhuri* (1), where the practice of all the High Courts was passed in review by Sir Lawrence Jenkins, C. J. There was a difference of opinion between the two Judges who at first heard the application, but ultimately Sir Lawrence Jenkins's view prevailed. The learned Chief Justice, after considering the history of the decisions upon this point, concluded by saying:—

"As I have already indicated, I am not prepared to say the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly, and only where it is urgently demanded in the interests of public justice. This view does not leave an aggrieved complainant without remedy: it would always be open to him to move the Government to appeal under section 417, and this appears to me the course that should be followed."

I am of opinion that this pronouncement of the Chief Justice should be followed, as correctly interpreting both the provisions of the law and the established practice of this Court. In the case before us if this principle is to be applied, it is clear that the petition must be rejected, for there is no matter of general public importance involved,

(1) 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

nor are the interests of public justice closely concerned. Moreover, the petitioners, if they have suffered any wrong by the acts of the opponents, have their opportunity of obtaining full redress in the Civil Courts.

The Rule must be discharged.

SHAH, J.—I agree.

*Rule discharged.*

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## ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 104 OF 1917.

February 15, 1917.

*Present*:—Justice Sir P. C. Banerji, KT.

EMPEROR—APPLICANT

*versus*

MUHAMMAD YUSUF - OPPOSITE PARTY.

*U. P. Municipalities Act (II of 1916), ss. 209, 210—"Structure", meaning of—Fixing portable plank over public drain, whether structure—Offence.*

The word "structure", as used in section 209 of the U. P. Municipalities Act, means a structure of a permanent character. Therefore, the fixing of a portable plank over a public drain cannot be deemed to be the erection of a structure within the meaning of that section, and does not amount to an offence under section 210 of the Act.

*Kamta Nath* v. *Municipal Board of Allahabad*, 28 A. 199; A. W. N. (1905) 252; 2 A. L. J. 676; 2 Cr. L. J. 793, followed.

Criminal reference made by the Sessions Judge, Saharanpur, dated the 19th January 1917.

JUDGMENT.—Muhammad Yusuf, the accused in this case, and Janki Das, the accused in the connected case No. 106 of 1917, have been convicted under section 210 of Act II of 1916, the United Provinces Municipalities Act, and each of them has been sentenced to a small fine. The two cases have been submitted by the learned Sessions Judge with the recommendation that the convictions and sentences should be set aside. Muhammad Yusuf and Janki Das own shops abutting on a public road within the Municipal limits of Dehra Dun. There is a drain in front of their shops which was apparently built at their expense. The drain is at the edge of the public road. Culverts have been built over the drain but the present dispute does not relate to the culverts. The charge against Muhammad Yusaf was that he had placed wooden planks in front of his shop supporting them by the culverts on one side and at in canister on the other. Janki Das was prosecuted for putting planks over the space between two culverts, so as to cover the drain. The learned Sessions Judge finds "in both cases the erections, if they can be so denominated, are temporary ones. Neither the planks nor Muhammad Yusaf's canister are fixtures; all are placed in sites in the mornings and removed when the shops are closed in the evenings. Presumably they can be and are also removed if and when it is desired to clean the drain, if it is necessary to remove them in order to perform this operation." Section 210 of the United Provinces Municipalities Act provides that any person erecting or re-erecting any such projection or structure as is referred to in section 209 without the permission thereby required or in contravention of any permission given thereunder shall be liable on conviction to a fine which may extend to two hundred and fifty rupees. Clause (*b*) of sub-section (1) to section 209, which is the clause applicable to the present case, refers "to the erection or re-erection of any projection or structure so as to overhang, project into, or encroach on or over a drain in a street." There is no question of projection in this case. The question is whether the accused had "erected" any structure encroaching over a drain in a street. The learned Sessions Judge is of opinion that a structure referred to in section 209 must mean a structure of a permanent nature. It seems to me that the view taken by the learned Judge is right. The use of the words "erect or re-erect" which precede the word "structure" indicates a structure of a permanent nature. The word "structure" is not defined in the Act, but the use of the word "erect" shows, as was observed in the case of *Kamta Nath* v. *Municipal Board of Allahabad* (1), that what was meant was something of the nature of a permanent structure. It does not seem to me that in enacting section 209 the Legislature intended to place any other meaning on the word "erect" than that held in the case to which I have referred. In this view the fixing of a portable plank cannot be deemed to be the erection of a structure within the meaning of section 209 of the Act. The conviction of the accused was, therefore, in my opinion, illegal. I accordingly set it aside and direct that the fine imposed on the accused, if paid, be refunded.

*Conviction quashed.*

(1) 28 A. 199; A. W. N. (1905) 252; 2 A. L. J. 676; 2 Cr. L. J. 793.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS REVISION NO. 22 OF 1917.

May 1, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

NIBARAN CHANDRA CHATTERJI—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Altercation between Judge and Counsel, whether ground for transfer—Judge and Counsel, respective obligations of--Cross-examination—Court, interference by.*

It is for the High Court, exercising its jurisdiction under section 526 of the Criminal Procedure Code to transfer a case from one Court to another, to satisfy itself that on the facts disclosed there is a reasonable apprehension that the accused may be prejudiced and not have a fair trial. [p. 320, col. 1.]

*Dupeyron* v. *Driver*, 23 C. 495; 12 Ind. Dec. (N. s) 329; *Legal Remembrancer* v. *Bhairab Chandra Chuckerbutty*, 25 C. 727 at 733; 2 C. W. N. 65; 13 Ind. Dec. (N. s.) 476 and *Kali Charan Ghose* v. *Emperor*, 33 C. 1183 at p. 1189; 3 C. L. J. 637; 10 C. W. N. 793; 3 Cr. L. J. 477, disapproved.

*Juggan* v. *Emperor*, 22 Ind. Cas. 996; 36 A. 239; 15 Cr. L. J. 212; 12 A. L. J. 399, approved.

A quarrel or unpleasantness between the Judge and the Counsel for the accused is no ground for the transfer of a case under section 526 of the Criminal Procedure Code. [p. 319, col. 1.]

It is for the Judge, when he sees that a Counsel is harassing or browbeating a witness unduly or trying to suppress his answers, to intervene and protect the witness in the interest of justice. [p. 321, col. 1.]

Obligations of the Bench and the Bar and to each other discussed. [p. 319, col. 1.]

Criminal miscellaneous revision from the order of the District Judge, Gaya.

Messrs. *Hasan Imam*, *Hari Bushan Mukerji* and *Gour Chandra Pal*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.

ATKINSON, J.—This is an application for the transfer of this case from the Court of the Sessions Judge of Gaya to some other Sessions Court within the Province.

The accused has been charged with offences under sections 161 and 165 of the Indian Penal Code. The charge is in respect of receiving illegal gratification. In the first instance the accused was proceeded against at Ranchi. He formerly occupied the position of Superintendent of the Office of the Inspector-General of Civil Hospitals for Bihar and Orissa. At Ranchi, the proceedings advanced up to a certain stage. An application was then made to this Court for a transfer of the case from Ranchi to some other Court. Eventually the matter came up before the Chief Justice and Mr. Justice Sharfuddin, with the result that an order was made transferring the case, more or less by consent, to the Court of the Sessions Judge of Gaya.

On the 10th of April, the learned Sessions Judge of Gaya had full seisin of the hearing of this case. The accused was represented by various leading legal gentlemen, but more particularly by the distinguished Advocate of this Court, Sir Ali Imam. On the 10th of April, it is alleged now for the first time, a remark was made by the Judge to Sir Ali Imam which caused some little unpleasantness; but inasmuch as this matter has not directly or indirectly been referred to in the petition before us, we will disregard it entirely from our consideration. Matters proceeded and the learned Judge, in order to meet the request of the professional gentlemen on behalf of the accused, made a certain order that inasmuch as he would take evidence in respect of illegal gratification received by the accused outside the three charges that were preferred against him, Counsel for accused should have the opportunity of cross-examining witnesses three days after the examination-in-chief of each witness had concluded, in order that the legal advisers of the accused might not be inconvenienced and have ample time to prepare materials for cross-examination; and as far as this arrangement was concerned the learned Judge appears to have treated the accused and his Counsel with every consideration possible.

On the 16th April the cross-examination of Panna Lal by Sir Ali Imam commenced and at this stage an incident, which is much to be regretted, took place. The cross-examination continued for two whole days, and Sir Ali Imam endeavoured in the course of the cross-examination to get from this witness from whom his instructions were received with regard to the procuring of certain confidential reports. The witness claimed privilege and the learned Sessions Judge ruled that the witness was entitled to claim privilege and that he should not be called upon to answer the questions that were then

being put to him. Whereupon Sir Ali Imam is alleged to have said: "I will get it yet;" and the learned Judge seems to suggest in his note that thereafter Counsel set himself to extract from the witness in an indirect way answers to the questions for which privilege had been allowed by the learned Judge. The learned Judge styled the conduct of Sir Ali Imam in so doing as "improper". I think that the learned Judge used the word "improper" in a wrong sense; and I do not think that the learned Judge could have intended to convey any personal insult to the learned Counsel or that his conduct was in any sense morally improper. I think, however, that Judges should have great regard for the high position they occupy and to the fact that they are the administrators of law and justice; and they should be very careful not to make wrong use of words or to offer discourtesy or insult to the professional gentlemen who appear before them. But in my opinion while the obligation on the part of the Judge towards the legal profession is great, the obligations imposed on Counsel in their conduct towards the Bench is of equal importance. Counsel are members of an honourable profession and should recognize their responsibility and their duties towards the Court and to the public, and should endeavour by their conduct to prevent on all occasions unpleasantness; and should not by word or gesture provoke the Court or the Judge to offer discourtesy. If the Judge rules that a certain question should not be asked, a reasonable man actuated by a high sense of professional dignity ought to follow that ruling and act accordingly. If Counsel thinks that the ruling of the Judge is wrong, he has a remedy for having the Judge set right and no attempt should be made which would be calculated to mislead or to provoke unpleasantness between the Judge and Counsel. Nobody regards more sincerely than I do the obligation which should guide the Court in its conduct towards the legal gentlemen who appear before it; and nobody has higher regard for the rights and traditions of the legal profession than I have; but it would be wrong to encourage the idea or create the impression that a quarrel or unpleasantness between Judge and Counsel should be allowed to form the basis for an application for transfer. If a quarrel is provoked then the responsibility is upon those who do provoke the quarrel. As I have indicated above, the learned Judge wrongly used the word "improper" in regard to the conduct of Sir Ali Imam. Sir Ali Imam is a distinguished member of the legal profession of 27 years' standing and I cannot think that the learned Judge could have intended to convey that Sir Ali Imam was guilty of improper conduct in the strict technical sense. Nobody who knows Sir Ali Imam would suggest that he would be consciously guilty of conduct likely to provoke the displeasure of the Court. There has been in this case an unfortunate misunderstanding between the Judge and Counsel and I think no more. All that we are concerned with in this application, however, is to see whether in this case there is any indication upon which we could hold as reasonable men that the accused will not get a fair trial at the hands of Mr. Foster. And we are also to consider in that aspect of the case whether a transfer should reasonably be given; and whether if the accused is further tried by Mr. Foster the accused will be prejudiced. Mr. Hassan Imam in concluding his address said that he felt sure that if the accused was further tried by Mr. Foster he would not get a fair or impartial trial. What we have to ascertain is whether there is any foundation or reasonable cause for this assertion. This Court must be satisfied itself that if a transfer is not granted the prisoner may be prejudiced, and not have a fair and impartial trial. In my opinion the law on this subject laid down by the Calcutta High Court is far too wide in its general terms, *vide* the cases reported as *Dupeyron* v. *Driver* (1), *Legal Remembrancer* v. *Bhairab Chandra Chuckerbutty*(2) and *Kali Charan Ghose* v. *Emperor* (3). These cases seem to suggest that the right to a transfer is to be governed by what the accused thinks are his prospects of securing a fair trial, and not as to whether prejudice exists or not in the mind of

(1) 23 C. 495; 12 Ind. Dec. (N. S.) 329.
(2) 25 C. 727 at p. 733; 2 C. W. N. 65; 13 Ind. Dec. (N. S.) 476.
(3) 33 C. 1183 at p. 1189; 3 C. L. J. 637; 10 C. W. N. 793; 3 Cr. L. J. 477.

the Trial Court. I cannot follow that line of reasoning. It is for the High Court exercising its jurisdiction to transfer to satisfy itself that on the facts disclosed there is a reasonable apprehension that the accused may be prejudiced and not have a fair trial. This was the law laid down by Mr. Justice Knox, in a case reported as *Juggan* v. *Emperor* (4), after a full and exhaustive review of all the authorities and certainly it appears to be consonant with the general principles of law and the meaning and spirit of section 526 of the Criminal Procedure Code. Otherwise the discretion of the High Court would be fettered and controlled by the opinion of the accused.

Mr. Foster made certain observations, whereupon Sir Ali Imam thought it incumbent on him to withdraw from the case and as Sir Ali Imam was leaving Court, Mr. Foster said: "If you take my rulings in a personal manner your absence will afford me great relief." It may have been rather indiscreet language to have made use of; but I do not think that the learned Judge intended to convey a personal insult to Sir Ali Imam; but certainly to my mind it does not afford reasonable ground for transferring the case. Sir Ali Imam withdrew; but the accused had representing him, besides Sir Ali Imam, three Barristers and two Vakils, every one of whom also withdrew. I think the attitude and conduct of these gentlemen amounted to gross injustice towards their client. There had been no insult offered to the Bar in general in any way by the learned Judge. If the Bar as a whole had been insulted they would have been entitled to withdraw as a protest against the Judge's conduct. But the incidents narrated in this matter were between the Judge and Sir Ali Imam, and had nothing whatever to do with the profession as a whole. Therefore, I think that the other gentlemen who appeared for the accused were bound to safeguard the interests of their client; and that they committed a serious breach of duty in leaving their client in a helpless condition without legal assistance. The unfortunate incident between the Judge and Sir Ali Imam appears to have taken place in the morning at 8 o'clock and was all over within 20 minutes. There is on the record a note by the learned Judge of everything that took place from day to day—a very full and ample record. The accused filed a petition on the 18th, asking that the case might be postponed for a week to enable him to engage fresh legal advisers for his defence; and it is noteworthy that nowhere in the petition filed on the 18th, nor in the two petitions filed on the 19th, is there any suggestion that the accused was being unfairly treated by the learned Judge. On the contrary, if the record of the 18th is correct the accused admitted that he had been fairly treated. After Counsel had withdrawn, the accused put in a petition for the postponement of the case on the sole ground that his legal advisers having deserted him he would be obliged to engage and instruct other gentlemen. The Judge at first allowed an hour's time—that of course was not sufficient—to engage and instruct Counsel. The learned Judge recognised this and granted further time for a day, or rather 22 hours—from 11 o'clock on the 18th to 9 o'clock the following morning. On the following morning the accused again appeared without any Legal Advisers and filed a petition praying for a further postponement for three days. Mr Foster said, 'I can't give you three days' time—I have witnesses here who are public servants and come from various districts and who have been kept here for their cross-examination for more than three days—I cannot delay the case further—my order is final.' However, after further consideration the learned Judge gave the accused another day in the hope that he would be able to engage some Vakil or Counsel, of whom there are several in Gaya, to defend him. The next day when the learned Judge proceeded to take up the case he received a telegram from Mr. Hasan Imam—Mr. Hasan Imam refers to the reference in the Judge's record to the receipt of this telegram and says that the manner in which the learned Judge has recorded its receipt by him was intended to be a personal insult to him. I certainly think no such inference could be drawn from the entry in the Judge's record. The suggestion appears wholly without foundation. Mr. Hassan Imam's motive in sending the

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(4) 22 Ind. Cas. 996; 36 A. 239; 15 Cr. L. J. 212; 12 A. L. J. 399.

telegram could only have been to relieve Mr. Foster of considerable embarrassment and to warn the District Judge against taking any steps calculated to prejudice the accused. Upon receipt of Mr. Hassan Imam's telegram the learned Judge wired to the Registrar (or to the District Magistrate) to ascertain what the exact position was; and by the post arrived Mr. Coutt's letter informing him that this Court had been pleased to let notice issue to show cause why this case should not be transferred from the file of the District Judge of Gaya to the file of some other Court.

In the petition for transfer it is stated that the learned Judge should have granted the petitioner an adjournment for seven days, because under the circumstances it was justifiable to enable him to secure new legal advisers; and that the learned Judge's refusal to give an adjournment clearly showed that the Judge was prejudiced towards the accused and that he could not expect justice at his hands. This agrument seems to be untenable. To countenance it would be to reduce the administration of justice to a farce. In this connection it is right to observe that it was not the learned Judge who was unfair to the accused, but his own legal advisers who wholly abandoned him without any plea or justification. The Judge was bound to proceed with the case after a reasonable opportunity was afforded to the accused to secure legal assistance; such opportunity was given to the accused but he failed to avail himself of it, though he was on bail and free to secure the services of some of the many legal practitioners in Gaya.

A further ground for asking for a transfer is that the learned Sessions Judge interfered unnecessarily in the cross-examination of a certain witness by the accused's Counsel, and thus showed himself not to be impartial.

Now, it is for the Judge, when he sees that a Counsel is harassing or browbeating a witness unduly, or trying to suppress his answers, to intervene and protect the witness in the interest of justice. In this case the learned Judge says that he had to intervene because he thought that the witness was being unduly harassed and treated with unfairness. I have known of many worse quarrels than this between Judge and Counsel, but I have never known of a case where the fact of an altercation between the Bench and Counsel was put forward as a ground for a transfer.

I do not think that, merely because there has been this unfortunate misunderstanding between the Judge and Counsel, we should, in the exercise of our discretion, transfer this case. If we do so we might be creating an impression that every little misunderstanding, whether provoked or unprovoked, between Judge and Counsel would be a sufficient ground for transfer, although there would be no ground for a reasonable apprehension that the accused would be prejudiced. In this case I am convinced that no prejudice against the accused exists in the mind of the learned Judge; and I am satisfied that the accused has not got a reasonable apprehension that he will not receive at the hands of Mr. Foster a fair or impartial trial.

One more matter is of importance and it is referred to incidentally in the petition. Sir Ali Imam is alleged to have called Panna Lal a liar three times. Sir Ali Imam, through the petitioner, says that he merely put it to the witness that a certain statement made by the witness was false. The learned Judge, in the daily record of the proceedings, seems to have put a wrong construction upon the question put to the witness by Sir Ali Imam; and he seems to think that the Counsel called the witness a liar three times when he gave Sir Ali Imam a hostile answer to a question put. If, as the learned Judge says, it was a fact that the Counsel called the witness a liar it would be clearly the duty of the Court to intervene; but we are inclined to think that the learned Judge was wrong in putting that interpretation on Sir Ali Imam's observation. It would, in our opinion, be very regretable to think that a gentleman of the legal profession of Sir Ali Imam's standing would call a witness in open Court a liar; and we decline to accept the statement that Sir Ali Imam called the witness Panna Lal a liar. We think that what Sir Ali Imam did say was, "I put it to you that the statement made by you is untrue, that is, is not true, that it is false." However, although we think that the unfortunate incident which took place between Sir Ali Imam and Mr. Foster is much to

be regretted, we cannot say that the learned Judge has done anything which would lead us in any way to hold that he has rendered himself incapable to proceed with the trial of this case and to discharge his duties fairly or impartially. Therefore, we feel that we must refuse this application.

CHAPMAN, J.—I agree. I desire to add one or two words upon the two points on which the application for transfer is based. In respect of the first ground, which concerns the unfortunate incident which arose from a question asked by Sir Ali Imam for the purpose of obtaining from the witness information in respect of which the District Judge had previously allowed privilege, I have this to say: that while there was reason for the District Judge to complain of the question it would have been better if he had simply disallowed it. He should not have accused Sir Ali Imam of impropriety of conduct. Again, when he saw that strong feeling had been aroused, the learned Judge was indiscreet in utilising that occasion for finding fault with the manner in which the witness had been cross-examined by Sir Ali Imam on the previous day. In my opinion the Courts in this country should be more careful to show courtesy to Counsel who appear before them than Courts elsewhere. The Courts have not had experience at the Bar and do not know the difficulties under which Counsel labour in conducting their cases and how often faults are due merely to the earnestness of the Advocate in the interest of his client. I have noticed an occasional tendency in the Courts in this Province to be too ready to attribute impropriety of motive to Counsel. They sometimes fail to appreciate that an Advocate may be led in the heat of contest to indulge in conduct which he would not indulge in but for his zeal to safeguard the interests of his client. In any event judicial proceedings are better controlled by the exercise of dignity than by intemperance. So far as the refusal of the application for time is concerned, I find it impossible to say that the refusal indicates any bias in the mind of the Judge. It might have been better if the Judge had, as suggested, allowed two days time at once, inasmuch as in the end the Judge was able to adjourn the trial for that period. But it is clear that there were special reasons for refusing to adjourn the case for too long a period. In the first place there were several public servants summoned as witnesses from various districts who had been detained in Gaya for cross-examination at the request of the Counsel for the accused, and in the second place the Sessions Judge's calendar was full. In these circumstances the learned Judge felt bound to refuse to adjourn the trial. Apart from the incident with Sir Ali Imam the record shows that the learned Judge throughout showed special consideration to the interests of the accused. I am unable to hold that there was any ground for a reasonable apprehension in the mind of the accused that he was likely to be prejudiced by reason of a bias in the mind of the Judge.

In these circumstances I agree that the application for transfer should be rejected.

*Application rejected.*

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## CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 1215 OF 1916.

February 5, 1917

*Present*:- Mr. Justice Teunon and Mr. Justice Chaudhuri.

February 19, 1917

*Present*:—Mr. Justice Chitty.

AMRITA LAL BOSE AND OTHERS—ACCUSED—PETITIONERS

*versus*

THE CHAIRMAN OF THE CORPORATION OF CALCUTTA—OPPOSITE PARTY.

*Calcutta Municipal Act (III B.C. of 1899), s. 561—Bye-laws framed under Act, Nos. 83, 85, interpretation of—Persons guilty of breach of bye-law, whether punishable separately.*

Per *Curiam*, (*Teunon, J.*, dissenting.)—The breach of a bye-law of the Calcutta Corporation by several persons acting in concert is punishable under the Calcutta Municipal Act as a single offence, the individual offenders not being punishable separately. [p. 325, col. 1; p. 327, col. 2.]

The joint proprietors of a theatre are "a person" for the purposes of Bye-law No. 85 of the Calcutta Corporation, framed under the Calcutta Municipal Act. Therefore for a breach of the bye-law the proprietors are not liable to be fined separately or more than Rs. 20 in all. [p. 325, col. 1; p. 327, col. 2.]

When a theatrical performance is continued later than 1 A. M. in violation of bye law No. 83 of the Calcutta Corporation, the Calcutta Municipal Act provides a punishment for the offence and not for the individual offenders. [p. 325, col. 1; p. 327, col. 2.]

Per *Chitty, J.*—The provisions of the Indian Penal Code have no direct bearing on the question of the interpretation of a bye-law of the Calcutta Corporation. [p. 328, col. 1.]

It will be *ultra vires* of the Calcutta Corporation to frame a bye-law under the Municipal Act providing separate punishments for offenders jointly implicated in a breach of the bye-law. [p. 327, col. 2; p. 328, col. 1.]

Per *Teunon, J.*—Under section 561 of the Calcutta Municipal Act a breach of a bye-law framed by the Calcutta Corporation makes the persons jointly guilty of the breach separately liable to be punished with a fine of Rs. 20 each. [p. 324, col. 1.]

FACTS of the case appear from the following judgments of Teunon and Chaudhuri, JJ:—

TEUNON, J.—In this case the three petitioners are the co-sharer owners, and managers of a theatre known as the Star Theatre situate in Cornwallis Street in the town of Calcutta.

On the night of 3rd September 1916 the performance at this theatre was continued beyond the hour 1 A. M., the closing hour fixed by the bye-laws framed by the Corporation under section 559, sub-section 52, of the Calcutta Municipal Act, 1899. The petitioners have, therefore, been convicted of a breach of one of the aforesaid bye-laws, namely, the 83rd and under the 85th bye-law they have been sentenced, the first petitioner to pay a fine of Rs. 20 and the 2nd and 3rd petitioner each to pay a fine of Rs. 10.

It is not disputed, on the contrary it is admitted, that the petitioners acting in concert committed the breach complained of, but on their behalf it is urged that under section 561 of the Act the breach of a bye-law is an offence single (or joint and indivisible) in its nature, and that there can, therefore, be but one penalty, a fine not exceeding Rs. 20. In other words, it is contended that in so far as Bye-law No. 85 says that every person guilty of a breach may be punished with fine which may extend to Rs. 20, it has gone beyond section 561, which provides that it is the breach of a bye-law that is or may be punishable with a fine of that amount and to that extent, therefore, the bye-law is *ultra vires*.

In support of this contention the case of *Rex* v. *Clark* (1), decided by Lord Mansfield in 1777, has been cited. In the course of the argument we have also been referred to the case of *Crepps* v. *Durden* (2), which seems to have no bearing on the question now at issue and also the case of *Reg.* v. *Dean* (3) and *Reg.* v. *Littlechild* (4).

Now in each of these cases it is to be observed that the joint offenders were severally punished, and the observations of the learned Judges touching offences in which, however many the persons concerned, only one penalty attaches, must be regarded as largely in the nature of *obiter dicta*.

Two earlier cases, *King* v. *Bleasdale* (5) and *Hardyman* v. *Whitaker* (6), the latter cited in *Rex* v. *Clark* (1), appear to have been decided on the special wording of the Statute 12 Ann. c. 14, section 4.

Whether the distinction drawn or attempted to be drawn in *Rex* v. *Clark* (1) between offences single in their nature and offences several in their nature continues at the present time to be recognised in English Law may be said, I think, to be doubtful.

But, whatever the law in England, no Indian authority in support of the contention advanced on behalf of the petitioners has been cited before us, and to any mind it is fairly clear that neither the distinction referred to nor collective penalties have been recognized in Indian penal legislation.

In support of this view I should refer to the definition of the word "offence" in section 40 of the Indian Penal Code. The 2nd clause of that section makes the subsequent sections (109, 110, 112 and 114—117) regarding abetment applicable to things punishable under special or local laws; section 109 then provides that each conspirator shall be punished with the punishment provided for the offence committed in pursuance of the conspiracy.

I should next refer to the Bengal General Caluses Act, I of 1899, which, for instance, applies sections 64 and 67 of the Indian

(1) (1777) 2 Cowp. 610; 98 E. R. 1267.

(2) (1777) 2 Cowp. 640; 1 Smith's Leading Cases 651; 98 E. R. 1283.

(3) (1843) 12 M. & W. 39; 13 L. J. Ex. 33; 67 R. R. 248; 152 E. R. 1102.

(4) (1871) 6 Q. B. 293 at p. 296; 40 L. J. M. C. 137; 24 L. T. 233; 19 W. R. 748.

(5) (1792) 4 T. R. 809; 100 E. R. 1314.

(6) (1801) 2 East 573*n*; 102 E. R. 489.

Penal Code to fines imposed under bye-laws made under the Calcutta Municipal Act, III of 1899.

For these reasons and on general principles I hold that when in section 561 of the Calcutta Municipal Act it is said that a breach of a bye-law may be made punishable with fine which may extend to twenty rupees, what is provided is that the persons guilty of the breach, and in the case of breaches jointly committed each offender, may be punished to that extent.

A secondary argument was that by virtue of the definition of the word "persons" to be found in the Bengal General Clauses Act, section 3, sub-section (32), the three petitioners being joint proprietors of the theatre in question are to be regarded as one person for the purpose of the bye-law But the definition applies only when there is no repugnancy in the subject or context. In the view I take three offenders cannot be punished as one, and fine and imprisonment are not to be apportioned.

Lastly, I observe that my learned colleague has suggested that the facts have not been sufficiently investigated, but this is to go outside the scope of the Rule and beyond any suggestion made or argument advanced either at the time when the application was presented or when the Rule came on for hearing. The petitioners having pleaded guilty, further investigation of facts became unnecessary, and there has been no suggestion that the theatre was kept open otherwise than as the result of combination and agreement between all three.

In the foregoing reasons, I am of opinion that the bye-law in question is not *ultra vires* and the petitioners have been properly convicted and sentenced.

In this view this Rule should be discharged.

CHAUDHURI, J.—This Rule was issued at the instance of three petitioners calling upon the Municipal Magistrate and the Chairman of the Calcutta Corporation, to show cause why the fine imposed upon them should not be reduced to a sum not exceeding Rs. 20 in all. They are the proprietors of a theatre known as the "Star Theatre" and have been convicted and sentenced by the Municipal Magistrate under clauses 83 and 85 of the bye-laws framed under section 559 (52) of the Calcutta Municipal Act, Act III B. C. of 1899, for having on the 3rd September 1915 continued the performance at the theatre later than 1 A. M. The petitioner Amritalal Bose has been fined Rs. 20 and Hari Charan Bose and Dasu Charan Neogy, the other two petitioners, Rs. 10 each. The question before us is whether separate fines exceeding Rs. 20 in all can be imposed. The Magistrate in his explanation says, that it has not been shown that the Star Theatre is a limited liability company, that the petitioners may be partners, but do not consitute a "person" in the eye of the law. He does not think that the definition of 'persons' in the General Clauses Act X of 1897 is strictly applicable to the Calcutta Municipal Act and the bye laws thereunder. He has, however, overlooked that the Bengal General Clauses Act—Act 1 of 1899—applies, section 3, sub-section (32), of which defines "person" thus: "'Person' shall include any company or association or body of individuals, whether incorporated or not." If the petitioners constitute a partnership, incorporated or not, it comes within the definition. Bye-law No. 85 runs as follows:—"Every person guilty of a breach of any of these bye laws (referring to the bye-laws relating to theatre) shall be punishable with fine which may extend to Rs. 20." I do not think that the three petitioners can be separately punished with fine exceeding Rs. 20 in all for a breach of bye-law No. 83, which prohibits performance later than 1 A.M. Section 559 of Act III of 1899, sub-section (52), empowers the General Committee of the Municipality to make bye-laws for the regulation of theatres. Section 561 provides that in making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable with fine which may extend to Rs. 20. The penalty is, therefore, limited to Rs. 20 only. No doubt Bye-law No. 85 says "every person guilty of a breach shall be punishable." The Statute makes the *breach punishable*. I do not think that the limit which has been imposed by the Statute can be exceeded by any bye-law. The Magistrate explains that Bye-law No. 85 says: "Every person shall be punishable and not every offence is to be punished."

He has referred to the case of *Reg.* v. *Dean* (3), and says that he has followed that ruling in awarding the above punishment. It is to be noticed that the case referred to was one under section 44 of the Smuggling Prosecution Act, 3 & 4 Will. 4, c. 53, which clearly makes different persons liable. Baron Alderson points out that it is necessary to look at the Statute to see whether it was intended that every person offending should be punished. Here clearly the Statute provides that the breach shall be punishable and the bye-law thereunder must be interpreted in that light. No bye-law can extend the meaning or effect of the present Statute. Here the penalty under the Statute refers to the offence. Crimes undobtedly are several, but an offence of this character can rarely be said to be several. The "person" who is guilty of the offence are the proprietors of the theatre, not the partners individually. If each partner were held liable for the breach, the larger the number of proprietors the greater would be the penalty. I do not think it was ever intended that the fine was to be imposed in this way, a limit having been placed as to the amount by the Statute itself. In *Rex* v. *Clark* (1) Lord Mansfield enunciates the principle thus: "Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single; because though several persons may join in committing it, it still constitutes but one offence." *Rex* v. *Clark* (1) was treated as good law in *Reg.* v. *Littlechild* (4), in which Hannen, J., quoted with approval the following rule from Paley on Convictions 5th edition 262, (6th edition, page 275): "If either the penalty be imposed by the Act upon each person convicted, even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the others, in either of these cases the penalties are several." Here the Act has not imposed several penalties, and it does not seem to me that keeping the theatre open is such an offence that the guilt of one proprietor can be considered distinct from the guilt of the others. They collectively are a "person". *Crepps* v. *Durden* (2) was cited at the Bar to show that such an offence is not divisible in point of time. It relates to Sunday sales which are prohibited by 29 Car. 2, c. 7, and it was held that different sales by the same person on a Sunday are not punishable as separate offences but as one offence. A breach of Bye-law No. 85 is under the Bengal General Clauses Act, Act I of 1899, section 3, sub-section (30), an "offence" which is defined as "any act or omission made punishable by any law for the time being in force". The punishment for the offence is provided in the Municipal Act, and also in the bye-law thereunder. Section 26 of the Bengal General Clauses Act provides that sections 63 to 70 of the Indian Penal Code and the provisions of the Criminal Procedure Code relating to the issue of processes for the levy of fines apply to all fines imposed under any Bengal Act or any rule or bye-law thereunder, unless the latter contains an express provision to the contrary. Beyond that we need not go to the Penal Code. In this case we need not consider the question as to whether "abettors" as defined in the Penal Code can be held liable. The Magistrate says that the petitioners are "also managers in three different capacities of the theatre in question". There is nothing to show what part each took in the management of the theatre. It is not shown what each of them did in respect of the performance on the 3rd September. They have been separately fined, merely as proprietors. No individual default has been proved or attempted to be proved against them. They apparently admitted they were proprietors and pleaded guilty that the theatre was kept open after 1 A. M. Beyond that nothing has been proved against them. I am not prepared to give the bye-law an extended application and hold that individual members of the audience who were present on that occasion, the actors, the orchestra and the menial staff of the theatre, all who aided the performance, are liable to a fine of Rs. 20 each, under Bye-law No. 85. Take for instance Bye law No. 84, which says that the manager shall not allow any person in a state of intoxication to enter a theatre. Bye-law No. 85 equally applies to its breach, but by the introduction of the abetment sections in

the Penal Code, various other persons may be held liable. It seems to me fairly clear that it was not so intended but as I have said, it is unnecessary to deal with that question in this case. In the case of penalties we cannot adopt an oppressive interpretation. Several bye-laws have been framed under the Municipal Act for the regulation of theatres and section 85 collectively deals with penalties for their breach. The language used in it does not seem to me to be happy.

The Magistrate has referred to some earlier cases in which separate fines were imposed upon the petitioners, to which apparently they did not object. I notice that in all these cases the aggregate amount of fine imposed did not in any instance exceed Rs 20. Those cases have no value at all in considering the question before us.

In view of what I have said, I would make the Rule absolute, and direct that the fine in excess of Rs. 20, if paid, be refunded.

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The Judges being equally divided in opinion, the case was under section 429, Criminal Procedure Code, laid before Mr. Justice Chitty.

Mr. *Norton* (with him Babu *Hemendra Nath Sen*), for the Petitioners.—Section 559, sub-section 52, of the Calcutta Municipal Act empowers the Corporation to frame certain bye-laws for the regulation of theatres, etc. Section 561 of the same Act makes the breach of a bye-law punishable with fine. The petitioners are here charged with the breach of Bye-law No. 83 and the punishment for that breach is stated in Bye-law No. 85. The punishment is a fine of Rs. 20. It is the offence clearly and not the offender, whether one or more, that is made punishable by section 561 of the Act. Bye-law No. 83 says that *every person* guilty of a breach of any of the bye-laws shall be punished with fine, etc. It is wrong to hold in the circumstances of the present case that each and every one of the three petitioners is liable to a fine of Rs. 20 each. The three persons here are to be regarded as one *person*. Awarding of fine exceeding Rs. 20, as it has been done here by sentencing the petitioners to pay fines of Rs. 40, is *ultra vires* because the provisions of section 561 are clear. Here the offence is one and indivisible, it is a non-separable offence and so the punishment will be Rs. 20 only on the petitioners as one *person*. The offence cannot be severed, *Rex* v. *Clark* (1) *Crepps* v. *Durden* (2), *Reg.* v. *Dean* (3) and *Reg.* v. *Showdar Ghenar* (7). The intention of the Statute is that every offence is to be punished and not every offender.

The petitioners are joint proprietors of the theatre and as such they constitute one *person* as contemplated by the Bengal General Clauses Act, 1899. Section 64 of the Indian Penal Code has no reference to the case in point.

Mr. *Langford James* (with him Babu *Manmathanath Mookerjee*), for the Corporation.—The wording of the Statute is clear and it is this,—Every person guilty of a breach of any of these bye-laws shall be punishable, etc., *vide*. Bye-law No. 85. So as a logical corollary, each of the three petitioners is liable to pay the fines inflicted on them. To say that they constitute *one person* is to stretch the meaning. Moreover, it has not been proved that there three form a limited liability company; each one of them is entrusted with different functions. The bye-law contemplates punishing the offender for the breach, *viz.*, continuing the theatre beyond 1 A. M. The cases cited by Mr. Norton do not lay down any proposition as to whether the offence here is inseparable and single or can be severed, and the remarks made there are in the nature of *obiter dicta* and so they must not guide your Lordships. Indian penal legislation does not recognise any distinction between single or several offences and the other side has not cited any Indian authority. Refers to section 40 of the Indian Penal Code and section 26 of Act I of 1899. Bye-law No. 85 says that every person shall be punishable and not every offence is to be punished.

JUDGMENT.—In this case a Rule was issued at the instance of the three petitioners Amritalal Bose, Hari Prasad Bose and Dasu Charan Neogi, calling on the Municipal Magistrate and the Chairman of the Corporation to show cause why the sentences

(7) 7 B. H. C. R. Cr. 39.

imposed on the three petitioners should not be modified and reduced to a sum not exceeding Rs. 20 in all. The grounds were (1) that Bye-law No. 85 does not empower the Magistrate to impose a fine of more than Rs. 20 for a breach thereof, and (2) that the petitioners being joint partners and owners of the Star Theatre were a "person" within the meaning of Bye-law No. 85 and thus not liable to be fined separately or more than Rs. 20 in all. The learned Judges who heard the Rule having differed in opinion, the case has been laid before me for my opinion under section 429, Criminal Procedure Code. The three petitioners are the joint proprietors of the Star Theatre in Cornwallis Street. On the night of 3rd September 1916, the performance at that theatre was continued beyond 1 A M. The three petitioners were summoned for having committed a breach of Bye-law No. 83 and the second petitioner appeared and admitted the offence. The Municipal Magistrate thereupon fined the three petitioners Rs. 20, Rs. 10 and Rs. 10 respectively. The only question is whether the imposition of such penalties was authorised by law.

Section 559 of the Calcutta Municipal Act, 1899, provides that the General Committee may make bye-laws, (*inter alia*), (52) for the regulation of theatres and other places of public resort, recreation or amusement.

By section 561, in making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable (*a*) with fine which may extend to twenty rupees, and, in case of a continuing breach, with fine which may extend to ten rupees for every day during which the breach continues after conviction for the first breach.

By bye-laws made under section 559, for the regulation of theatres, etc., it was provided, (*inter alia*), (83) no performance shall be continued later than 1 A. M. unless with the special permission of the Chairman for any particular occasion, and (85) every person guilty of a breach of any of these bye-laws shall be punishable (*a*) with a fine which may extend to twenty rupees, etc., (following the words of section 561 above quoted).

In Paley on Summary Convictions, 6th edition, at page 275, the law is thus stated: "Though several offenders may be (as it seems) included in one conviction for offences jointly committed, it depends upon the wording of the particular Statutes applicable to each case and the quality of the offence, whether each person be liable to a distinct penalty or all collectively to but one." The determination of the question, therefore, depends upon the interpretation to be put upon the particular Statute, in this case the Calcutta Municipal Act, 1899. In *Rex* v. *Clark* (1) Lord Mansfield thus enunciated the proposition: "Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence; but where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others and each is punishable for his own crime." I am unable to agree that because in that case the offence was found to be in its nature several, this is a mere *obiter dictum*. It lays down in clear and unmistakable terms the test to be applied. So, too, the remarks of Alderson, B., in *Reg.* v. *Dean* (3): "We must look at the Statute to see whether it was intended that every person offending should be punished, or merely that every offence should be punished. The question is, whether an offence which is committed by several persons is to be visited by one penalty or each person is to be visited by a penalty." In the case before me I am clearly of opinion that the offence is single in its nature and that the Calcutta Municipal Act provides a punishment for the offence, and not for the individual offenders. The words "a breach (of a bye-law) shall be punishable" can only mean that. Nor can it have been intended that the penalty to be imposed, *i. e.*, Rs. 20 or Rs. 10 per diem, for a continuing breach, should be indefinitely multiplied in proportion to the number of persons jointly committing such breach.

If it be argued that such an intention is indicated by the use of the words: "Every person" in Bye-law No. 85, and if that was

the only possible interpretation to be put upon them, I should be inclined to hold that the bye-law was to that extent *ultra vires*. But I do not so read it. The word "person" by the definition in the Bengal Clauses Act, 1899, includes "any company, or association or body of individuals, whether incorporated or not." It would, therefore, include the three petitioners as joint proprietors of this theatre and they may properly be regarded as a "person" for the purposes of Bye-law No. 85.

In my opinion the provisions of the Indian Penal Code have no direct bearing on the present question, which is one of the interpretation of the particular Statute. No doubt some of the provisions of that Code are made applicable by the Bengal General Clauses Act, 1899, and in other ways to offences under special and local laws, such as the present. But we are not now concerned with, say, the question of abetment of the breach of a bye-law, and I am not prepared to say that a person might not be charged with such an abetment. The question of intention would then crop up, which finds no place in cases of the breach of many of the bye-laws.

So far as section 64 of the Indian Penal Code is concerned, it has been pointed out that it could not be enforced in case of such a breach of a bye law as that which we are now considering [see *Basanta Kumari Devi* v. *Corporation of Calcutta* (8)].

So far as I am aware, the principles laid down in the various English cases for the interpretation of the Statutes, to ascertain whether the offence be single or several in its nature, have not been changed in recent years. In the case of *Reg.* v. *Showdar Ghenar* (7), the question came before a Full Bench of the Bombay High Court. There Westropp, C. J., in an exhaustive judgment reviewed all the English cases, and the Court applying the same test to the Statute then before them (Regulation XXI of 1827, section 4) held that the several accused could only be liable for the one penalty. This case, which does not appear to have been cited to the Bench who heard the Rule, shows that in Bombay at least the old English decisions were accepted as sound law in 1870.

I agree, therefore, with Chaudhuri, J., in holding that the Rule must be made absolute. The conviction of the three petitioners will be upheld but the penalty imposed upon them will be one of Rs. 20 only, to be apportioned equally between them. Any excess over Rs. 20, if paid, to be refunded.

*Rule made absolute.*

(8) 11 Ind. Dec. 142; 15 C. W. N. 906.

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## ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 69 OF 1917.

May 4, 1917.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

HANSRAJ SINGH—APPLICANT

*versus*

BHAGWANA—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 476, 195—Prosecution of complainant—Sanction, form of—Court, duty of.*

Where the prosecution of a complainant is justifiable in the general public interest, it should be carefully guarded against becoming a means of oppression or revenge in the hands of individuals. [p. 329, col. 2.]

Therefore, under such circumstances an order under section 476, Criminal Procedure Code, is more appropriate than an order for sanction under section 195, Criminal Procedure Code. [p. 329, col. 2; p. 330, col. 2.]

Per *Walsh, J.*—The absence of an authority whose duty it is to decide upon and undertake prosecutions under section 211 is a flaw in the criminal procedure in this country. [p. 329, col. 2.]

There is no higher duty laid upon a Court of Law than that of strict enforcement of a strict adherence to truth. [p. 330, col. 1.]

Per *Piggott, J.*—Where one of two Judges constituting a Bench is clearly of opinion that the case under consideration is a proper one for the institution of further proceedings, it would be improper for his colleague to refuse to concur. [p. 330, cols. 1 & 2.]

Criminal miscellaneous application for sanction to prosecute the opposite party under section 194, Indian Penal Code.

Mr. *Sital Prasad Ghosh*, for the Applicant.

Mr. *G. W. Dillon*, for the Opposite Party.

JUDGMENT.

WALSH, J.—I think this case demands further enquiry and the better plan is to send it to the District Magistrate of Allahabad as "the nearest Magistrate" and on our own initiation under section 526, Criminal Procedure Code, to transfer it thence to the District Magistrate of Meerut to institute proceedings against (1) *Musammat* Bharto under section 211, Indian Penal Code, for having, in

the first report made on 15th October 1916 at the Police Station, Begamabad, laid a false charge against Hansraj Singh for the murder of Ganga Bakhsh, knowing the said charge to be false, (2) *Musammat* Bharto and Nanhua for having on the same date conspired to make such false charge and having conspired to support it by evidence which they knew to be false, (3) *Musammat* Bharto for offences under section 194, Indian Penal Code, at the Court of Session, Meerut, on the 3rd of January 1917 in Trial No. 105 by falsely swearing, (*a*) "I met the *choukidar* on the road by the village. He was sitting there a little way from the village. I told him to accompany me". (*b*) "The *chowkidar* did not go to see the body". (*c*) "I do not know Balle Mukhia. I do not know any Balwant. I did not go out of the house. I did not go to Balle's house and did not see Balle that day." (*d*) "We (*i.e.*, Ganga Bakhsh and *Musammat* Bharto) had bullocks when he was called a month before (he was killed), two bullocks and a buffalo. My father-in-law had the cane sown after ploughing with his own bullocks. The field had been ploughed three or four days before my father-in-law was killed;" (4) Nankua Jat for offences under section 194, Indian Penal Code, at the time and place mentioned in paragraph (3) in respect of the following statements: (*a*) "I heard Hansraj giving abuse to Ganga Bakhsh. I saw them two 150 yards away. Hansraj began to say to Ganga Bakhsh, '*Betichod*, I told you last night to plough. Hoshyar, beat *berchod*.' Hoshyar then hit Ganga Bakhsh with a *lathi* on the head. Ganga Bakhsh fell." (*b*) "Hansraj kept saying the same thing over and over again. 'Why are you ploughing when I forbade you last night.' Hansa told Hoshyar to beat the *betichod* as he had forbidden him the night before to plough the field." (5) Bhagwana for offences under section 194, Indian Penal Code, at the time and place mentioned in paragraph (3) in respect of the following statements: (*a*) "Hansraj was giving *gali* to Ganga Bakhsh. I saw them two 150 yards away. Hansraj began to say to Ganga Bakhsh, '*Betichod*, I told you last night not to plough. Hoshyar, beat the *berchod*.' Hoshyar then hit Ganga Bakhsh with a *lathi* on the head. Ganga Bakhsh fell." (*b*) "I was going to Qadirabad to Amir *darzi* to take back some clothes. I had given them to him 4 or 5 days before. I had got other clothes made by him." (*c*) "I did not go to Balwant's house at all that day. I did not see Balwant that day." I do not think that any prosecution undertaken as the result of this order need necessarily include all the statements above set out or need be confined to such statements, if it is thought that charges ought to be framed including other statements from the same deposition of the same witness respectively. Those are matters more fit to be decided by the Court undertaking the enquiry and deliberately framing the charges. I say nothing about the merits, except that the charge on which the evidence was given was a serious one resulting in a capital sentence, which this Court quashed on account of the unsatisfactory nature of the evidence which, if untrue, would appear to have been elaborately concocted in concert. The question comes before us upon three applications primarily for sanction. Under the circumstances I would not grant sanction to prosecute if the result of doing so would be to leave the matter in the hands of the applicant.

Prosecution in this case is justifiable only in the general public interest and should be carefully guarded against becoming a means of oppression or revenge in the hands of individuals. Our attention was drawn to the provisions of section 476, Criminal Procedure Code, as a means of avoiding this contingency. It is on this ground that I think it wise to make an order under that section rather than grant the application in the form in which it is primarily made. On the general question, I recognise that there may be circumstances which justify a Court in refusing to take action under either section. These are considerations which in my judgment are really more fit for executive action than for a judicial Tribunal. Whether the evidence is sufficient to secure the conviction, whether the prosecution is able to present a case with sufficient substance in it to justify its continuance to a hearing, whether the complaint is made with an indirect motive, whether the prosecution may result in terrifying witnesses from coming forward at all in the interests of justice, are matters really for departmental decision. It seems to me that the absence of an authority whose duty it is to decide upon and undertake prosecutions of this kind, is a flaw in the criminal procedure of this country. I cannot sitting

here allow myself to condone what seems to be a case of perjury even when apparently committed in the supposed vindication of the law. A judicial Tribunal cannot commit itself to the proposition that the end justifies the means. It seems to me more injurious that a possibly innocent man should be hanged upon perjured evidence than that a possibly guilty one should escape punishment or even reap some advantage from the corrupt conduct of his enemies. Theoratically there is no higher duty laid upon a Court of Law than that of strict enforcing of a strict adherence to truth.

PIGGOTT, J.—I feel bound to add a few words in order to explain my position in this matter. It has never been my practice to wait for an application from any person to move me to exercise the powers conferred upon Courts of Justice by section 476 of the Code of Criminal Procedure in respect of the offences committed before such Courts or brought under their notice in the course of a judicial proceeding. If I think at the time of my order disposing of the judicial proceeding, whatever it may be, that the interests of justice require action to be taken under the section above mentioned, I have invariably taken such action. When disposing of the appeal of Hansraj Singh, I did not at the time think that it was advisable to institute proceedings against any of the witnesses for the prosecution. So far as my experience goes, it is an exceptionally strong step for an Appellate Court to direct a prosecution in respect of evidence which has been believed by the Court which heard it. I cannot say that I am satisfied now that the interests of justice require or will be served by the order in which I propose to concur. The application before us, however, was in the alternative asking either for an order of sanction under section 195, Criminal Procedure Code, or for an order under section 476 of the same Code directing an enquiry or trial. An application for sanction merely asks the Court to remove in its discretion a bar which the Legislature has seen fit to impose upon the institution of proceedings in respect of certain classes of offences. When one of two Judges constituting a Bench of this Court is clearly of opinion that the case under consideration is a proper one for the institution of further proceedings, I think it would be improper for his colleague to refuse to concur. I should have found it impossible, therefore, to withhold my concurrence if my learned colleague had desired merely to grant the sanction applied for under section 195, Criminal Procedure Code. Under the circumstances of this case we were both agreed that an order under section 476, Criminal Procedure Code, was more appropriate than a mere order of sanction to prosecute. I have, therefore, thought it right to concur in the order proposed and I do so accordingly.

*Order accordingly.*

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PATNA HIGH COURT.

CRIMINAL REVISION No. 140 OF 1917.

April 26, 1917.

*Present*:—Mr. Justice Mullick.

*Mahanth* KRISHNA DEYAL GIR AND ANOTHER—1ST PARTY—PETITIONERS

*versus*

*Sheikh* NIRMALI AND ANOTHER—2ND PARTY —OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s.* 145 (6) —"*Due course of law*," *meaning of.*

The phrase "due course of law" in section 145 (6) of the Criminal Procedure Code does not necessarily mean a decree of a Civil Court, but an order which evicts a party must either be an order of a Civil Court or of a Court acting under statutory authority. In the latter case, there must be a clear indication, express or implied in the terms of the Statute itself, to show that the order has the effect of a decree. [p. 331, col. 2.]

*Leo. Moore* v. *Monoranjan Guha*, 12 C. W. N. 696; 7 C. L. J. 547, followed.

**Criminal revision against the order of the Sub-Divisinal Magistrate, Gaya, dated 22nd February 1917.**

Sir *Ali Imam* (with him Messrs. *P. C. Manuk*, *S. N. Palit*, *Kailash Pati* and *Profulla Kumar Bose*), for the Appellants.

Mr. *Abanibhushan Murkherji*, for the Respondents.

JUDGMENT. - The first party in these proceedings is a person who claims through the *Mahanth* of Budh Gaya, and the second party is a person who claims through Irshad Ali Khan by purchase.

It is admitted that the *Mahanth* is the proprietor in possession of 13 annas

(thirteen annas) of *Mouza* Jaigir, which is the village in dispute, and that in 1889 he became an usufructuary mortgagee of the remaining 3 annas (three annas) and that on the 29th of April 1916 there was a proceeding under section 145, Criminal Procedure Code, between the first party and second party with the result that the first party, was confirmed in possession of the whole of the disputed land. Then at or about the month of July 1916 the second party deposited in the Civil Court, purporting to act under section 83 of the Transfer of Property Act, the amount of the *zarpeshgi*, but the *Mahanth* declined to accept the deposit and that matter is still in dispute. It also appears that a litigation is going on about the *Mahanth's* title by purchase to an one anna odd share of the three annas which the second party claim.

On the 27th of July 1916 the Settlement Officer made an order directing that the second party should be recorded as proprietors in possession of the three-annas share and that the entry in favour of the first party as usufructuary mortgagee should be cancelled. There were then disputes between the parties and a temporary injunction under section 144, Criminal Procedure Code, was issued by the Magistrate on both sides.

Finally on the 2nd of February 1917 the Police reported that the second party was wrongfully interfering with the possession of the first party and that action under section 107, Criminal Procedure Code, should be taken against them. The Sub-Divisional Magistrate of Gaya, however, declined to take action under section 107, Criminal Procedure Code, and decided to take action under section 145, Criminal Procedure Code. The present application is made by the first party on the ground that the learned Sub-Divisional Magistrate had no jurisdiction to take fresh proceedings under section 145, Criminal Procedure Code, while the proceeding of the 29th of April 1916 declaring the possession of the first party remained in force.

Now that proceeding directed that the first party was to be maintained in possession till evicted by due course of law. The question is, has the first party been evicted by due course of law.

The learned Vakil for the second party contends that the Settlement Officer's order amounts to an eviction of the first party by due course of law and he relies upon *Leo. Morre* v. *Monoranjan Guha* (1).

It my be admitted that due course of law does not necessarily mean a decree of the Civil Court, but an order which evicts the first party must be either an order of a Civil Court or of a Court acting under statutory authority. In the latter case, there must be a clear indication, express or implied in the terms of the Statute itself, to show that the order has the effect of a decree.

Now here, what was the nature of the Settlement Officer's order? The Settlement Officer's order created no rights. He had only the power to record possession. The record was only a rebuttable piece of evidence and there is no statutory authority by which it can be inferred that such a record has the effect of evicting a person from any property. It is quite clear to my mind that the Settlement Officer had no power to evict the first party by his order.

Let us next look at the Settlement Officer's entry as a piece of evidence. It is contended that upon the entry itself it must be presumed that the second party had legal possession at the time that the entry was made.

It is quite clear, however, from the judgment of the learned Settlement Officer himself that the only ground for cancelling the entry in favour of the first party and substituting an entry in favour of the second party was that the second party had deposited in Court the amount of the usufructuary mortgage. Apparently the Settlement Officer thought that this was sufficient to transfer legal possession and that title passed automatically from the first party to the second party. This, however, was a totally erroneous conception of the law and where, as in this case, the first party does not admit the validity of the deposit, no inference as to the passing of title can be made. The Settlement

(1) 12 C. W. N. 696; 7 C. L. J. 547.

Officer's proceedings as evidence rebut themselves and it is quite clear that the entry was incorrect.

It is also further clear that the learned Sub-Divisional Magistrate had only the Police report as a basis for action and as the Police themselves reported that the first party was in possession and had continued in possession since the order under section 145, Criminal Procedure Code, of the 29th of April 1916, the Settlement Officer's finding, if any such finding can be inferred, to the effect that possession had passed from the first party to the second party, was totally without evidence.

It has been urged that perhaps possession passed by consent, but this is negatived by the relations of parties and the Police report.

Then it is urged that the second party did in fact collect some rents from the tenants after depositing the *zarpeshgi* money. If that was so, that was an act of trespass. So long as the order under section 145, Criminal Procedure Code, remains in force and effect, such an act of trespass would not throw the burden of proving possession upon the first party again.

Therefore, on a review of all the circumstances, it is quite clear that the first party have neither been evicted in due course of law, nor surrendered possession amicably; and that upon the evidence which was before the learned Sub-Divisional Magistrate, the proceeding under section 145 made on the 29th of April 1916 was still in force and effect; and if that was so, the learned Sub-Divisional Magistrate had no jurisdiction to institute fresh section 145 proceedings between the same parties. The proper course was to take proceedings under section 107, Criminal Procedure Code, against the second party, if he thought that the second party was wrongfully disturbing the possession of the first party. It is not contemplated by the law that a successful party in a proceeding under section 145 should be harassed by repeated proceedings under the same section at the instance of the unsuccessful party.

The order of the learned Sub-Divisional Magistrate, being in my opinion without jurisdiction, is set aside.

*Revision accepted.*

## ALLAHABAD HIGH COURT.

### CRIMINAL REFERENCE No. 367 OF 1917.

May 13, 1917.

*Present*:—Mr. Justice Piggott.

BHOLA AND OTHERS—APPLICANTS

*versus*

EMPEROR THROUGH NIHAL TAGA—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 439—Appealable and non-appealable sentences—Appeal—Conviction set aside—Sessions Judge, duty of—Revision—High Court, power of.*

If at one and the same trial an appealable sentence is passed against one or more accused and non-appealable sentences are passed against others and the Sessions Judge, hearing the case on the merits on the appeals of those convicts who had a right of appeal, comes to the conclusion that the convictions are bad as against all the accused persons, he should consider it his duty to refer to the High Court the case of those persons against whom non-appealable sentences were passed, and the matter should then be dealt with by the High Court under section 439 of the Criminal Procedure Code, 1898. [p. 333, col. 1.]

Criminal reference by the Sessions Judge, Meerut, dated the 3rd of May 1917.

JUDGMENT.—This was a case in which eleven persons were jointly tried before a Magistrate of the first class in respect of offences charged under section 409 and section 424 of the Indian Penal Code. Three men were convicted under the former of these sections and received appealable sentences, the remaining eight, Bhola and others, being convicted on a charge under section 424 of the Indian Penal Code, were sentenced to fine only. The three first mentioned appealed to the Sessions Court, and the learned Sessions Judge, in a carefully reasoned judgment, has accepted their appeal on the facts. He has accordingly set aside the convictions and sentences against these three men and has acquitted them and ordered their release. The case of the eight men against whom unappealable sentences were passed has been referred to this Court. As the Code of Criminal Procedure at present stands, there is room for controversy as to whether in a case like the present an appeal from those accused persons in respect of whom the sentence passed was individually unappealable is barred by the provisions of section 413 of that Code. I take this opportunity of stating that, although I have myself expressed and acted upon the view that the provisions of section 413 aforesaid do not operate so as to take away the right of appeal, which would othar-

wise be conferred, in any case tried by a Magistrate of the first class, to the Court of Session by section 408. I find that this view has not been generally accepted in this Court and has been expressly dissented from by the present Acting Chief Justice. I do not propose, therefore, further to insist on my own individual view in this matter. So far as I am concerned, the law may be taken as settled in accordance with what I admit to have been the prevailing practice in this Court. If, therefore, at one and the same trial, an appealable sentence is passed against one or more accused and unappealable sentences against others, and the learned Sessions Judge, hearing the case on the merits on the appeals of those convicts who had a right of appeal, comes to the conclusion that the convictions were bad as against all the persons accused, he should consider it his duty to refer to this Court the case of those persons against whom unappealable sentences were passed. The matter can then be dealt with by this Court under its general revisional jurisdiction, as provided by section 439 of the Code of Criminal Procedure. The procedure is clumsy and I hope to see it amended by a reasonable modification of the Code. At present this must be taken as the settled procedure of this Court under the Code as it stands. I have no doubt that the learned Sessions Judge was right in this case. I accept his reference and for the reasons given by him, I set aside the convictions and sentences against Bhola and each of the other seven men named in the referring order. I acquit them of the offence; charged and direct that the fines imposed upon them if paid, be refunded.

*Reference accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 112 OF 1917.

April 24, 1917.

*Present*:—Mr. Justice Mullick.

HARI PRASAD TEWARI AND OTHERS—1ST PARTY—PETITIONERS

*versus*

SEWAK DAS—2ND PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—Arbitration—Magistrate, whether can make reference—Jurisdiction.*

A Magistrate, acting under section 145 of the Criminal Procedure Code, has no jurisdiction even with the parties' consent to refer the dispute to arbitration, and to make an order in regard to the possession of the parties upon the award of the arbitrators. [p. 334, col. 2.]

Criminal revision from an order of the Magistrate, Sitamarhi, Darbhanga.

Mr. *L. N. Singh*, for the Appellants.

Mr. *Lakshmi Kanta Jha*, for the Respondent.

JUDGMENT.—The point for decision is whether a Magistrate, acting under section 145, Criminal Procedure Code, is authorized to refer a dispute to arbitration and to make an order in regard to the possession of parties upon the award of the arbitrators. The jurisdiction of the High Court to interfere in orders under section 145 Criminal Procedure Code, has been discussed by a Full Bench of this Court in *Parmessar Singh* v. *Kailaspati* (1), and it has been decided that where there has been a refusal to exercise jurisdiction or an absence of jurisdiction or an excess of jurisdiction has been exercised with material irregularity, the High Court can interfere.

Here the question is whether reference of a case to arbitrators, even though made with the consent of parties, and a decision of the case based upon the award of the arbitrators is not an illegal exercise of jurisdiction or refusal to exercise jurisdiction. It has been held in *Hamidul Haq* v. *Ataet Hossain* (2) that a Court has no jurisdiction to delegate its functions and to refer the dispute to arbitration without trying the case under section 145, Criminal Procedure Code, and that the decision of a

(1) 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1.

(2) 37 Ind. Cas. 513; 2 P. L. J. 86; 1 P. L. W. 81; 18 Cr. L. J. 145.

case on the award of the arbitrators is not a legal exercise of jurisdiction.

It is contended on behalf of the second party that there is nothing in the Criminal Procedure Code which prohibits a Magistrate to make a reference to arbitration if the parties consent to do so and that even if it is contrary to the provisions of the Code to make such a reference, the error is at most an irregularity and in no case can amount to an illegal exercise of jurisdiction.

There is, however, no authority cited in support of this argument. The learned Vakil relies, *firstly*, upon *Janki Miser* v. *Klika Miser* (3). In that case a Division Bench of the Calcutta High Court did not give any reasons for its order, but merely remarked that upon the merits of the case they declined to interfere. Stevens, J., one of the Judges, does appear to have said: "As the parties themselves had consented to an arbitration they had no right to complain in revision," but no reasons were assigned for the dictum and it must be treated as merely *obiter*. The other learned Judge, who was a member of the Bench, passed his order only upon the merits and he appears to have thought that substantial justice had been done.

The next case on which the learned Vakil relies is *Taramoni Chaudhurani* v. *Gyanendra Mohan Chaudhurani* (4). In that case Brett and Harington, JJ., of the Calcutta High Court directed that the Magistrate should take into consideration the award of the arbitrators. The learned Judges, however, refrained from saying whether the award would be legal evidence and whether the Court was bound to abide by it. On the other hand in *Banwari Lal Mukerjee* v. *Hriday Chakravarti* (5), the learned Judges of a Division Bench of the Calcutta High Court ruled that the Code does not contemplate reference to arbitration under section 145, Criminal Procedure Code, but they went on to express the opinion that the error in this respect did not perhaps amount to an illegal exercise of jurisdiction. They did not, however, pronounce any definite opinion upon the point.

(3) 6 C. W. N. cix (109).
(4) 7 C. W. N. 461.
(5) 32 C. 552; 1 C. L. J. 432; 2 Cr. L. J. 347.

To my mind the matter is perfectly clear. Under section 145, Criminal Procedure Code, the Magistrate has to make an inquiry himself and to pass the order after applying his judicial mind to the facts of the case, and to the evidence adduced by the parties. He cannot divest himself of the case by delegating the decision to arbitrators even though appointed by consent of parties. To accept the award of the arbitrators as the sole basis of the decision is to substitute the mind of the arbitrators for the mind of the Court; and that is where the refusal to exercise jurisdiction arises. A Court may always direct inquiries and call for reports and may, where such reports are evidence. take them into consideration, but an arbitration is a different matter altogether, for there the Court accepts the award of the arbitrators as the final pronouncement upon the facts. Looked at in this light, the arbitrators' award in this case was entirely without jurisdiction and its acceptance by the learned Magistrate as the only basis for his decision constitutes a refusal to exercise jurisdiction.

There are two further defects in the Magistrate's proceedings.

The so-called award had been returned by only two of the arbitrators and, therefore, it was not a complete award on which the Court should have acted.

The other point is that one member of the first party objected to the award, saying that his guardian had no right to consent to the reference. This point was not decided by the learned Magistrate.

So, even if there was jurisdiction to act on the award, there has been material irregularity in the exercise of that jurisdiction.

The question is not one of simple irregularity; in my opinion, there was a total absence of jurisdiction.

But even if the learned Magistrate's acts in making the reference at all and in accepting a defective award amount only to irregularities, then the irregularities were serious and material irregularity and entitled the first party to invoke the aid of this Court.

The order of the Magistrate will, therefore, be set aside and the proceedings

quashed. If there is still a fear of a breach of the peace the Magistrate will be at liberty to take fresh proceedings.

*Order set aside.*

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## PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 18 OF 1917.

April 25, 1917.

*Present*:—Mr. Justice Mullick.

EMPEROR—PROSECUTOR

*versus*

LALU GOPE AND OTHERS—ACCUSED.

*Penal Code (Act XLV of* 1860*)*, *s.* 424—*Mischief—Landlord and tenant*—Bhaoli danabandi *tenant, right of, to remove crop—Criminal Procedure Code (Act V of* 1898*)*, *s.* 239—*Several tenants holding separate lands of same landlord charged with mischief, whether can be tried together.*

A *bhaoli danabandi* tenant can remove the crop either to the threshing floor or to his house, provided he does so in due course of husbandary. But before he cuts his crop he must give the landlord reasonable opportunity of appraising it. [p. 335, col. 2]

Where five tenants who act in concert are charged with the offence of mischief, committed in respect of different plots in their respective possessions they can be jointly tried under section 239 of the Criminal Procedure Code. [p. 336, col. 1.]

Criminal reference made by the Sessions Judge, Gaya.

Rai *Tribhuan Nath Sahai* and Mr. *Murari Prasad*, for the Accused.

JUDGMENT.—This reference has been made by the learned Sessions Judge of Gaya and raises a somewhat interesting point of law.

The five petitioners are tenants on the *bhaoli danabandi* system. It is alleged by the prosecution that on the 10th of December 1916 the petitioners began to cut the ripe paddy from their respective holdings. The servants of the *zemindar* thereupon remonstrated on the ground that the *zemindar* had not had time to appraise the crop, but the tenants did not listen and carried away the crop according to some witnesses to their respective threshing floors and according to other witnesses to their houses.

On the 12th of December a complaint was lodged on behalf of the *zemindar* against five petitioners charging them with an offence under section 424, Indian Penal Code, that is to say committing mischief in respect of their own property in order to cause wrongful loss to the landlord.

The defence of the tenants was that the landlord had in fact appraised the crop some seven or eight days before the date of the cutting, but that defence was disbelieved with the result that the Deputy Magistrate of Gaya has convicted the accused and sentenced them to a fine of Rs. 15 each. It appears that after the crop was carried away the landlord on the 19th of December lodged an application under section 69, Bengal Tenancy Act, before the Collector asking for the appraisement of the crop. There is no evidence before me as to what was the result of that case.

The learned Vakil for the petitioner has strenuously contended that there could have been no dishonest intention on the part of the petitioners inasmuch as section 71, Bengal Tenancy Act, allows the tenants to cut and harvest the produce in due course of husbandary without any interference on the part of the landlord. He also urges that clause 4, section 71, declares how the appraisement is to be made, if the tenant removes any portion of the produce in such a manner as to prevent its due appraisement at the proper time.

Now clause 2, section, 71, expressly enacts that a tenant holding on the *bhaoli batai* system is not entitled to remove the crop from his threshing floor, and it has been held in *Kuldip Pandey* v. *Ramnath Singh* (1) that if a tenant does so remove the produce he is liable to punishment under section 424, Indian Penal Code. But it is contended that the *bhaoli danabandi* tenant is in a better position and that there is nothing to bar his removing the crop either to the threshing floor or to his house, if this is done in due course of husbandary. I accept this contention so far as it goes, but clearly it is subject to a qualification and that qualification is that before the tenant cuts his crop, he must give the landlord reasonable opportunity of appraising it.

Here the landlord gives evidence that his

(1) 35 Ind. Cas. 491; 1 P. L. J. 353; 17 Cr. L. J. 315; (1917) Pat. 71.

men remonstrate with the tenants at the time of cutting and he denies that he had any opportunity of appraising the crop. The tenants set up the case that the landlord had in fact appraised the crop earlier and that case has been disbelieved. The onus of proving in these circumstances that reasonable opportunity was given to the landlord is upon the tenants. I have gone through the evidence and there is nothing to show that the onus has been discharged.

Then it is contended that there could have been no intention to cause wrongful loss to the landlord, for the paddy was stored at the threshing floor. This is not conclusively established by the evidence and even if it had been for the landlord's purpose, such storage would have been useless unless the produce of each field had been separately ticketed so that the landlord might have been able to appraise the outturn of that field. If it had been the intention of the tenants to give reasonable opportunity to the landlord to appraise the crop, they would have stored the produce of each field in order that the landlord might have had no difficulty in knowing what was the outturn per *bigha* of the plots in question. Reading the proceedings as a whole, I have no doubt that the charge of *mala fides* against the tenants has been conclusively established.

The result, therefore, is that the reference will be disallowed and the conviction and sentence affirmed.

Another point which has been argued by the Vakil is that the trial of five tenants holding separate lands in one proceeding is contrary to law. Now that depends on whether the tenants acted in concert. If they did so act, the fact that the offence of mischief was committed in respect of different plots in the possession of different persons would be immaterial. For the purpose of the Indian Penal Code only one offence can be said to have been committed, when there is evidence of jointness and concert. In this case there is such evidence and, therefore, the procedure was not vitiated by any irregularity. Under the circumstances it was incumbent upon the accused to show that they did not act in concert and this they have not been able to do.

*Reference disallowed.*

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 81 OF 1916.

November 3, 1916.

*Present*:—Mr. Justice Walsh and Mr. Justice Stuart.

KAMESHAR DAYAL—DEFENDANT—APPELLANT

*versus*

MISRI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), s. 439—Revision—Refusal to restore application to set aside appellate decree—Appeal, whether lies.*

No appeal lies against an order refusing to restore an application to set aside an appellate decree which has been dismissed. But where there has been a serious miscarriage of justice, the High Court will admit the case on the revisional side.

First appeal from an order of the Second Additional Judge, Aligarh, dated the 14th December 1915.

Mr. *Girdhari Lal Agarwala*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—In this case we are of opinion that there is no right of appeal. The order complained of is an order, dated the 14th of December 1915, refusing to restore an application which had already been dismissed on the 26th of November, which application was to set aside an appellate decree of the 21st of August. We are of opinion that although the Court below might, in the exercise of its inherent jurisdiction, as we said yesterday, restore the application, there is no appeal against its refusal, but following what we said yesterday, if we were satisfied that there is reason to think that there has been a serious miscarriage of justice, we might have admitted the case as a revision and allowed it to be argued on that footing. We are not satisfied for many reasons that there has been a miscarriage of justice, and it is sufficient to say that the absence of the party now applying from the application of the 26th of November, which was the reason for its refusal, is to this moment unexplained. Under these circumstances the Court cannot grant a revision. The appeal must be dismissed with costs.

*Appeal dismissed.*

BASANTA KUMAR ROY *v.* SECRETARY OF STATE.

## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 1, 1917.

*Present*:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

*Kumar* BASANTA KUMAR ROY AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Alluvion and diluvion—Re-formation* in situ*—Limitation—Burden of proof—Limitation Act (XV of* 1877*), s.* 2, *Sch II, Arts.* 142, 144*—Dispossession—Exclusive adverse possession.*

A *chur*, which was found to be a re-formation *in situ* of plaintiff's land, was occupied for some years by Government. It was then claimed by defendants as their property, and Government made over possession to them. On plaintiff's suing to recover possession, defendants pleaded limitation and to make out their plea claimed to tack on to their own occupation the period of Government's possession:

*Held*, that the defendants did not derive their liability to be sued "from or through" the Revenue Authorities within the meaning of section 2 (4) of the Indian Limitation Act and that, therefore, their plea must fail. [p. 344, col. 1.]

The Limitation Act of 1877 does not define the term "dispossession", but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues until he is dispossessed, and upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. [p. 343, col. 1.]

There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment. Similarly there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession continues until there is fresh dispossession and revives as it ceases. [p. 343, col. 1.]

Appeal from a decree of the Calcutta High Court, dated July 12, 1909, reported as 3 Ind. Cas. 15, reversing a decree of the Subordinate Judge of Nuddia, dated June 30, 1906.

FACTS.—A certain *zemindari* of the Hooghly District was long ago divided into separate *mahals*, known as lot Mahomed Aminpur and lot Gobindpur respectively. Plaintiffs-appellants are the proprietors of a half of lot Mahomed Aminpur, the owner of the other half being Maharajah Sir J. M. Tagore. The respondents other than the Secretary of State, the Kundu Babus, are proprietors of lot Gobindpur.

The lands in suit were alleged by plaintiffs and admitted in the first Court by defendants to be re-formations *in situ* of diluviated lands of three *mouzahs*, which admittedly appertained as to 10 annas to lot Mahomed Aminpur and as to 6 annas to lot Gobindpur.

The lands re-formed gradually from about 1839 onwards. A *chur* formed and increased year by year: for some years it was entirely submerged in the rains. The Revenue Authorities at first settled annually so much as was cultivable with the actual cultivators on the *utbandi* system, and later made longer settlements. Up to 1894 plaintiffs were minors under the Court of Wards. About 1903 both plaintiffs and the Kundu Babus laid claim to the lands. Government allowed the claim of the Kundu Babus and delivered possession to them.

Thereafter in 1904, appellants sued the Kundu Babus to recover possession, also impleading their co-owner the Maharajah.

The Kundu Babus (hereinafter described as the respondents) denied plaintiffs' title and pleaded *inter alia* limitation on the ground of adverse possession.

The Subordinate Judge held that plaintiffs' title was made out and that the suit was not barred by limitation. He gave plaintiffs a decree. On appeal his decision was reversed by the Calcutta High Court (Chitty and Carnduff, JJ.), who held that Government was in possession of portions of the land from 1889 adversely to plaintiffs, and (impliedly) that such possession was continuous. They further held that the burden of proving that the possession of Government and the respondents did not extend for twelve years to the whole of the land lay on the plaintiffs and had not been discharged. They dismissed plaintffs' suit.

Hence this appeal.

Sir *R. Finlay*, *K. C.* (with him Mr. *Kenworthy Brown*), for the Appellants.—There are two questions in this case, (1) title, (2) limitation. Title has been found in our favour by the Sub-Judge. The High Court indicated some doubts, but did not overrule his finding. Limitation was decided in our favour by the Sub-Judge, but against us by the High Court.

BASANTA KUMAR ROY v. SECRETARY OF STATE.

Article 144 of Schedule II, Limitation Act, 1877, applies. The High Court have erroneously allowed respondents to reckon in the time during which the *chur* was in the possession of Government. Government was in no sense respondents' predecessor any more than they were ours.

Further plaintiffs were all infants under the Court of Wards, and Government could not hold possession adversely to their own wards.

In addition, plaintiffs and some of the respondents were tenants-in-common, and the receipt of rent by one tenant-in-common does not in India amount to exclusion of the others.

[SIR LAWRENCE JENKINS referred to *Trustees and Agency Co.* v. *Short* (1). It has been held in India that where there has been a long exclusive possession you may presume an ouster, but that ouster does not begin from the commencement of the exclusive possession.]

There is nothing in India corresponding to 3 and 4 Will. IV c. 27, nor is there any decision as to the time after which ouster is presumed.

The burden of proving adverse pessession is on the respondents—*Radha Gobind Roy Saheb* v. *Inglis* (2), *Secretary of State* v. *Chelikani Rama Rao* (3).

The twelve years' adverse possession required by Article 144 must be twelve years' adverse possession by the defendant or by some one through whom he claims—*vide* definitions of "defendant", "plaintiff" in section 2 (4) and (8) of the Indian Limitation Act.

Adverse possession by a series of independent trespassers confers no right on any one of them who has not himself had uninterrupted possession for the period required by law—*Dixon* v. *Gayfere* (4), though Cockburn, C. J., commented adversely on this case in *Asher* v. *Whitlock* (5), *Trustees and Agency Co.* v. *Short* (1).

Here there was no possibility for any one to have continuous possession for twelve years before suit, as the whole *chur* was periodically submerged up to a later date: such submergence determines the possession of a trespasser: *Secretary of State* v. *Krishnamoni Gupta* (6).

Under the present law of limitation plaintiffs need not prove they were in possession within twelve years of suit: they may sue within twelve years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to them: *Karan Singh* v. *Bakar Ali Khan* (7).

Article 144 as to adverse possession only applies when there is no other article which specially provides for the case—*Mahammud Amanulla Khan* v. *Badan Singh* (8).

The law is not the same when the rightful owners sue *ryots* to recover possession. There the plaintiffs must prove possession within twelve years of suit: *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (9).

But that is because Article 142 applies. Here the Article applicable is 144.

The view that the onus in such a case lies on defendant was adopted in *Innasimuttu Udayan* v. *Upakarath Udayan* (10), where, however, it was held that he had sustained it. Here the respondents are quite unable to sustain the onus. The plaintiffs were Wards of Court, and it was the duty of Government to look after them. Government never intended to set up a claim against them.

Respondents did not claim under Government but against it.

(1) (1889) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.
(2) 7 C. L. R. 364; 3 Suth. P. C. J. 809.
(3) 35 Ind. Cas. 902; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69 (P. C.); 43 I. A. 197.
(4) (1853) 17 Beav. 421; 23 L. J. Ch. 60; 51 E. R. 1097; 99 R. R. 218.
(5) (1866) 1 Q. B. 1 at p. 4; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26.
(6) 29 C. 518; 4 Bom. L. R. 537; 6 C. W. N. 617; 29 I. A. 104; 8 Sar. P. C. J. 269 (P. C.)
(7) 5 A. 1; 9 I. A. 99; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S.) 1044 (P. C.)
(8) 17 C. 137; 16 I. A. 148; 13 Ind. Jur. 330; 5 Sar. P. C. J. 412; 23 P. R. 1890; 8 Ind. Dec. (N. S.) 629 (P. C.).
(9) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).
(10) 23 M. 10; 26 I. A. 210; 7 Sar. P. C. J. 620; 8 Ind. Dec. (N. S.) 401 (P. C.).

Further, the possession of a tenant-in-common is for all the tenants, not for himself alone.

As to a small portion of Hatikanda, one of the three *mouzahs* in suit, there is no defence, as Government did not release it till 1904.

Respondents in their case lodged before this Board dispute the identity of the lands. As to propounding riddles of this kind, *vide Rajkumar Roy* v. *Gobind Chunder Roy* (11).

Mr. *Kenworthy Brown* followed.—A large portion of the land in suit emerged after Government gave up possession, and the emergence is still going on.

It may be true that under the old law the burden of proof in these cases lay on the plaintiff to prove possession within twelve years of suit: *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* (12), *Koomar Runjit Singh* v. *Schoene Kilburn* (13).

The latter case was two or three years before this Board's decision in *Karan Singh* v. *Bakar Ali Khan* (7), and was under the old Limitation Act. Until 1881 the view then taken prevailed to some extent even under the new Act: but the law was altered in 1871 by Act IX of 1871, and this was clearly laid down by this Board in *Karan Singh* v. *Bakar Ali Khan* (7).

The respondents now dispute the identity of the lands, and claim that a great part of them are part of an older *chur* which they occupied long ago. This is a new case altogether.

The evidence shows that up to 1893-4 only a very small portion of these lands had emerged at all. At the time when Government gave over possession even this much was completely under water from June to October. It was not possible, therefore, for a title by adverse possession to be acquired. Disturbance by *vis major* of the flood is tantamount to abandonment and interrupts continuous possession: *Secretary of State* v. *Krishnamoni* (6).

The duration of the abandonment is immaterial. The principle applies whether it is for 150 days or for several years.

[LORD SUMNER.—It would seem that even if Government ever asserted adverse possession they abandoned it.]

Lord Canning by a proclamation cancelled all titles in Oudh. When that proclamation was withdrawn as to Lucknow the intervening time was simply wiped out. *Mirza Jehan Kadar* v. *Afsur Bahu* (14).

[LORD SUMNER.—The Collector's order is simply a formal way of retiring from possession and leaving those entitled to possession to take it.]

As to possession of co-owners, the fundamental rule is that possession by one will not be presumed to be adverse to the others but will ordinarily be held for the benefit of all. *Jogendra Nath Rai* v. *Baladeo Das* (15) where the previous cases are discussed. The same case lays down another proposition on which we rely, *viz.*, that the doctrine of constructive possession applied only in favour of a rightful owner (page 972). Even if Government were in possession of a small fragment adversely that was not possession of the whole.

[LORD SUMNER.—Some of the lands which have emerged belonged to two other *mouzahs* altogether, and for all the evidence there is to the contrary the lands occupied before 1894 may have been that part.]

Mr. *O'Gormon*, for the Respondents.—I contend that the whole of these *mouzahs* belonged to Lot Gobindpur, not merely 10 annas. If these villages had been divided into 10 annas and 6 annas, the proportions of revenue would have been the same.

[LORD PARKER.—The assessment is on the whole *mahal*, not on particular villages.]

The plaintiffs have not made out their title to these three *mauzahs*. They have never produced any document showing they were registered as proprietor under the Bengal Land Registration Act of 1876. Certain papers they did in fact produce, but the

(11) 19 C. 660; 19 I. A. 140; 6 Sar. P. C. J. 140; 9 Ind. Dec. (N. S.) 883 (P. C.).

(12) 8 M. I. A. 199; 1 W. R. (P. C.) 51; 1 Suth. P. C. J. 420; 1 Sar. P. C. J. 744; 19 E. R. 506.

(13) 4 C. L. R. 390.

(14) 4 C. 727; 6 I. A. 76; 3 Sar. P. C. J. 865; Rafique and Jackson's P. C. No. 54; 3 Ind. Jur. 222; 2 Ind. Dec. (N. S.) 462 (P. C).

(15) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

Judges of the High Court were not satisfied that those papers made out their case.

[LORD SUMNER.—It is a question of fact. The first Court is satisfied. The second Court have criticised the Sub-Judge's methods, but have not taken upon themselves to say he was wrong. Do you want us to send the case back? It began in 1904.]

We produced our copy of the general register, and their omission to do the same raises a strong presumption that they were not owners of the 10 annas as they alleged.

Next, we allege that we were in possession of this land or a part of it since 1886. This appears from map No. 14.

[LORD PARKER.—I can't find anything about that in the pleadings or in your "case".]

[LORD SUMNER.—Is their anything in the whole record except the maps to show that you had or claimed possession in 1886?]

Mr. *De Gruyther, K. C.*, (intervening).—We propose to show that plaintiffs' claim includes more than is in the new *chur*—*Chur* Raninagar No. 2.

[LORD SUMNER asked Sir R. Finlay if he claimed any more of the land than was in *Chur* No. 2.]

Sir *R. Finlay.*—We believe that it is all *Chur* No. 2, but we do not abandon any part of our claim.

[LORD PARKER.—I can't find this point intelligibly raised anywhere.]

I submit it is not open to them.

Plaintiffs would not at first state the boundaries intelligibly: hence we could not tell what they claimed.

Counsel went into the maps and other evidence and contended that most of the land in fact fell within *Chur* No. 1.

The Article of the Limitation Act to be applied even as regards *Chur* No. 2, still more as regards *Chur* No. 1, is Article 142, not Article 144. Plaintiffs have been dispossessed within the meaning of Article 142 more than twelve years before suit and are barred: *Mohammud Amanulla Khan* v. *Badan Singh* (8).

There is no question of co-ownership in the ordinary sense; the estates are separate and the owners pay separate revenue.

Even if Article 144 applies, Government has held adversely for more than twelve years. The possession of Government is my possession. Government took possession not on behalf of anybody else, but as owner or proprietor: it was asserting its right under Bengal Regulation XI of 1825, section 4. Even as regards *Chur* No. 2, regular tenancy commenced in 1891, and before that date there had been *utbandi* tenancy. If the plaintiffs had sued Government only in 1904, their suit would have been dismissed. Their title has been extinguished under section 28 of the Limitation Act, and cannot be revived.

As to title, their case is that we have 6 annas only of these three *mouzahs*. The copy of the general register produced by us shows that we are entitled to the whole 6 annas.

## JUDGMENT.

LORD SUMNER.—This suit was brought by members of a family called the Kumars of Dighapatia against certain persons, called collectively the Kundu Babus of Mahiari, to recover *khas* possession, jointly with their co-sharer *maliks*, of a 10-anna share in portions of *Mouzahs* Durlabhpur, Jirat, and Hatikanda. *Wasilat* was also claimed. Some years ago the Ganges overflowed these lands. They have now re-formed *in situ*.

The plaintiffs held one moiety of the *zemindari* lot Mahomed Aminpur, the other moiety being held by various persons, who were jointed as subordinate defendants. To this *mahal*, bearing *Touzi* No. 3989 of the Hooghly Collectorate, this 10-anna share was said to have belonged for at least a century. The 6-anna share was the property of the principal defendants in right of their *zemindari*, *viz.*, lot Gobindpur bearing *Touzi* No. 100. The Trial Judge found for the plaintiffs' title. The High Court criticised this decision as having been arrived at "without any real discussion or consideration of the documentary evidence," but did not expressly dissent from it. They allowed the appeal on another ground. Having examined the documentary evidence in question with some care, their Lordships conclude that the decision of the Trial Judge in this regard was right.

The plaintiffs put in an extract from the quinquennial register of *Pergunnah* Mahomed Aminpur, for A. D. 1816, which

showed that a 10-anna share in each of the three *mouzahs* then belonged to *Taluq* Mahomed Aminpur. An extract from the *Mahalwari* Register, apparently for A. D. 1880, showed these *mouzahs* still belonging to Mahomed Aminpur, though not under the same *Touzi* number, and stated the *maliks*, as recorded in the general register, to be certain persons of whom one was Purna Chandra Roy, the plaintiffs' predecessor-in-title. It further remarked that part or all of the land of these *mouzahs* was *ijmali*, without naming either the co-sharers or the proportions of the shares. No doubt these entries are in some respects inconclusive. For several years, from 1888 onwards until 1894, when the guardianship of the Court ended, the plaintiffs were minors, whose property was in the charge of the Court of Wards, and they produced documents showing that year after year each of these *mouzahs* was administered on their behalf, and that rents and profits collected in respect of them were credited to the account of the plaintiffs. *Amdanis* of money on account of rent, *Touzi* accounts, extracts from the *jumma wasil-baki* accounts and *karcha* accounts were forthcoming in regular sequence, in which the plaintiffs were stated to be proprietors and their share to be a 10-anna share in *Touzi* No. 3989. To these proofs of enjoyment no real answer was made and their Lordships see no reason to question the finding of the Trial Judge in favour of the plaintiffs' title.

The identity of the lands in suit held by the principal defendants with those originally washed away, to which the plaintiffs made title, was accepted by the Trial Judge, doubted but not decided by the High Court, and strenuously contested before their Lordships. Before the trial an *ameen* was appointed to survey the *locus in quo* and set it out on a map. The limits of the ground in dispute were agreed and shown on this map. Portions of each of the three *mauzahs* fell beyond them. At the instance of the principal defendants the *ameen* also prepared a map purporting to show the natural features "as contained in the release map of 1886." In his report he stated that the latter features depended on the position of a palm-tree, which was taken as the datum because it was said to be the only thing that had survived from 1886, and to be identical with a palm tree shown on a copy map produced by the defendants and alleged to be a map of things as they were in that year. No proof of the identity of this palm-tree was forthcoming: no *thak* map was produced; no release of 1886 or any evidence of it was put in. It is plain that the *ameen* thought that this map of the supposed features of 1886 was not worth much, and their Lordships think so too.

The respondents' argument rested on three points: first, that since 1886 they had been, as they said, in possession of certain portions of a *chur* known as *Chur* Raninagar No. 1, that by superimposing the *ameen's* 1886 map on his survey of 1906, it would be seen that part of the area disputed in this action, though claimed as part of *Chur* Raninagar No. 2, really fell within *Chur* Raninagar No. 1, and that there had been a confusion of *Mouzah* Jirat, which lay in the north of the disputed area, with an area called *Chur* Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now [*Rajkumar Roy's* case (11)] to deprecate the practice of "propounding riddles of this kind," and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now. The Trial Judge records that "it is admitted on both sides that the lands in suit are re-formations on their old sites of diluviated lands of *Mouzahs* Durlabhpur, Jirat, and Hatikanda." On that admission he proceeded, and by that admission, in their Lordships' opinion, the respondents must be bound. In the result the plaintiffs have made out their case alike as to title and parcels.

There remains the question on which alone the High Court proceeded, the question of limitation. This involves some

account of the history of the re-formed land. At the date of the Government Survey of 1869 and 1870 the there *mouzas* lay to the west of the Bhaghirathi. Shortly after that date the river began to traverse bodily to the south-west, in a direction at right angles to the axis of its course at that part of the stream, and steadily moved for some miles across country till in 1906 only portions of Jirat and Hatikanda, and no part of the Durlabhpur were any longer to the west of the river. The total area submerged no doubt extended far beyond the bounds of these *mouzahs*. As the river passed on *churs* began to form. *Chur* Raninagar No. 1 was the first; *Chur* Raninagar No. 2, somewhere within which the present re-formations fall, began to appear as an island *chur* in 1888. The plaint in the present suit was filed on the 6th September 1904. It is common ground that the period of limitation applicable is twelve years, the contest being whether Article 142 of Schedule II of Act XV of 1877 is the Article applicable or Article 144. The critical time is the time prior to the 6th September 1892.

A great body of evidence was called, of which the Trial Judge says that the witnesses "have sworn hard without any regard to truth." Neither side has ever thought it worth while to quote what they said to their Lordships. If the appellants are right, the question is whether the respondents had adverse possession before September 1892; if the respondents are right, the question is whether before that time the appellants had not been dispossessed. A good deal has been said about the burden of proof in either case, but as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given. Their Lordships accordingly pass by the question who would have suffered if the facts had turned out otherwise or had not been proved at all, and proceed to examine them.

The best evidence of the history of the *chur* lands in question is to be found in the Collectrate reports of the Settlements of 1894, 1899, and 1902. An island *chur* in or about this spot was thrown up in 1888, but was unfit for assessment, and apparently for cultivation, till 1890. At first the surrounding water was unfordable on all sides, but further accretions soon attached it on the north to *Chur* Raninagar No. 1. In 1889 it was first treated as an accretion to *Chur* Raninagar No. 1 and Jirat, which had been released to Suksagar *zemindars*, as re-formations *in situ* of their *mouzahs*, and then shortly afterwards came to be considered as an accretion to the part of *Chur* Raninagar No. 1, which was a Government estate. It was not regularly surveyed till 1894, but, beginning in the year 1891-1892, it was under direct management on the *utbandi* system on yearly settlements. The area then producing a rent was about 350 *bighas*; in the following year it was slightly more. On the survey in 1894 the area of this *chur* was found to be 2,060 *bighas*, of which 583 were by this time under cultivation. The residue was uncultivated jungle, and the whole of it was every year completely under water from the beginning of June to the end of October. Naturally, the land was then very poor, and there was no resident *raiyat* in the *mahal*.

The *chur* had so far increased by 1894 that a *raiyatwari* settlement was then made with the *utbandi raiyats* for a term of five years. On the expiration of this term it was again surveyed, and its area was found to have increased to over 3,000 *bighas*, and 86½ acres of it were released to the proprietor of estate No. 399, as being land which was a re-formation *in situ* of his *Mouzah* Sardanga. It would seem that a further portion of it had been previously released to the owner of *Mouzah* Baliadunga. The cultivable lands were then settled again for an undefined term.

In 1902 the principal defendants petitioned the Collector of Nuddia for the release to them of the lands in question, alleging that they were re-formations *in situ* of lands belonging to their estate, lot Gobindpur, *Touzi* No. 100, and ten months later the Officiating Collector granted the petition. In his judgment the petitioners had proved their title and the identity of the re-formed lands, and the Government could not legitimately resist their claim. Accordingly possession was delivered in due form, by planting a bamboo on the estate, by proclamation, and by beat of drum.

The report of 1899 in terms speaks of

these re-formed lands as being the "property" of the Government resumed in 1888, which at most means that in time the Government's actual possession, such as it was, might be expected to ripen into ownership. The report of 1902 speaks of possession, direct management, and settlement. The order of 1903, while avoiding the term "property," because it recognised the property of the petitioners, recited that the Government took possession of *Chur* Raninagar No. 2 in 1888, the year in which it came into existence as a *chur*. These documents, however, were reciting what had happened some years before, and presumably after some change of Collectors in the meantime, and it is very noticeable that in the *khasras* of the *chur* the column headed "Name of proprietor and landlord" appears to have been left blank until 1899, when it is filled in for the first time with the name of the Empress of India.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" [per Cotton, L. J., in *Leigh* v. *Jack* (16)]. It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession, of course, continues until there is fresh dispossession, and revives as it ceases.

In the case of *Secretary of State* v. *Krishnamoni* (6), their Lordships' Board applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one where the re-flooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

Again to apply the test suggested by Bramwell, L. J., in *Leigh* v. *Jack* (16) at page 273, "to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and, therefore, it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. "It is impossible," says Lord Halsbury in *Marshall* v. *Taylor* (17), "to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh* v. *Jack* (16), to the nature of the property." An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which *prima facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object. In the present case beyond the temporary *utbandi* cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue Authorities.

Their Lordships are of opinion that, whatever may have been the case later on, there had not been, down to September 1892, any dispossession of the plaintiffs within the meaning of Article 142. The evidence of possession by the Government consists in the direct management under which *bandobastdars* cultivated at annual rents. Two Collectors' orders, dated in 1889, are referred to, but not exhibited, under which the land was first of all "treated" as an accretion to one property and almost immediately afterwards "considered" as an accretion to another; but beyond

(16) (1880) 5 Ex. D. 264; 49 L. J. Ex. 220; 28 W. R, 452; 42 L. T. 463; 44 J. P. 488.

(17) (1895) 1 Ch. 641 at p. 645; 64 L. J. Ch. 416; 12 R. 310; 72 L. T. 670.

the *utbandi* cultivation, nothing was done. Whether the land cultivated was the same each year or not does not appear; at any rate, it was annually submerged, and there are no circumstances to link together various portions of the ground, so as to make the possession of a part, as it emerged, amount constructively to possession of the whole; *Mohini Mohan Roy* v. *Promoda Nath Roy* (18). The lands in question in this suit form only a part of *Chur* Raninagar No. 2. It cannot be shown that they formed part of the land cultivated, or of the *chur* which had emerged up to 1892. It is quite possible that most, if not all, of the land cultivated between 1891 and 1893 may have belonged to the land, which was shortly afterwards released to the Baliadunga and Sardanga *zemindars*. It is clear that in those early years there was considerable uncertainty as to the course the re-formation was taking, and the fact must have been well known that the *chur* might turn out to be a re-formation *in situ* of the land, which had only diluviated within the previous twenty years.

If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, Article 144 is the Article applicable, and not Article 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants; but, be that as it may, in their Lordships' opinion the defendants' contention resting on Article 144 fails on another ground. The period of time requisite to bring the defendants under the protection of Article 144 cannot be made out, unless to the period during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue Authorities had possession, a number of years going back to 1892. The definition section, section 2, shows that in the present case this cannot be done. The defendants do not derive their liability to be sued "from or through" the Revenue Authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue Authorities, which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was inconsistent with and an invasion of their own superior title. On investigation the Revenue Authorities recognised and submitted to this adverse claim and withdrew from any enjoyment or occupation. If the defendants could make good now the claim which they made then, well and good; but they would succeed, not by reason of, but independently of the Limitation Act. Upon this ground they fail as far as Article 144 is concerned.

In this view of the case it is not necessary to decide two points much discussed before their Lordships: *first*, that the defendants' possession could not as such be deemed to be adverse to their co-sharers or available to deprive the plaintiffs of their rights; and, *second*, that the possession of the Revenue Authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. In differing from the High Court upon the determination of the appeal, their Lordships do not wish to be taken as expressing any opinion adverse to their view on this second point.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, the judgment of the High Court should be set aside with costs, and the decision of the Trial Judge should be restored. As the first defendant on the record, the Secretary of State for India in Council, lodged no case and did not appear before their Lordships to support or resist the appeal, their Lordships do not advise that the terms of any order as to costs should affect him.

*Appeal allowed.*

Solicitors for the Appellants: Messrs. *Watkins & Hunter.*

Solicitors for the Respondents: Messrs. *T. H. Wilson & Co.*

(18) 24 C. 256; 1 C. W. N. 304; 12 Ind. Dec. (N. S.) 857.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 162 OF 1916.
May 30, 1917.
*Present*:—Mr. Justice Tudball and
Mr. Justice Rafique.
*Musammat* ZAIBUNNESSA BIBI—
PLAINTIFF—APPELLANT
*versus*
*H. H. Maharaja* PARBHU NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage—Redemption—Integrity broken—Mortgagor, suit by one—Extent of share, redemption of.*

Where the integrity of a mortgage has been broken, one of the mortgagors is entitled only to redeem the share which he owns in the mortgaged property.

Second appeal against the decision of the District Judge, Allahabad, dated the 25th August 1915.

Messrs. *A. H. C. Hamilton* and *J. Nehru*, for the Appellant.

Messrs. *Gokul Prasad* and *S. C. Chaudhry*, for the Respondents.

JUDGMENT.—The facts of this case, so far as it is necessary to state them for the purposes of this appeal, are as follows:—A mortgage was made in 1823 of certain property. One of the mortgagors was Sheikh Dalilullah, who owned a two-annas eight-pies share out of the sixteen annas mortgaged. The present plaintiff is one of the descendants of Dalilullah. The other descendants and heirs of Dalilullah are also parties to the suit, having been made *pro forma* defendants. Admittedly the integrity of the mortgage has been broken up and the mortgagee is now owner of thirteen annas four pies out of the sixteen annas. The plaintiff sought to redeem the whole of the two-annas eight-pies share which originally belonged to Dalilullah. The Court of First Instance gave her a decree. The Lower Appellate Court has held, on the strength of the rulings of this Court, that the plaintiff is only entitled to redeem her own share. That share has been ascertained. The plaintiff comes here in second appeal and she pleads that she is entitled to redeem the whole of two-annas eight-pies share because the other heirs and descendants have expressed their willingness that she should do so. It is urged that the suit is in substance a suit by all the heirs to redeem the whole share. With this last plea we cannot agree. It would have been easy enough for the *pro forma* defendants, if they had so wished, to have turned themselves into plaintiffs and



to have joined in the suit with the appellant. This they did not do. Our attention has been called to a decision of the Bombay High Court reported as *Sakharam Narayan* v. *Gopal Lakshuman* (1), which is somewhat in favour of the appellant. The appellant, however, is met at the forefront of this appeal by a series of rulings of this Court commencing from *Kuray Mal* v. *Puran Mal* (2) and ending with *Munshi* v. *Daulat* (3). It is clear, on the face of these rulings, that the plaintiff is entitled only to redeem the share which she owns in the mortgaged property, and that share is much less than two annas eight pies. We can see no good reason to differ from a long series of decisions which have prevailed in this Court, merely because in the year 1856 another Court has held otherwise, especially when the rulings of this Court are based on a ruling of their Lordships of the Privy Council. In our opinion the decision of the Court below is quite correct. We, therefore, dismiss this appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

(1) 10 B. 656*n*; Unrep. P. J. B. H. C. (1881-83) 551; 5 Ind. Dec. (N. S.) 825.
(2) 2 A. 565; 4 Ind Jur. 653; 1 Ind. Dec. (N. S.) 928.
(3) 29 A. 262; A. W. N. (1907) 49; 4 A. L. J. 74.

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PATNA HIGH COURT.
FIRST CIVIL APPEAL No 419 OF 1915.
April 26, 1917.
*Present*:—Mr. Justice Chapman and
Mr. Justice Atkinson.
JUGESHWAR NATH SAHAI AND ANOTHER
—PLAINTIFFS—APPELLANTS
*versus*
JAGATDHARI PRASAD AND OTHERS
—DEFENDANTS—RESPONDENTS.

*Probate and Administration Act (V of 1881), s. 55—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Will—Probate, application for, withdrawal of—Court, duty of—O. XXIII, r. 1, applicability of, to Probate proceedings.*

An application for Probate cannot legally be disposed of by a compromise. The law imposes on the Court the duty of determining whether the Will is genuine or not. [p. 346, col. 1.]

Order XXIII, rule 1, of the Civil Procedure Code does not apply to an application for Probate. If an executor improperly withdraws an application for Probate, he is not precluded from again undertaking the discharge of his duty in obtaining the finding of the Court on the genuineness of the Will. [p. 346, col. 2.]

JUGESHWAR NATH SAHAI *v.* JAGATDHARI PRASAD.

Appeal against the decision of the Judicial Commissioner, Ranchi, dated the 8th August 1915.

Messrs. *Rajendra Nath Ghose* and *Atul Krishna Roy*, for the Appellants.

Messrs. *Mustafa Khan* and *Harnarain Parsad*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises ont of a proceeding for the Probate of the Will of a person who died leaving three sons by a wife who predeceased him, and a widow with a son by her. The Will purported to leave the bulk of his property to the widow and her son. The application for Probate was made by two of the executors on the 2nd of Februray 1914. On the 13th July a petition of compromise was filed under which the widow on behalf of herself and her son agreed to divide the properties with the three sons by the first wife. On the same date the two executors who had applied for Probate withdrew their application. On the 11th of February 1915 a fresh application for Probate of this Will was made. In this application one of the executors who had applied before joined; the other applicant was another executor. An objection was taken on behalf of the sons of the first wife that the previous application for Probate having been withdrawn the executors were preculded by the provisions of Order XXIII, rule 1, of the Code of Civil Procedure from again applying for Probate. It is well settled by authority that an application for Probate cannot legally be disposed of by a compromise. The law imposes on the Court itself the duty of determining whether the Will is genuine or not. It is quite clear, therefore, that the Court acted improperly in permitting the executors to withdraw the application for Probate merely by reason of the compromise which was filed. So far as the question of the application of Order XXIII, rule 1, of the Code of Civil Procedure is concerned, that question has to be determined by reference to section 55 of the Probate and Administration Act, 1881. That section says that the proceeding of the Court in relation to the granting of Probate shall be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure. Now the circumstances of a Probate case do not properly admit of the withdrawal of an application for Probate by an executor. Order XXIII, rule 1, of the Code of Civil Procedure, which says that a plaintiff may withdraw his suit or abandon a part of his claim, therefore, does not, in my opinion, apply to an application for Probate. It is the duty of an applicant for Probate to obtain the opinion of the Court upon the genuineness or otherwise of the Will. He fails in his duty if he does not obtain the finding of the Court on the Will: that being so, it is clear that the further provision in Order XXIII, rule 1, to the effect that if a plaintiff withdraws from a suit, he shall be precluded from instituting any fresh suit in respect of the same subject-matter, also does not apply. It is clearly undesirable that if any executor does improperly withdraw an application for Probate, he should be precluded from again undertakig the discharge of his duty in obtaining the finding of the Court on the genuineness of the Will. I would accordingly allow this appeal, set aside the judgment and order of the learned Judicial Commissioner and remand the case to him for a fresh decision. I am not prepared to express any opinion as to whether the parties will or will not be bound *inter se* by the petition of compromise which they filed, in so far as the disposal of the assets is concerned: but that has nothing to do with the question whether the Will is genuine or not, and upon that question the learned Judicial Commissioner must express an opinion.

The matter has been greatly delayed and we trust that it will be expedited as much as possible.

The appellants are entitled to their costs.

ATKINSON, J.—I agree.

*Appeal allowed; Case remanded.*

## MADRAS HIGH COURT.

CIVIL APPEALS NOS. 235 AND 440 TO 442 OF 1915.

January 24, 1917.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

GHULAMSA RAVUTHAR AND OTHERS—DEFENDANTS NOS. 1, 2 AND 6 TO 9—APPELLANTS IN A. S. NO. 235 OF 1915

SULTAN MOHIUDDIN RAVUTHAR AND OTHERS—DEFENDANTS NOS. 1 AND 5 TO 9—APPELLANTS IN A. S. NOS. 440 AND 441 OF 1915

A. S. MUHAMMAD HUSAIN RAVUTHAR AND OTHERS—DEFENDANTS NOS. 1, 4, 5 & 9 to 12—APPELLANTS IN A. S. NO. 442 OF 1915

*versus*

S. M. R. M. S. V. VISVANATHAN CHETTIAR—PLAINTIFF—RESPONDENT IN ALL.

*Negotiable Instruments Act (XXVI of* 1881), *s.* 28, *scope of—Payee, description of, by* vilasam *of firm—Mercantile usage*—Nattukottai Chetties, *custom among—Document, construction of—Surety for consolidated amount made up of several promissory notes, liability of—Cause of action—Contract Act (IX of* 1872), *s.* 128.

The principle underlying section 28 of the Negotiable Instruments Act that if a promissory note is made payable by a person as agent of another, the latter is not liable personally on the note, applies also to the case of a payee. [p. 348, col. 1]

It is a well-known usage among Natukottai Chetties to draw *hundies*, bills and promissory notes in the name of the agent of a firm represented by the firm's *vilasam*, and in such cases it is the firm indicated by the *vilasam* which is intended to be the payee and not the agent whose name appears on the instrument. [p. 347, col 2.]

The question is entirely one of construction of a document. [p. 347, col. 2]

Where a person makes himself liable as a surety for a consolidated amount, the amounts themselves having been borrowed under several promissory notes from time to time, the cause of action as against the surety arises on each of the dates on which the sums borrowed under the several promissory notes become payable. Where the cause of action is separate the liability of the surety is also separate with respect to each of the promissory notes. [p. 348, col. 1.]

Appeals preferred respectively against the decrees of the Court of the Subordinate Judge, Mayavaram, in Original Suits Nos. 66 of 1913 and 16 to 18 of 1914.

Mr. *T. R. Venkatarama Sastri*, for the Appellants.

Messrs. *T. Narasimha Aiyangar* and *R. K. Narayanasami Aiyar*, for the Respondent.

JUDGMENT.—The first objection raised in these appeals is that the plaintiff's firm was not entitled to maintain the suits, inasmuch as the promissory notes on which the suits are based are made out in the name of 'S.M.R.M.S.V. Raman Chetty', the contention being that the payee that is intended is Raman Chetty, the agent of the firm, indicated by the letters prefixed to his name, and not the firm itself. The question is entirely one of construction. We have to consider whether when the notes purport to be made payable to S.M.R.M.S.V. Raman Chetty what was intended was that the payee was to be the firm as indicated by the letters of the *vilasam* and represented by Raman Chetty the agent, or whether the payee was to be Raman Chetty who was in fact the agent of the plaintiff's firm. No evidence has been adduced in this case as to any particular usage obtaining among the Nattukottai Chetties, in describing the firm either as maker of the promissory note or as payee. But there is a decision, *Mungamal Jesse Singh* v. *A.L.V.R.C.T. Firm* (1), of Mr. Justice Wallis, as he then was, sitting on the Original Side of this Court where he held on the evidence adduced in that case that it was a well-known usage among Chetties to draw *hundies*, bills and promissory notes in this form and that in such cases, it is the firm indicated by the *vilasam* which is intended to be the payee and not the agent, though his name appears on the instrument. This decision was appealed from and confirmed by this Court in Original Side Appeal No. 58 of 1908. There is an allusion to this usage to be found also in *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (2), and the learned Subordinate Judge in this very case also holds it to be clear that the person indicated as the payee on these promissory notes is the firm and not Raman Chetty, the agent. We, therefore, read the promissory notes as meaning that the amounts were to be paid to the firm as represented by Raman Chetty.

But even if we were to read the notes as contended on behalf of the appellants, as if they were made payable to Raman Chetty the agent of the plaintiff's firm, that will not in any way help them. It has been laid down by the Full Bench in *Koneti*

(1) 4 M. L. T. 309.
(2) 28 M. 544 at p. 549; 15 M. L. J. 384.

*Naicker* v. *Gopala Aiyar* (3) that if a promissory note is made by a person as agent of another, the latter is not liable personally on the note. This is the effect of section 28 of the Negotiable Instruments Act and we think the principle underlying the section is applicable also in the case of a payee. We, therefore, hold that this objection to the suits is not tenable.

The next question which is argued by Mr. T. R. Venkatarama Sastriar is that inasmuch as the 1st defendant's liability was based on Exhibit E according to which he made himself liable to the extent of Rs. 15,000, the entire cause of action arose at the date of the institution of the Original Suit No. 16 of 1914 and the subsequent suits were barred by virtue of Order II, rule 2, corresponding to section 43 of the old Civil Procedure Code. It is contended that the liability of the 1st defendant under Exhibit E was a single liability with respect to the entire amount borrowed, though different amounts were borrowed from time to time under separate promissory notes. We do not think there is any force in this contention. The cause of action on each of these promissory notes was separate and that being so, the liability of the 1st defendant who stood in the position of a surety was also separate with respect to each of the promissory notes. The objection, therefore, fails.

It is also argued that the 1st defendant was not the partner of the firm, but we have not the slightest doubt that the finding of the Subordinate Judge on this point is right.

Another objection had been taken to the suits that inasmuch as the partnership of the defendants was not registered according to the Ordinance of Ceylon, they would not be liable for the debts contracted from the plaintiff. The Ordinance itself in express terms says that the absence of registration would not affect the liability of the partners to third persons.

Then it was argued that the Subordinate Judge ought to have appointed a Commissioner to take the accounts. But with respect to the amounts borrowed, there are the promissory notes on which the suits are based and there was no necessity for any accounts being taken since the amounts due upon the promissory notes were proved before the Subordinate Judge. All the appeals are dismissed with costs.

*Appeals dismissed.*

V.R.P.

(3) 21 Ind. Cas. 417; 38 M. 482; 25 M. L. J. 425; 14 M. L. T. 414.

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2659 OF 1913.

July 20, 1915

*Present*:—Justice Sir Asutosh Mookerjee Kt., and Mr. Justice Beachcroft.

RAMNATH SIL AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

SIBA SUNDARI DEBYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Service tenure—Tenant refusing to perform service, consequences of—Transfer of Property Act (IV of 1882), s. 111, (b), (g)—Forfeiture of service tenure created before or after the passing of the Act.*

A service tenure, whether created before or after the passing of the Transfer of Property Act, determines if the tenant refuses to render the requisite service and the landlord is thereupon entitled to re-enter without serving a notice to quit upon the tenant. [p. 349, cols. 1 & 2]

Clause (*g*) of section 111 of the Transfer of Property Act does not render it obligatory upon the lessor to serve a notice to quit upon a lessee who has forfeited his tenancy; a mere demand for possession is sufficient to determine the lease. [p. 350, col. 1.]

The plaintiffs instituted a suit for the ejectment of the defendants from land, which they held on condition that they would serve the plaintiffs as barbers and enjoy the land in consideration of their service, on the allegation that the defendants by refusing to perform the requisite service had forfeited the tenancy:

*Held*, that if the service tenure be assumed to have been created before the Transfer of Property Act came into operation, it was competent to the plaintiffs, on the service thus ceasing, to resume and take possession of the land without reference to the Court at all, but if, on the other hand, the tenancy be assumed to have been created after the Transfer of Property Act came into operation then the position of the parties must be determined with reference to the terms of section 111, clause (*b*) or clause (*g*), whichever was applicable to the case, and that in either case, the defendants were liable to be ejected without service of notice to quit. [p. 349, cols. 1 & 2; p. 350, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 14th May 1913, modifying that of the Munsif,

Manickgunge, dated the 28th September 1912.

Babu *Sasadhar Roy* (Junior), for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Ramani Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in an action in ejectment. The defendants, who are barbers by caste and profession, held the disputed land under the plaintiffs on condition that they would serve them as barbers and enjoy the land in consideration of their service. The plaintiffs seek to eject the defendants on the allegation that they have forfeited the tenancy, as since 1901 they have refused to perform the requisite service. The defendants urged that the tenancy is held at a money rent, that there has been no forfeiture and that they are entitled to a reasonable notice to quit, before they can be evicted. The Courts below have found on the merits in favour of the plaintiffs and have decreed the suit. In our opinion, that decree is manifestly right and cannot be successfully assailed.

As the origion of the tenancy is unknown, two alternative hypotheses have been placed before us. If the tenancy be assumed to have been created before the Tansfer of Property Act came into operation, the position of the defendants must be determined with reference to the law as it stood at that time. Now, it was ruled by a Full Bench of the Sudder Court in the case of *Sreesh Chunder* v. *Madhub Mochee* (1) that where the defendant held land for the performance of certain services, he was not entitled to continue in possession when he failed to perfrom the services and that it was competent to the grantor, on the service thus ceasing, to resume and take possession of the land without reference to the Court at all. This view was confirmed subsequently in the cases of *Hurrogobind Raha* v. *Ramrutno Dey* (2), *Makbul Hossain* v. *Ameer Sheikh* (3) and *Ansar Ali Jemadar* v. *C. E. Grey* (4). Consequently if the law as it stood before the Transfer of Property Act is applied to the case before us, the defendants are liable to be ejected without notice, as they have refused to perform the requisite service. If, on the other hand, the tenancy is assumed to have been created after the Transfer of Property Act came into operation the position of the parties must be determined with reference to the terms of section 111. Under clause (*b*) of that section, a lease of immoveable property determines, where such time (that is, the time limited thereby) is limited conditionally on the happening of some event, by the happening of such event. Under clause (*g*) a lease of immoveable property determines by forfeiture in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re enter or the lease shall become void, if the lessor does some act showing his intention to determine the lease. In our opinion the case falls either within clause (*b*) or clause (*g*). A service tenant holds the land on condition that if he refuses to render service the lease shall determine, and thereupon the landlord shall be entitled to re-enter. There can thus be no doubt that if a service tenant renounces his character as service tenant, by claiming to hold the lands at money or produce rent, and denies the title of the landlord to resume the lands, the lease to him determines and no notice is necessary to eject him. It is also plain that if clause (*g*) be held applicable, the lessors did, in the present case, signify, prior to the institution of the suit, their intention to determine the lease. In 1908, they instituted a suit to eject the defendants on the grounnd that their tenancy had been forfeited by reason of their refusal to render service: that suit was withdrawn, with liberty reserved to institute a fresh suit on the same cause of action. This was sufficient notice of intent to forfeit: *Serjeant* v. *Nash Field & Co.* (5), *Grimwood* v. *Moss* (6), *Jones* v. *Carter* (7). As was

(1) (1857) S. D. A. 1772.
(2) 4 C. 67; 2 Ind. Dec. (N. S.) 44.
(3) 25 C. 131; 13 Ind. Dec. (N. S.) 89.
(4) 2 C. L. J. 403.
(5) (1903) 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T 112;19 T. L. R 510.
(6) (1872) 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 20 W. R. 972.
(7) (1846) 15 M. & W. 718; 71 R. R. 809; 10 Jur. 33; 153 E. R. 1040.

explained in the case of *Anandamoyee* v. *Lakhi Chandra Mitra* (8), clause (*g*) of section 111 does not render it obligatory upon the lessor to serve a notice to quit upon the lessee who has forfeited his tenancy; even a demand for possession is sufficient: *Deo Nandan Pershad* v. *Meghu Mahton* (9). It is consequently plain that whether the tenancy was created before or after the Transfer of Property Act came into force, the defendants are liable to be ejected without service of notice to quit.

The decree of the Subordinate Judge is accordingly confirmed and this appeal dismissed with costs.

*Appeal dismissed.*

(8) 33 C. 339; 3 C. L. J. 274.
(9) 5 C. L. J. 181; 11 C. W. N. 225; 34 C. 57.

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## PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 160 OF 1916.

March 21, 1917.

*Present*:—Mr. Justice Mullick and Mr. Justice Atkinson.

BISHUN CHAND—PLAINTIFF—APPELLANT

*versus*

*Babu* AUDH BIHARI LAL—DEFENDANT—RESPONDENT.

*Negotiable Instruments Act (XXVI of 1881), s. 80—Hand-note 'payable on demand,' whether carries interest—'On demand', meaning of—Demand, whether necessary before institution of suit—'After demand', meaning of—Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Set-off, principles governing.*

Where a hand-note is silent as to the rate of interest payable, the lender is entitled, under section 80 of the Negotiable Instruments Act, to interest at the rate of 6 per cent. from the date when the money ought to have been paid. [p. 350, col. 2.]

The words 'payable on demand' have a legal meaning and sense, which convey that the note is payable on the date of its execution. In such a case no demand is necessary prior to the suit. [p. 351, col. 2.]

If, however, the words used are 'after demand', then a demand becomes necessary before a suit is instituted. [p. 351, col. 2.]

In a suit for the recovery of money the defendant is not allowed to set off against the plaintiff's demand any sum which is not an ascertained sum legally recoverable and the claim with respect to which does not arise out of the same transaction. [p. 352, col. 1.]

Appeal from the decision of the Additional District Judge, Shahabad, dated the 27th August 1915, affirming that of the Officiating Additional Sub-Judge, Shahabad, dated the 5th June 1914.

Mr. *Sushil Madhav Mullick*, for the Appellant.

Mr. *Tribhuwan Nath Sahay*, for the Respondent.

### JUDGMENT.

ATKINSON, J.—The plaintiff sues the defendant for recovery of the principal sum of Rs. 1,109 on foot of a hand-note, dated the 2nd of November 1910. There is no dispute that the amount of the principal stated in the note of hand is due and owing by the defendant to the plaintiff. The note of hand, however, is quite silent as to the payment of interest. The hand-note is, in terms, a hand-note payable on demand. The plaintiff, in his plaint, in paragraph 2, claims interest at the rate of 12 per cent. upon the principal sum advanced to the defendant. The learned Judge, however, held that the plaintiff was not entitled to any interest whatever, because in the hand-note interest was not provided for. It is contended before us that the learned Judge was wrong in arriving at that conclusion in point of law, because, even though the hand-note contained no provision as to interest, yet under section 80 of the Negotiable Instruments Act, XXVI of 1881, the plaintiff would be entitled to interest at the rate of 6 per cent. from the date on which the amount secured by the hand-note ought to have been paid. The learned Judge was not referred to section 80 of the Negotiable Instruments Act; because I feel sure that if his attention had been directed to the provisions of that Act he would have passed a decree in favour of the plaintiff for interest at the rate of 6 per cent.

The only question of difficulty which arises in this case is the time from which the rate of interest began to run. I think that it must be admitted, having regard to the authorities, that where a hand-note is silent as to the rate of interest payable, under section 80 of the Negotiable Instruments Act the lender is entitled to interest at the rate of 6 per cent. from the date when the money ought to have been paid. The case reported as *Ghanshiam Lalji* v. *Ram Narain* (1) and also the case reported as *Basanti Bibi* v. *Sheo Mangal*

(1) 29 A. 33; 11 C. W. N. 105, 17 M. L. J. 35; 4 A. L. J. 29; 1 M. L. T. 427; 9 Bom. L. R. 1; 5 C. L. J. 7 (P. C.).

*Farshad* (2) undoubtedly favour that construction. There is a case reported as *Bhupati Ram* v. *Sourendra Mohun Tagore* (3), which seems to take a different view, but in that case the learned Judge who decided the case never considered or discussed the effect of section 80 of the Negotiable Instruments Act. Therefore, we consider that on the true construction of section 80 of the Negotiable Instruments Act interest was payable on the note in suit.

The next question is, from what date the interest became due. The note of hand expressly purports to be a note of hand "payable on demand" and it is contended by Mr. Mullick that where a hand-note is payable on demand it is payable immediately on its execution; and Mr. Mullick relies, in support of his argument, upon a case reported as *Perumal Ayyan* v. *Alagirisami Bhagavathar* (4), and at page 248 their Lordships say: "The words 'on demand' must, we think, be regarded as a technical expression equivalent to 'immediately' or 'forthwith'. That, we think, was the intention of the parties." That case was considered in the case reported as *Perianna Goundan* v. *Muthuvira Goundan* (5) and their Lordships say: "There can be no doubt but that, under the general law, money lent, payable on demand, is due from the date of the loan; in other words, there is a cause of action on the date of the loan." To the like effect are the authorities in England; and the law may be summed up, according to the decision of Blackburn, J., as follows:—"In general, where money is payable on demand, the law holds that the debtor is bound to find out the creditor and pay him; and this the debtor is liable to do at once. Therefore, a promissory note 'payable on demand' is payable at the instant the note is made. No demand is necessary prior to an action." The authorities for this proposition laid down by Blackburn, J., are to be found in *Norton* v. *Ellam* (6), *Maltby* v. *Murrells* (7) and *George, In re, Francis* v. *Bruce* (8). Therefore, the words "payable on demand" have a legal meaning and sense which convey that the note is payable on the date of its execution. It must be remembered that the words "on demand" are distinct and separate from the words "after demand". If the words used are "after demand", then a demand is necessary; but if the words are "on demand", then no demand is necessary. Accordingly we are of opinion that the note in suit was liable to interest as and from the 2nd of November 1910, that is the date on which it was executed; and that the plaintiff is entitled in this case to interest at the rate of 6 per cent. from the 2nd of November 1910 until the date of realization of the debt.

The defendant, as against the principal sum and interest due from him to the plaintiff, seeks to set off certain sums which he claims as the value of his services rendered to the plaintiff as a Pleader. He sets out in his claim various items, ranging alphabetically from A to H, which aggregate in all to nearly Rs. 2,000, and he seeks to have the full sum set off as against the plaintiff's claim. As a matter of fact, however, the defendant is not entitled to claim the entire sum set out in his claim. He is only entitled to a share jointly with other Pleaders who were associated with him in the cases in which he represented the plaintiff. He is thus only entitled to claim a fractional part of the amounts shown by him. Therefore it can in no sense be said that the defendant's claim is for an ascertained amount within the meaning of Order VIII, rule 6. Indeed that his claim is not for an ascertained sum is demonstrated by the fact that the learned Judge had himself to ascertain and declare the proportionate share of the sum claimed by the defendant to which he (the defendant) was in fact entitled. The learned Judge has assessed this share at Rs. 176-9-0; but the fact that the learned Judge has arrived at this conclusion does not entitle

(2) 2 Ind. Cas. 199; 6 A. L. J. 233.
(3) 30 C. 446; 7 C. W. N. 412.
(4) 20 M. 245 at p. 248; 7 M. L. J. 222; 7 Ind. Dec. (N. S.) 174.
(5) 21 M. 139; 7 M. L. J. 315; 7 Ind. Dec. (N. S.) 455.
(6) (1837) 2 M. & W. 461; M. & H. 69; 6 L. J. Ex. 121; 1 Jur. 433; 46 R. R. 646; 150 E. R. 839.
(7) (1860) 29 L. J. Ex. 377; 5 H. & N. 813; 2 L. T. (N. S.) 362; 157 E. R. 1405; 120 R. R. 839.
(8) (1890) 44 Ch. D. 627; 59 L. J. Ch. 709; 63 L. T. 49; 38 W. R. 617.

the defendant to say that he is legally entitled to recover this sum without giving proof that it was legally recoverable at the date of the institution of the suit. The learned Judge has come to the conclusion that Rs. 176-9-0 is due to the defendant by the plaintiff for the value of services rendered by him as a professional legal gentleman. But we think that the plaintiff cannot claim this sum as a legal or an equitable set-off; and certainly not as an equitable set off because the claim does not arise out of the same transaction. We have carefully considered the effect of the law laid down in the case reported as *Dilfor Koer* v. *Karkhoo Singh* (9), and we are of opinion that the defendant in this case is not entitled in point of law to the set-off which he claims. Therefore, strictly speaking, the decree of the lower Court should be varied and the defendant's claim for a set-off should be dismissed. However, it appearing to us that something must be due by the plaintiff to the defendant for services rendered, we threw out the suggestion that the plaintiff as an honest man should pay an honest debt, more especially as the creditor is a Pleader who is usually one of the most deserving creditors in the world. However, Mr. Mullick had some diffidence in acceding to our suggestion; but we consider that it is desirable that this litigation should, if possible, be brought to a termination. Therefore, although we think that the defendant is not entitled to a set-off in point of law, nevertheless we think that we should, on the principle of justice, equity and good conscience, settle this litigation on a fair and equitable basis; and we would, therefore, allow the defendant, as against the plaintiff, credit for the amount to which he is entitled for services rendered by him as a Pleader and we fix this sum at the figure arrived at by the learned Judge, *viz.*, Rs. 176-9-0. We accordingly set aside the decree of the lower Court and declare that the plaintiff is entitled to a decree for the full sum claimed by him by way of principal, *viz.*, Rs. 1,109; and that he is further entitled to interest on this sum at the rate of 6 per cent per annum as and from the 2nd of November 1910 until the date of realization. As against this sum of principal and interest the defendant will get credit for Rs. 176-9-0 as and for the value of services rendered by him to the plaintiff *plus* Rs. 400, being the sum already paid by him to the plaintiff, *i.e.*, in all Rs. 570.

The appeal is accordingly allowed with costs.

*Appeal allowed.*

(9) 37 Ind. Cas. 367.

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MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 121 OF 1916.

February 23, 1917.

*Present*:—Sir John Wallis, KT, Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

CHIKKAM AMMIRAJU AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

CHIKKAM SESHAMMA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Contract Act (IX of 1872), s. 15—Coercion—Threat to commit suicide, whether 'coercion'—Suicide, whether 'act forbidden by the Penal Code'—'To the prejudice of any person whatever', meaning of—Document, execution of, under threat of suicide, validity of—Penal Code (XLV of 1860), ss. 305, 306, 309.*

Per *Wallis, C. J.*, and *Seshagiri Aiyar, J.*, (*Oldfield, J.*, dissenting).—A threat to commit suicide, in consequence of which a document is executed by a person, is the threatening to commit an 'act forbidden by the Indian Penal Code' and amounts to 'coercion' within the meaning of section 15 of the Contract Act, and the document executed in pursuance of the threat is invalid and inoperative. [p. 353, col. 1; p. 355, cols. 1 & 2.]

Per *Wallis, C. J.*—It is impossible to hold that an act which it is made punishable to abet or attempt is not forbidden by the Penal Code, especially as the absence of any section punishing the act itself is due to the fact that suicide is, in the nature of things, beyond the jurisdiction of the Court. [p. 353, col. 2.]

Per *Seshagiri Aiyar, J.*—Though there is no provision in the Indian Penal Code which forbids in terms the commission of suicide, there can be no doubt that the intention of the Legislature is to forbid such an act simply because a man, by committing the act, is beyond the reach of the law. [p. 353, col. 1.]

The word 'prejudice' in section 15 of the Contract Act does not mean mere sentimental prejudice. Some legal injury must flow before a person can be said to be 'prejudiced' under the section. [p. 353, cols. 1 & 2.]

A wife who executes a document in consequence of the husband's threat that he would commit suicide is prejudicially affected by the threat. [p. 353, col. 2.]

Per *Oldfield, J.*—Section 15 of the Contract Act should be strictly construed, and the act of prohibition not being expressly forbidden by the Penal Code, the prohibition cannot be inferred from the prohibition of attempts to commit it. An attempt

in the legal sense, can be recognized as such only after the criminal's intention has been frustrated, not when it is expressed, *i.e.*, when the threat is made. [p. 354, cols. 1 & 2.]

Appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Sadasiva Aiyar, in Second Appeal No. 1357 of 1914, reported as 34 Ind. Cas. 578, preferred against the decree of the District Court, Godaveri at Rajahmundry, in Appeal Suit No. 6 of 1913 (Original Suit No. 4 of 1912, on the file of the Court of the Temporary Subordinate Judge, Rajahmundry.)

Mr. *Patanjali Sastri*, for Mr. *P. Narayana Murthi*, for the Appellants.

Mr. *G. Venkataramiah*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—It has been found by both Courts that the deed in question was obtained by coercion, the coercion consisting in a threat by the fifth witness for the plaintiffs to his wife and son that he would commit suicide if they did not execute the document.

It is easy to set up such a defence and the evidence in support of it should, therefore, be very closely scrutinized before it is held to be made out. Here it has been found as a fact and we are not at liberty to interfere with the finding on second appeal.

The case now comes before us on a Letters Patent appeal owing to a difference of opinion between Sadasiva Aiyar and Moore, JJ., as to whether the facts as found amounted to coercion within the meaning of section 15 of the Indian Contract Act.

The point mainly argued before us was that suicide was not an "act forbidden by the Indian Penal Code" within the meaning of the section. With this I cannot agree. At Common Law suicide was a form of homicide. "Homicide properly so called", says Hawkins (Pleas of the Crown, Book I, Chapter 9), "is either against a man's own life or that of another." Wilful suicide was felony, and on a finding that the suicide was *felo de se* his chattels were forfeited to the Crown like those of other convicted felons. In section 299 of the Indian Penal Code the offence of culpable homicide is defined in terms which are sufficiently wide to cover deliberate suicide, which is dealt with by Mr. Nelson in his Indian Penal Code as a species of unlawful homicide, though, of course, section 302 and the following sections which prescribe the punishment for the various kinds of homicide are only applicable to living offenders. These sections are immediately followed by sections 305 and 306, which make abetment of suicide punishable with death in some circumstances and with lesser penalties in others. Then after dealing in sections 307 and 308 with attempts to commit murder and to commit culpable homicide, the Code proceeds in section 309 to provide for attempts to commit suicide. I find it impossible to hold that an act which it is made punishable to abet or attempt is not forbidden by the Indian Penal Code, especially as the absence of any section punishing the act itself is due to the fact that the suicide is in the nature of things beyond the jurisdiction of the Court, and it is no longer thought desirable to inflict a vicarious punishment on those who come after him by forfeiting his goods to the Crown.

As to the second point, the act threatened must be "to the prejudice of any person whatever," and would cover threats to a wife to murder her husband or to a son to murder his father. Here the threat was by the husband and father to kill himself, which must be taken to be an act to his own prejudice, which seems to me sufficient to satisfy the section. I may add that I think the threatened act would also be directly to the prejudice of the wife, as it must be taken to be to the prejudice of any wife to deprive her of her husband, especially of a Hindu wife who thereby incurs all the disabilities of a Hindu widow. For the same reason, I think the act must be taken to be to the prejudice of the son. I would, therefore, dismiss the appeal with costs.

Under section 36 of the Letters Patent the appeal is dismissed with costs.

OLDFIELD, J.—I have the misfortune to differ from the learned Chief Justice and therefore deal with the case at length.

The question is whether a threat to commit suicide is a threat to commit an act forbidden by the Indian Penal Code within the meaning of section 15, Indian Con-

tract Act; and it is conceded that it is not forbidden either directly or in the sense that a penalty is provided for it. It, therefore, can be regarded as forbidden only by implication. It is accordingly in place to consider whether section 15 can be construed by implication or should be read strictly.

Section 15 has given rise to few decisions, and to none in which the policy of the portion we are concerned with has been defined. No definition of that policy has been suggested before us, and advisedly. For it would be hard to argue that any general policy is in question, when the coercive character of an act depends on the applicability to it of a Statute, which, though wide, does not enumerate acts criminal in India exhaustively, which (as the illustration shows) need not have been enacted at all or need not have been in force at the date or place in question and which might make conduct punishable, although it would be so under no law binding on those concerned or of which they could even be presumed to have known. The test thus provided may commend itself as definite, but can be regarded only as arbitrary and not as intended to promote any general policy by reference to which a liberal construction can be supported. Taking this view, I am bound to scrutinize respondents' arguments closely.

The first is that a threat to commit suicide is indistinguishable from one to attempt to do so and that such an attempt is forbidden by section 309, Indian Penal Code, which penalizes it. The answer is that threats of these two descriptions are distinguishable, unless the word "attempt" is used throughout the argument in its ordinary sense as equivalent to "endeavour" and not, as it must be in the second place, where it occurs, in the legal sense, in which it is used in sections 305 and 511. Further if the word is used in its legal sense throughout, a threat to attempt to commit suicide is not only different from one to commit suicide, but is, like other threats to commit an attempt, a contradiction in terms. For an attempt in the legal sense can be recognized as such only after the criminal's intention has been frustrated, not when it is expressed; that is, when the threat is made. The remaining contention relied on is that the Code implicitly forbids suicide, because in sections 306 and 309 it explicitly forbids abetment of it and attempts to commit it. But this will advance the argument, only if it corresponds with some general principle; and it does not as regards abetment. For, apart from the cases of abetment of children and lunatics, it is not suggested that acts done without guilty knowledge or intention (and, therefore, innocently), but which nevertheless can be abetted under section 108, explanation 3, are forbidden. The principle, if there is one, is, therefore, sustainable only subject to these exceptions. But, even so, reference to it is useless. For it is not shown that it can be tested by application to any instance, except the case of suicide, with which we are concerned; and there is no more security for its validity when such test is impossible, than for the validity of respondents' argument as applied to that case alone.

Respondents must, therefore, succeed, if at all, on the single and direct contention that in the case of suicide a prohibition can be inferred from the prohibition of attempts to commit it; and with all respect, having decided in favour of a strict construction of section 15, Indian Contract Act, I cannot accept it. No doubt the only species of prohibition employed in the Code, the specification of a penalty, would be useless in this case. But it does not follow that the failure to employ the other, direct prohibition, or to make provision for the case of suicide in the Contract Act was due to inadvertence and that the omission should be supplied by inference. For it is possible that provision was omitted deliberately, because cases for its application would be rare and their truth difficult to establish, the party alleged to be coerced having usually easier means of preventing the accomplishment of the threat than by entering into the agreement sought to be avoided.

Holding that respondents cannot succeed on section 15, I turn to section 16 on which they also rely. In this connection, the threat of suicide is irrelevant, since Swami, who made it, was not a party to the contract; and there is no finding of fact, which would support any exercise of undue influence by the parties to the contract, appellants. This plea, therefore, fails,

As the majority of the Court would dismiss the appeal with reference to section 15, respondents' other contentions have not been heard. On the view I take it would be necessary to consider them before the appeal could be disposed of.

SESHAGIRI AIYAR, J.—I agree with the judgment of the learned Chief Justice.

I do not think that the evidence in this case is sufficient to warrant a finding on the question of undue influence. On the question of coercion, although I had some doubts in the beginning, I have come to the conclusion that the facts do bring the case within section 15 of the Indian Contract Act. Mr. Patanjali Sastri argued that threatening to commit suicide is not forbidden by the Indian Penal Code. A man who commits suicide goes unpunished, because the law cannot reach him, and not because the offence is not forbidden. The Code makes a person who abets the committing of suicide punishable. It also reaches a man who attempts to commit suicide. Although, therefore, there is no provision in the Indian Penal Code which forbids in terms the commission of suicide, there can be no doubt that the intention of the Legislature is to forbid such an act. I agree with Mr. Venkatarama Aiyah that the term "any act forbidden by the Indian Penal Code" is wider than the term "punishable by the Indian Penal Code." Simply because a man escapes punishment, it does not follow that the act is not forbidden by the Indian Penal Code. For example, a lunatic or a minor may not be punished. This does not show that their criminal acts are not forbidden by the Indian Penal Code. On the same analogy, a man who commits suicide escapes punishment because by committing the act, he is out of the reach of the law. Where the abetment of it and the attempt to do it are both made punishable by the Indian Penal Code, I am prepared to hold that the act itself is one forbidden by the Indian Penal Code.

The second contention of the learned Vakil was, that the threat to commit suicide could not have prejudiced the plaintiff. I agree with him that mere sentimental prejudice is not what the law contemplates. As pointed out in *Reg.* v. *Metropolitan Board of Works* (1), some legal injury must flow in order that the man may be said to have been prejudiced. See also *Clark* v. *London General Omnibus Company, Limited* (2). Accepting this test, I am unable to hold that the wife to whom the threat was addressed by a husband that he would commit suicide in case she does not execute a document, is not prejudicially affected by such a threat. In my opinion, the possibility of the husband dying leaving the wife and the child uncared for is sufficient in the eye of the law to furnish the ground of prejudice. On this ground I agree with Mr. Justice Sadasiva Aiyar in thinking that Exhibit A was brought about by the use of coercion and that it should be set aside.

The appeal should be dismissed with costs.

*Appeal dismissed.*

V. R. P.

(1) (1863) 3 B. & S. 710; 32 L. J. Q. B. 105; 8 L. T. 238; 9 Jur. (N. S.) 1009; 11 W. R. 492; 122 E. R. 266; 129 R. R. 529.

(2) (1906) 2 K. B. 648; 75 L. J. K. B. 907; 95 L. T. 435; 22 T. L. R. 691.

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## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 88 OF 1915.

February 22, 1917.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

MAHENDRA CHANDRA DATTA AND OTHERS—APPELLANTS

*versus*

ABHOY CHARAN SARMA AND OTHERS—RESPONDENTS.

*Land Acquisition Act (I of 1894), s. 18, sub-s. 2, cl. (6)—Reference by Collector—Limitation—Hindu Law—Widow—Sale of inherited property without legal necessity or consent of reversioners, validity of—Purchaser, position of.*

Where before the date of the award, the Collector having passed an order that the party should go to the Civil Court, the *Mukhtear* of the party ceased to take any further part in the proceedings before the Collector and a reference was made more than six weeks after but within six months of the award:

*Held*, that the reference was within time under section 18 (2) (6) of the Land Acquisition Act. [p. 356, col. 2.]

The sale by a Hindu widow without legal necessity or the consent of the reversioners of property inherited from her husband, is not void, but is only voidable

at the instance of the reversioners or persons claiming under them. [p. 357, col. 2.]

*Obiter.*—A purchaser under such a sale is entitled to sue in ejectment. [p. 357, col. 2.]

Appeal against the decree of the District Judge, Sylhet, dated the 17th December 1914.

FACTS of the case appear from the judgment.

Babu *Sasadhar Roy* (Senior), for the Appellants.—We have always denied the title of Jagannath Misra, husband of Annapurna. The respondent has got to prove that the land belonged to her husband and that she inherited it from him, before any presumption can arise that she had only a life-interest. Her possession and title being proved, it should be presumed that she had an absolute right, so no question of legal necessity can arise. I rely on the Privy Council ruling reported as *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (1). Moreover, sale by her, assuming that the property sold was her husband's property, is not absolutely void.

Even if it be assumed that she had only a life-interest, the purchaser from her has a good title, so long as the sale is not set aside by the reversioners or those who claim through the reversioners.

Babu *Hemendra Kumar Das*, for the Respondents.—It was practically admitted that Annapurna's husband was the owner of the properties. See the *kabalas* by his daughter's sons. The title of the respondent by adverse possession has been made out. The reversioner was a party to this proceeding, but he has compromised the matter with the respondent and has no objection to the respondent getting the compensation.

JUDGMENT.—This appeal arises out of a proceeding under the Land Acquisition Act and the question involved in the appeal is whether the appellant or the respondent should get the compensation awarded by the Collector.

A preliminary objection has been taken on behalf of the respondent that the reference under section 18 was barred by limitation, inasmuch as it was not made within six weeks from the date of the Collector's award. It is contended that, as a *Mukhtear* appeared at some stage of the proceedings, it must be taken that the appellant was represented before the Collector at the time when the Collector made his award. It appears, however, that some time before the date of the award, the Collector passed an order that the appellant should go to the Civil Court; and it does not appear that the *Mukhtear* took any further part in the proceedings before the Collector. That being so, the appellant was not present or represented before the Collector at the time when he made his award. The reference having been made within six months of the award was within time under section 18, sub-section (2), clause (*b*). The preliminary objection is accordingly overruled.

The dispute between the parties relates to compensation for five plots of land, namely, plots Nos. 14, 19, 20, 58 and 28. So far as plot No. 28 is concerned, it appears that, after the delivery of possession thereof to the appellants' predecessor, who purchased it at an execution sale, the respondent preferred a claim which was successful and no suit was brought within the period of limitation. The claim, so far as this plot is concerned, was not pressed in argument before the Court below and must accordingly be disallowed.

With regard to the remaining four plots, the appellant claims to have purchased them in execution of a decree against Bimala Sundari, widow of Dinonath, in respect of debt due by the latter. The respondent, on the other land, claims title to one half of them by right of adverse possession, and the other half by virtue of one Baikuntha "having given up the same in his favour." He says that these lands originally belonged to one Jagannath and that, after the death of Jagannath and his widow Annapurna, they were inherited by their daughter's sons Ratanmoni and Banku Behari, that Banku Behari sold his 8 annas to Baikuntha and that it was this Baikuntha who gave up the 8 annas in his favour. So far as Ratanmoni's 8-annas share is concerned, the respondent claims it by right of adverse possession.

The learned District Judge has found that neither party has been able to prove his title, and, as the respondent was in possession, he disallowed the claim of the appellant. The learned Judge seems to have

(1) 4 C. W. N. 1; 26 C. 871; 26 I. A. 226; 2 Bom. L. R. 1; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158.

proceeded upon the assumption that the properties originally belonged to Jagannath. That, however, was not the case of the appellant, and there is really no evidence on the side of the respondent to show that the properties originally belonged to Jagannath. The witnesses who deposed on the point have no personal knowledge about the matter, and we must hold that the respondent has failed to prove that Jagannath was entitled to the lands. But assuming that Jagannath had any title to the lands and that they descended to his daughter's sons, Ratanmoni and Banku Behari, we do not think that the title of the respondent has been made out. As stated above, so far as Banku Behari's share is concerned, all that the respondent said in his written statement in the Court below was that Baikuntha had given up his right in his favour, and that throws considerable doubt upon the evidence adduced by him to prove that there was a purchase of the 8-annas share from Baikuntha.

Then, as regards the share of Ratanmoni, the respondent claims his title by adverse possession for over twelve years. He himself in his deposition said that he had been in possession for about eleven or twelve years and one of his witnesses, Dinonath Sarma, said that it was for fourteen or fifteen years. But Dinonath is his brother-in-law and he went further than the respondent himself as to the period for which the respondent was in possession. As stated above the respondent in his written statement claimed title to Ratanmoni's share by adverse possession for twelve years but adduced evidence to show that he had also purchased Ratanmoni's share. That evidence cannot be accepted and we think that neither the purchase from Ratanmoni nor from Baikuntha has been satisfactorily proved.

The learned Judge relied upon the fact that the respondent was in possession; and it is contended before us that the respondent should be awarded the compensation unless the appellant can show a better title. The learned Judge was of opinion that the properties belonged to Jagannath and that, if the appellant purchased the properties from Annapurna, that purchase was not binding upon the reversionary heirs of Jagannath or persons claiming under him. But, in the *first* place, it has not been shown that the properties belonged to Jagannath; and, *secondly*, even if the properties belonged to Jagannath and were inherited by his widow Annapurna, the purchase by the appellant or his vendor from Annapurna is not void. It is only voidable at the instance of the revesioners or persons claiming under them. That is well settled. See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2). A purchaser from a Hindu widow, although he is not able to show either legal necessity or consent of the reversioner, is entitled to sue in ejectment. See *Kishori Pal* v. *Sheikh Bhushai Bhuiya* (3). We have already found that the respondent has not proved any title derived from the reversioners of Jagannath, assuming that the title belonged to him. That being so, he cannot question the title of the appellant even if he is taken to have purchased from Jagannath's widow Annapurna. He, however, claims his title through Dinanath and it is not disputed that he purchased the interest of Dinanath at the execution sale. In any view of the matter, we think that the appellant has proved his title to the four plots and that he is entitled to the compensation in respect of them.

The respective values of plot No. 28 and of the other four plots do not appear from the record before us. We accordingly send the case back to the lower Court in order that the value of plot No. 28 may be ascertained and the compensation awarded in respect of that plot may be given to the respondent Abhoy Charan Sarma out of the five plots, the subject-matter of the appeal, and that the compensation in respect of the other plots Nos. 14, 19, 20 and 58 may be given to the appellant. The parties will get their costs in both the Courts in proportion to their success. We assess the hearing fee in this Court at five gold *mohurs*.

*Appeal allowed; Case lent back.*

(2) 34 I. A. 87; 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 C. 329; (P. C.).

(3) 3 Ind. Cas. 73; 14 C. W. N. 106.

NATHAMUNI PILLAI *v.* VENGAMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 805 OF 1915.

January 23, 1917.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

S. NATHAMUNI PILLAI—PLAINTIFF—APPELLANT

*versus*

VENGAMMAL AND OTHERS—DEFENDANTS NOS. 1, 2, 4 AND 5—RESPONDENTS.

*Mortgage—Document, construction of—Usufructuary hypothecation bond—Hypothecation clause, claim on, barred—Redemption, suit for—Rights of mortgagor and mortgagee—Limitation Act (IX of 1908), ss. 3, 28.*

A mortgage-bond, entitled usufructuary hypothecation bond, for Rs. 3,000 provided that interest on the moiety of the amount advanced would be payable out of the usufruct and that interest at one per cent. per month would be paid on the balance by the mortgagor. The final provision was that both sums were to be paid in a lump on the same day 10 years afterwards. After the right to sue on the hypothecation clause became barred, the mortgagor sued to redeem the mortgage and claimed that he was entitled to possession of the entire property on payment of Rs. 1,500 only:

*Held*, (1) that the document constituted only one mortgage transaction; [p. 358, col. 2.]

(2) that section 28 of the Limitation Act could not apply to the case and that the mortgagor was not entitled to redeem without discharging the whole debt. [p. 359, col. 1.]

*Kesar Kunwar* v. *Kashi Ram*, 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889 and *Athan Kutti* v. *Matavil Illoth Sutarjanam*, 37 Ind. Cas. 756; (1917) M. W. N. 9; 5 L. W. 461; 32 M. L. J. 317, distinguished.

The provisions of the Limitation Act should be construed strictly. Limitation is not extinction and the bar created by it does not operate to discharge a debt except in the particular circumstances of section 28. [p. 359, col. 1.]

The limitation of the mortgagee's right to recover must not be read as a good plea to be urged by a mortgagor endeavouring to redeem, and unless the mortgagee is compelled to bring a suit within the meaning of section 3 of the Limitation Act, he is entitled to set up every claim in defence that he has in law to support the debt which still remains due. [p. 359, col. 1.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 270 of 1914, preferred against that of the Additional District Munsif, Trichinopoly, in Original Suit No. 157 of 1914.

Messrs. *T. R. Ramachandra Aiyar* and Mr. *T. R. Krishnaswamy Aiyar*, for the Appellant.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.

NAPIER, J.—In my opinion, the view taken by the Munsif and upheld by the District Judge that the right of redemption can only be exercised on payment of the whole of the mortgage amount is correct. The mortgage-bond, Exhibit A, is perfectly easy to understand. A sum of Rs. 3,000 was borrowed. The property was obviously not of sufficient value to discharge the interest which the mortgagee required from the usufruct and so the usufruct was to be applied to the payment of only half the interest. With respect to the interest on the balance of Rs. 1,500, the mortgage is treated as a hypothecation bond and the interest is calculated at one per cent. a month. Then the final provision is that both sums are to be paid in one lump on the same day, 10 years afterwards, and the bond is entitled "usufructuary hypothecation bond."

Mr. Ramachandra Aiyar has sought to make two mortgages out of this transaction and suggests that the fact that these two mortgages are contained in one document does not make any difference. In my opinion it is, as it purports to be, one mortgage with provisions in it which are rendered necessary by the fact that the whole of the interest chargeable cannot be discharged by the usufruct.

Now the plaintiff seeks to redeem the property. Admittedly he cannot redeem without paying the whole amount that is due; and it is not disputed that, apart from any question of limitation, the whole amount which he claims is due: but it is said that he cannot be compelled to pay Rs. 1,500 because if the defendant had brought a suit to recover that amount of Rs. 1,500 in respect of what may be called the hypothecation clause of the document, the suit would be barred.

Reliance is placed on two cases, *Kesar Kunwar* v. *Kashi Ram* (1) and *Athan Kutti* v. *Matavil Illoth Sutarjanam* (2). I do not think that these cases have any bearing on the narrow points we have to decide here. In both of them there were two documents and two distinct transactions and to my mind that is a quite sufficient distinction between those cases and this and it is not necessary for us to consider what would be the position if there were in this case two documents and to go into the rather difficult subject of consolidation. The short

(1) 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889.

(2) 37 Ind. Cas. 756; (1917) M. W. N. 9; 5 L. W. 461; 32 M. L. J. 317.

answer to the appellant's case is that the Limitation Act must be construed strictly and that limitation is not extinction, except in the particular circumstances of section 28. Mr. Ramachandra Aiyar has not argued that section 28 applies to this case and we do not think that such an argument could be put forward with any chance of success. We are, therefore, left with section 3: "Subject to the provisions contained in sections 4 to 25 every suit instituted shall be dismissed." Now that is the sole provision and it is accepted law in this Court, and I think in every other Court in India that the bar of limitation does not operate to discharge. For this proposition it is only necessary to quote *Subrahmania Ayyar* v. *Poovan*(3) and *Subramania Aiyar* v. *Gopala Aiyar* (4). If, therefore, the debt is not extinguished and if the sole effect of the Statute is that the mortgagee could not have brought a suit to recover that amount and if it is provided by Statute that a mortgagor cannot redeem without discharging the whole of the debt, there is to my mind an end of the contention of the appellant. And this is, I think, the true view of the case. Our attention has been called to two English cases, one of them specifically dealing with the rights and liabilites of a mortgagor. They are *Edmunds* v. *Waugh* (5) and *Marshfield, In re*; *Marshfield* v. *Hutchings* (6). The principle stated there, that the limitation of the mortgagee's right to recover must not be read as a good plea to be urged by a mortgagor endeavouring to redeem, covers this case and, in my opinion, unless the mortgagee is compelled to bring a suit within the meaning of section 3 he is entitled to set up every claim that he has in law, to support the debt which still remains due.

I would dismiss this appeal with costs.

AYLING, J.—I agree.

*Appeal dismissed.*

V.R.P.

(3) 27 M. 28 at p. 30.

(4) 7 Ind. Cas. 898; 33 M. 308 at p. 310; 20 M. L. J. 633; 8 M. L. T. 321.

(5) (1866) 1 Eq. 418 at p. 421; 35 L. J. Ch. 234; 12 Jur. (N. S.) 326; 13 L. T. 739; 14 W R. 257.

(6) (1887) 34 Ch. D. 721 at p. 724; 56 L. J. Ch. 599, 56 L. T. 694; 35 W. R. 491.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3742 1913.

July 30, 1915.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

KESHO PROSAD SINGH—PLAINTIFF—APPELLANT

*versus*

SARWAN LAL—DEFENDANT—RESPONDENT.

*Principal and agent—Agent's obligation to render accounts, scope of—Limitation Act (IX of 1908), Sch. I, Arts. 64, 89, 115—Suit for recovery of money found due on accounts taken and adjusted—Limitation—"Moveable property", whether includes money.*

Where the accounts of an agent have been taken and adjusted and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for its recovery and the position is not altered, even if the agent continues thereafter to hold his office as agent of that principal. A suit of this description falls under Article 64 or Article 115 of the Limitation Act. [p. 360, col. 2.]

Where accounts have been rendered by an agent, Article 89 of the Limitation Act has no application to a suit by the principal against the agent for recovery of money found due on such accounts, as the suit contemplated by Article 89 is a suit in which accounts have to be taken. [p. 360, col. 2.]

The obligation of an agent to render an account of his agency and to account for money received by him is not merely confined to rendering of accounts of what has been done with the moneys, but includes also the payment of any balance which might be found due from him upon taking accounts. [p. 360, cols. 1 & 2.]

*Kalee Kishen Paul Chowdhry* v. *Musammt Juggut Tara*, 11 W. R. 76; 2 B. L. R. A. C. 139, followed.

The expression "moveable property" in Article 89 of the Limitation Act includes money. [p. 360, col. 1.]

Appeal against the decision of the District Judge, Arrah, dated the 30th July 1913, affirming that of the Subordinate Judge, Arrah, dated the 1st July 1912.

Babus *Provas Chundra Mitter* and *Susil Madhub Mullick*, for the Appellant.

Babus *Akshoy Kumar Banerjee* and *Harnandan Sahay*, for the Respondent.

JUDGMENT.—This is an appeal in a suit by a principal for recovery of a sum of money from his agent. The plaintiff claims three sums from the defendant, namely, Rs. 785-14 found due on adjustment of the accounts of 1311, Rs. 1867-2-9 alleged to be due on the unadjusted accounts of 1314, and Rs. 661-5-6 said to have been advanced to the defendant. The agency ceased on the 15th October 1907 and the suit was instituted on the 4th November 1910; but in this connection, it is to be

borne in mind that the Court was closed on account of the annual vacation from the 2nd October to the 3rd November 1910. The District Judge has found, with regard to the sum of Rs. 661-5-6, that as the defendant has already accounted for it, the plaintiff is not entitled to relief in respect thereof. As regards the sum of Rs. 1,857-2-9, the District Judge has found that the plaintiff is entitled to succeed, and that no questions of limitation arises, as the suit was brought within three years from the date of termination of the agency as required by Article 89 of the Schedule to the Indian Limitation Act. The only question in controversy, consequently, is, whether the claim for Rs. 785-14 found due on adjustment of the accounts of the year 1311 is barred by limitation. The case for the plaintiff is that the suit in respect of this claim is governed by Article 89, while the contention of the defendant is that Article 64 applies to this matter. In our opinion, Article 89 has no possible application in so far as this portion of the claim is concerned.

Article 89 provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for must be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. If attention is confined only to the first column of this Article, the contention of the appellant may seem plausible; for the argument is that this is a suit by a principal against his agent; it is for recovery of moveable property, because it has been ruled that the expression "moveable property" includes money; and it is further a suit for recovery of money which has been received by the agent and has not been accounted for, because the agent has not paid to the principal the sum claimed. Now, it need not be disputed, as was explained by Sir Barnes Peacock, C. J., in *Kalee Kishen Paul Chowdhry* v. *Musammat Juggut Tara* (1), that the obligation of an agent to render an account of his agency and to account for money received by him, is not confined merely to rendering of accounts of what has been done with the moneys, but includes also the payment of any balance which might be found due from him upon taking accounts. But when the first column of Article 89 is read along with the third column, it becomes plain that the suit contemplated by Article 89 is a suit in which accounts have to be taken. The first alternative mentioned in the third column refers to a case where the principal has demanded an account during the continuance of the agency and has met with a refusal; the second alternative refers to a case where an account has not been demanded and presumably has not been rendered. Where an account has been rendered, Article 89 has thus no application. In our opinion, it is plain that where accounts have been taken and adjusted, and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for recovery of that money: *Nobin Chunder Sahoo* v. *Suroop Chunder Dass* (2), *Bissessur Gir* v. *Sree Kishen Shaha Chowdhry* (3); *Umedchand Hukamchand* v. *Sha Bulakidas Lalchand* (4) and *Dukhi Sahu* v. *Mahomed Bikhu* (5); and the position is not altered, even if the agent continues thereafter to hold his office as agent of that principal. To a suit for the enforcement of a claim of this description, for the recovery of a specific sum found due on adjustment of accounts, Article 64 or Article 115 applies. Article 64 applies to a suit for money payable to the plaintiff as money found to be due from the defendant to the plaintiff on accounts settled between them. Such a suit has to be instituted within three years from the date when the accounts are stated in writing, signed by the defendant or his agent duly authorised in this behalf. There is, however, an important exception to this rule, namely, in the case where the debt is, by a simultaneous agreement in writing signed by the defendant or his duly authorised agent, made payable at a future time, the period runs from the date when such time arrives. In the case before us, it has not been suggested that when the accounts of 1311 were adjusted, there was a simultaneous agreement, in writing and signed as required by the Statute, for payment of the sum due at a future time. Consequently,

(1) 11 W. R. 76; 2 B. L. R. A. C. 139.

(2) 6 W. R. 328.

(3) 24 W. R. 840.

(4) 5 B. H. C. R. O. C. J. 16.

(5) 10 C. 284; 13 C. L. R. 445; 5 Ind. Dec. (N. S.) 199.

time ran against the plaintiff from the date when the accounts were adjusted and the statement signed, and as the suit has been brought more than three years after such date, the claim is clearly barred by limitation. On the other hand, if we hold, as has been done in some cases [*Laycock* v. *Pickles* (6), *Nahanibai* v. *Nathu Bhau* (7), *Tribhovan Gangaram* v. *Amina* (8), *Zulfikar Husain* v. *Munna Lal*(9), *Amuthu* v. *Muthayya*(10)], that the expression "account stated" applies only where there are reciprocal demands, though a more popular signification was accepted in *Dukhi Sahu* v. *Mahomed Bikhu* (5) and *Manjunatha Kamti* v. *Devamma* (11), it is plain that Article 115 is applicable, and in that view also, the claim is barred by limitation: *Jalim Singh* v. *Choonee Lal* (12).

An ingenious attempt has been made to induce us to hold that the principal appropriated the sum due from the collection of subsequent years. There is no foundation for this contention. If the sum found due on adjustment had, as a matter of fact, been paid by the agent to the principal, the plaintiff would not have included a claim for that sum in his plaint. On the other hand, it is plain that the accounts for the different years were separately adjusted and no claim has been instituted for the years 1312 and 1313, because, presumably, upon accounts taken for those years, nothing was found due from the agent to the principal. The suit is, in substance, for recovery of money found due on adjustment of accounts of the year 1311 and alleged to be due for the year 1314. In respect of the latter claim, the suit is governed by Article 89, as the accounts have to be taken; in respect of the former claim, the suit is for recovery of a debt found due on adjustment of accounts and is governed by Article 64 or Article 115. We hold, accordingly, that the view taken by the District Judge is correct and that his decree must be affirmed. The appeal is dismissed with costs.

*Appeal dismissed.*

(6) (1863) 4 B. & S. 497; 33 L. J. Q. B. 43; 9 L. T. 378; 10 Jur. (N. S.) 336; 12 W. R. 76; 122 E. R. 546; 129 R. R 827.
(7) 7 B. 414; 8 Ind. Jur. 64; 4 Ind. Dec. (N. S.) 278.
(8) 9 B. 516; 5 Ind. Dec. (N. S.) 343.
(9) 3 A. 148; 2 Ind. Dec. (N. S.) 77.
(10) 16 M 339; 5 Ind. Dec. (N. S.) 943.
(11) 26 M. 186.
(12) 11 Ind. Cas. 540; 15 C. W. N. 882.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 252 OF 1914*.

January 30, 1917.

*Present*:—Mr. Lindsay, J. C.

MAZHAR ALI KHAN, DEAD, AND AFTER HIS DEATH *Musammat* SIRAJ-UN-NISA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ALI ASGHAR—DEFENDANT—RESPONDENT.

*Construction of document—Sale-deed, interpretation of—Vendor and purchaser—Money left with vendee for payment to mortgagee—Redemption, no attempt made by vendee for - Mortgagee's suit decreed—Decree satisfied by vendee—Vendee, position of.*

On the sale of an immoveable property a portion of the sale-consideration was left with the vendee for payment to the mortgagee of the said property. The sale-deed provided that if the money so left with the vendee fell short of the sum actually due to the mortgagee the vendor was bound to discharge the excess money, and that if the vendee was put to any expense in connection with the deposit of the mortgage-money by reason of any bad faith or dishonesty on the part of the mortgagee he was to bear the burden of that cost himself. The vendee made no attempt to redeem the mortgage. Long after the date of the sale and the date when redemption of the mortgage first became possible, the mortgagee sued both the vendor and the vendee on the basis of the mortgage and obtained a decree against them. The vendee discharged the whole decretal amount and then brought a suit against the vendor for recovery of the difference between the sum he had had to pay for the satisfaction of the decree and the sum which had been left with him at the time of the sale for payment to the mortgagee:

*Held*, (1) that the vendee was bound in the first instance to redeem, or at least to make an attempt to redeem the mortgage; [p. 365, col. 2.]

(2) that the vendee having failed to make an attempt to redeem the mortgage at a reasonably early date after the conclusion of the sale-transaction, so as to discover that the money left with him fell short of the requisite amount, he was not entitled to the sum claimed by him, but only to the difference between the sum left with him and the amount which was actually payable to the mortgagee on the date when redemption of the mortgage first became possible. [p. 366, col. 1.]

*Muhammad Siddiq Khan* v. *Muhammad Nasir Ullah Khan*, 21 A. 223; 3 C. W. N. 201; 26 I. A. 45; 7 Sar. P. C. J. 472; 9 Ind. Dec. (N. S.) 851; *Badri Das* v. *Jivan Lal*, 15 Ind. Cas. 854; 10 A. L. J. 480, distinguished.

Appeal from the decree of the Additional Judge, Lucknow, dated the 24th February 1914, upholding the order of the Subordinate Judge, Unao, dated the 1st December 913.

Syed *Zohur Ahmad*, for Appellant No. 1.

The Hon'ble Mirza *Sami Ullah Beg*, for the Respondent.

*The judgment in this case disposes of two cases together, *viz.*, Second Civil Appeal No. 252 of 1914 and First Civil Appeal No. 38 of 1915—*Ed.*

MAZHAR ALI KHAN *v.* ALI ASGHAR.

JUDGMENT.—These two appeals, although they arise out of two different suits, may conveniently be disposed of by one and the same judgment. Both suits have their origin in a deed which was executed on the 9th of November 1895 by one Mazhar Ali Khan in favour of Ali Asghar. Mazhar Ali Khan was the plaintiff in the suit out of which the second appeal has sprung. He has died since the institution of the suit and is represented by three ladies *Musammat* Siraj-un-nisa, *Musammat* Ikbal-un-nisa and *Musammat* Shakir-un-nisa. Ali Asghar, the other party to the sale-deed just mentioned, was the plaintiff in the suit which has given rise to First Civil Appeal No. 38 of 1915. In order to understand the matters in issue between the parties to these two cases it is necessary to go back to the year 1891. On the 31st of March of that year Mazhar Ali, who was at that time the owner of an entire village named Khairanpur Ganwansa, situated in the Unao district, mortgaged it with possession to a lady named *Musammat* Husaini Jan to secure a loan of Rs. 5,000. The period of the mortgage was five years and it was provided that the mortgagor was to be at liberty to redeem in the first "*khali fasl Jeth*," which fell after the expiry of the mortgage period. There is no dispute now that redemption of this mortgage first became possible on the 28th of April 1896. During the year 1891 Mazhar Ali executed three deeds of further charge in favour of his mortgagee; a fourth deed was executed on the 12th of January 1895. On the 9th of November 1895 Mazhar Ali sold a 12-annas share of this village to the other party to these cases, namely, Ali Asghar. The price at which this share was sold was stated in the deed to be Rs. 7,431. Out of this Rs. 100 was taken up in defraying the expenses of stamping and registering the deed. The balance Rs. 7,331 was left with Ali Asghar for payment to the mortgagee. The other terms of the sale-deed will be considered at a later stage. It is sufficient at the present time to say that no attempt seems to have been made by Ali Asghar to redeem Husaini Jan's mortgage. It may here be mentioned that under this mortgage of the 31st of March 1891 it had been agreed between the mortgagor and the mortgagee that if redemption did not take place in the first "*khali fasl Jeth*" after the expiry of the mortgage period, the mortgagee was to be entitled to remain in possession for a further period of fifteen years with an option of bringing a suit at any time for the sale of the property for the purpose of recovering her mortgage-money. In the month of July 1911 Husaini Jan brought a suit for sale against her mortgagor Mazhar Ali and his purchaser Ali Asghar. She claimed a sum of close on Rs. 14,000. On the 23rd of March 1911 the suit was compromised, the mortgagee agreeing to accept a sum of Rs. 10,525. A decree was passed in terms of this compromise and eventually in the month of December 1911 the total debt, which was due under the decree and which at that date amounted to Rs. 11,915, was discharged by the purchaser Ali Asghar. Ali Asghar has, therefore, brought the suit out of which First Civil Appeal No. 38 of 1915 has arisen, in order to recover from Mazhar Ali or his representatives in interest the difference between the sum which he had to pay for redemption of Husaini Jan's mortgage and the sum of Rs. 7,331 left with him at the time of the execution of the sale for payment to the mortgagee. His case may be put briefly as follows. He says that the sum which was left with him for redemption was insufficient to discharge the mortgage; that it was the duty of the mortgagor Mazhar Ali to give him a clear title and to pay all that was owing in respect of the mortgage and deeds of further charge executed in favour of *Musammat* Husaini Jan, that Mazhar Ali failed to discharge this legal duty and that the result of his failure was that he (Ali Asghar) was obliged to pay a sum much in excess of the money which was left with him for redemption. The defence put forward to this claim was that the duty of redeeming the property lay with the purchaser; that he failed to take any steps towards redemption until the mortgagee brought a suit and obtained a decree and that if he has been obliged to pay a sum largely in excess of the amount which was left with him in order to obtain redemption, he is liable to bear the loss by reason of his failure to perform the duty which was laid upon him in accordance with the terms of the contract of sale entered into on the 9th of November 1895. I may here briefly describe the nature

of the claim which was brought by Mazhar Ali who was the original plaintiff in the suit out of which Second Civil Appeal No. 252 of 1914 has sprung. Under the terms of his mortgage executed in favour of Husaini Jan, Mazhar Ali was entitled to an allowance from the mortgagee at the rate of Rs. 15 a month. At the time when the suit brought by the mortgagee was compromised, an account was taken of the money which was outstanding on this account. It appears that the mortgagee had not paid this annuity for a number of years and when the compromise was arrived at and accounts were taken, a sum of Rs. 1,292 was set off as being the amount due for *guzara* to the mortgagor Mazhar Ali. Mazhar Ali, therefore, claimed that he was entitled to recover this sum from Ali Asghar who had failed to redeem the mortgage. His case was that this money which was owing to him had been applied in satisfaction of the mortgage decree. Mazhar Ali's suit was tried first. The Court of first instance, the Subordinate Judge of Unao, was of opinion that the responsibility for failure to redeem the mortgage lay with Mazhar Ali the mortgagor and not with his purchaser Ali Asghar and consequently he was of opinion that Mazhar Ali was not entitled to recover this amount. He held on the fourth issue raised in that suit that if it were possible to say that it was the duty of Ali Asghar to redeem the mortgage on the 28th of April 1896, Mazhar Ali would be justly entitled to the sum which he was claiming. This decree of the Subordinate Judge was appealed and his order was upheld in appeal by the learned Additional Judge of Lucknow. The other suit out of which First Civil Appeal No. 38 of 1915 has arisen was tried by another Subordinate Judge of Unao. He has adopted a different interpretation of the rights and liabilities of the parties arising out of the sale transaction of the 9th of November 1895. He holds that on a proper construction of the deed of sale and having regard to the attendant circumstances Ali Asghar was bound to redeem the mortgage. The Subordinate Judge has found that he failed to discharge this duty, and he has, therefore, disallowed the greater portion of the claim made by Ali Asghar. He has decided that the most that Ali Asghar could recover was a sum of Rs. 59-4-3.

To deal first with the first appeal in which Ali Asghar is the appellant. The case which has been put forward on his behalf is that the Subordinate Judge has taken a wrong view of the legal relations which were created by the deed of sale of the 9th of November 1895. It is argued that Mazhar Ali as the vendor of the property free from any encumbrance was bound to secure a good title to his purchaser and that for that purpose it lay upon Mazhar Ali to take steps to redeem the mortgage in favour of *Musammat* Husaini Jan. It is said that Mazhar Ali having failed to carry out his contract the plaintiff, having been damnified to a substantial extent by this failure, was entitled to recover the sum claimed by way of damages for breach of a contract. This brings us at once to the principal issue which has to be decided in these two cases. It is not to be denied that in the absence of a contract to the contrary the seller of immoveable property is bound, except in the case where the property is sold subject to encumbrances, to discharge encumbrances on the property existing at the time of the sale [section 55 (1) (*g*) of the Transfer of Property Act]. Looking at the terms of the sale-deed in suit which is marked Exhibit 22, it appears to me to be clear beyond all dispute that the conveyance was a conveyance of property not subject to encumbrances. An attempt indeed was made to argue in the opposite sense but such an argument could not, in my opinion, in the face of the language of the deed in question be seriously entertained. In dealing with this question of the duty to redeem two cases were cited before the lower Court. One of these is a decision of their Lordships of the Privy Council, which is reported as *Muhammad Siddiq Khan* v. *Muhammad Nasir Ullah Khan* (1). The other case, a decision of the Allahabad High Court, is to be found as *Badri Das* v. *Jiwan Lal* (2). In the case decided by their Lordships of the Privy Council it was held that where money was left with a purchaser for the purpose of paying off the mortgage he was entitled

(1) 21 A. 223; 3 C. W. N. 201; 26 I. A. 45; 7 Sar. P. C. J. 472; 9 Ind. Dec. (N. S.) 851.

(2) 15 Ind. Cas. 854; 10 A. L. J. 480.

to retain it as a security that the property sold should be freed from the encumbrances upon it and that he should have a good title. Their Lordships laid down that the purchaser was entitled to retain such money until the vendor provided the rest of the money necessary for the purpose of redemption. This ruling of their Lordships was followed in the Allahabad case which has been mentioned. There again it was held that it was the duty of the vendor to give a clear title to the purchaser, subject only to the payment by the purchaser of the sum left in his hands. The general law, therefore, relating to cases of this kind must be taken to be settled by the two judgments I have just referred to, and indeed they do nothing more than declare the law as laid down in the provisions of the Transfer of Property Act to which I have referred above. At the same time it is clear that these rights and obligations arising between the vendor and the purchaser of immoveable property may be varied by covenants contained in the contract of sale, and what I have to consider here in particular is whether on the terms of the sale-deed of the 9th of November 1895 the duty of redeeming the pre-existing mortgage or at any rate of making an attempt to redeem it was not cast upon the purchaser Ali Asghar. The learned Subordinate Judge and the learned Additional Judge who dealt with the case in which Mazhar Ali was the plaintiff accepted the law as laid down in the two judgments I have referred to above and applied it to the present case without making any attempt to distinguish the facts. The learned Subordinate Judge who tried the suit brought by Ali Asghar has made an attempt to distinguish the facts of the two reported cases from the facts of the case with which we are now dealing. I am not disposed to agree with all the reasons which are given in the latter judgment for the distinctions drawn between this case and the two reported cases. But after a careful consideration I have come to the conclusion that the view taken by the Subordinate Judge in the suit brought by Ali Asghar is a correct view and is based upon what I consider to be fair and proper construction of the terms of the sale-deed. I do not suggest that any different principle can be applied in the decision of the present suit by reason of the fact that in the two reported cases just mentioned the suits were brought by the vendor and not by the purchaser. But one important difference is to be noticed. Both in the case which came before their Lordships of the Privy Council and in the case which was decided in the Allahabad High Court, the purchaser had at a reasonably early date after the conclusion of the transaction of sale made an attempt to redeem the mortgages and had discovered that the money left for the purpose of redemption was in each case short of the requisite amount. In the present case, as I have already mentioned, Ali Asghar does not appear to have made any endeavour to redeem the mortgage: on the contrary he seems to have waited from the year 1895 until a suit was brought by the mortgagee in the year 1911 before he took any steps to clear the property of the encumbrance.

I turn now to a consideration of certain provisions of the sale-deed. The vendor Mazhar Ali stated in this deed that the principal amounts which were due by him to Husaini Jan in respect of the mortgage-deed and of the deeds of further charge amounted to Rs. 6,652-2-6. It is clearly stated in the deed that interest was due on these sums; presumably some account was made up between the parties to this deed of sale, for it is only in this way that we can account for the fact that a specific sum of Rs. 7,331 was left with the purchaser for the purpose of obtaining redemption. No doubt the language of the document shows that it was contemplated by the parties that this amount might fall short of the sum actually due, and so we find a provision by which the vendor undertook the liability of discharging any sum in excess of this amount of Rs. 7,331 which was left with the purchaser for the purpose of discharging the mortgage. I quote in original the words relating to this part of the contract.—"*Agar sar saman mundarja bainama jo kabza mushtari men waste adai zar rahen murtahna ke chhora gaya hai kafi na ho aur bagaraz maskur kuch aur rupiya zaid murtahna ko dena ya jama karna pare to uski zimmedari aur adai zimma mujh baya ke hai.*" To this I may add the

clause which follows and which seems to me to be of some importance in deciding upon the proper construction of this contract. It is as follows: "*Kharcha ijtima zar rahen ka bar jo fak-i-rahen men ba wajah murtahan ki bad muamlagi ke pare, kull zimme mushtari ke hai. Mujh baya se kuch wasta nahin.*"

Now reading these clauses together it is apparent that the vendor was to be responsible to make good to the purchaser any sum in excess of the Rs. 7,331 which he had to pay for the purpose of obtaining redemption. The liability, however, for this excess could only arise when it had been actually ascertained that the sum of Rs. 7,331 was in fact too little for the purpose of discharging the encumbrances. How then was it contemplated that the amount of this liability should be ascertained? It seems to me that what was intended clearly was that at any rate the purchaser was in the first instance to make an attempt to redeem the mortgages. By doing so and by putting himself in contact with the mortgagee he could at once discover whether or not the sum of Rs. 7,331 was sufficient for the purpose. Until something of this kind was done it was quite impossible to cast any definite liability under the terms of this contract upon the vendor Mazhar Ali. That the intention was that the purchaser should make this attempt to redeem seems to me to be more clearly brought out by the last clause which I have quoted above, which provides that if the purchaser were put to any expense in connection with the deposit of the mortgage-money by reason of any bad faith or dishonesty on the part of the mortgagee he was to bear the burden of that cost himself. The vendor was not to be responsible for any costs so incurred. On the terms, therefore, of this document I am prepared to hold that the purchaser took upon himself the duty of redeeming or at any rate of attempting to redeem the encumbrances and as he failed to do anything of the sort, I agree with the learned Judge of the lower Court that his suit cannot be decreed to the extent he claims. Instead of making any attempt to clear off the mortgage-debts he sat quiet for a period of about sixteen years and allowed the mortgage-debt to accumulate to a very large sum and now he is asking the representatives of his vendor to re-emburse him for a loss which was entirely due to his own failure to discharge his part of the contract. Without agreeing in all the reasons given by the learned Subordinate Judge for his decision I am satisfied that he was right in this respect, namely, that the purchaser Ali Asghar failed to carry out his part of the contract and that he is not entitled, therefore, to the sum he claims. I may here mention that Ali Asghar did not go into the witness-box to give any evidence relating either to this transaction of sale or to any of the events which followed afterwards. The representatives of the mortgage presumably were unable to give any information regarding these matters and their evidence, of course, was not taken. There is, however, a document upon the record which demands some passing consideration. It seems that in or about the year 1901 Mazhar Ali got impatient regarding the failure of his purchaser to attempt anything in the way of redeeming the mortgage. It will be remembered that the purchaser had taken a conveyance of only a 12-annas share in the property and that one result of redemption would have been that a 4-annas share of the property would have returned to the possession of Mazhar Ali. He sent a notice to Ali Asghar calling attention to the fact that there had been a great delay in redeeming the mortgage and pointing out the heavy losses which were being incurred in this connection.

Ali Asghar in reply to this notice sent a letter to Mazhar Ali (Exhibit 3) upon the file. In this letter Ali Asghar professes that at the time when the deed of sale was executed it was understood between the parties that the sum of Rs. 7,331 was considerably short of the amount which was required for the discharge of the mortgages. He states in the letter that Mazhar Ali had undertaken to raise the balance due on the mortgages by borrowing the necessary amount from a person named Farid-uz-zaman. In fact in this letter he goes as far as to say that he was aware that Mazhar Ali executed a mortgage in favour of this person Farid-uz zaman in order to raise a sum of Rs. 566, the amount by which Rs. 7,531 fell short of the money payable to *Musammat* Husaini Jan. I have mentioned that Ali Asghar did not go into the witness-box to explain the statements contained in the letter, and I may

say at once that this belated account of what took place in the year 1895 appears to me to be quite untrue. From the calculations which have been made by the Courts below, it is quite clear that although the sum of Rs. 7,331 did actually fall short of the sum which was payable to Husaini Jan on the 28th April 1896, it fell short only by a very small amount and certainly not by any such sum as the Rs. 568 which is referred to in Exhibit 3. Of course this document Exhibit 3 cannot be treated as evidence in the case in favour of Ali Asghar who wrote it. But it is at any rate important to notice that Ali Asghar, having in the year 1901 set up a plea that there was some subsidiary contract between himself and Mazhar Ali relating to the discharge of the mortgage-deed, had not the courage to enter the witness-box and to depose to what is stated in the document referred to. I refuse to believe that there was any such understanding between Mazhar Ali and Ali Asghar at the time of the execution of the deed of sale and having regard to the surrounding circumstances and principally to the facts, *first*, that the purchase-money was calculated on a very liberal scale and *second*, that Mazhar Ali was presumably anxious to recover possession of a 4-annas share of his property, I am of opinion that the Subordinate Judge is right when he says that the real understanding between the parties was that Ali Asghar was to take immediate steps to redeem the mortgages. This being so, I agree with the finding of the Court below that Ali Asghar is in no way entitled to the enormous sum which he has claimed in this suit.

The question then remains as to what sum he is entitled to recover. He certainly is entitled to the difference between Rs. 7,331 and the amount which was actually payable on the 28th of April 1896 when the redemption of the mortgage became possible. I may mention here that Ali Asghar in the letter Exhibit 3 above referred to seems to have made a grievance regarding the delay in the registration of the sale-deed executed in November 1895. This deed it seems was not registered until the month of March 1896. What the reason of the delay was is difficult to ascertain, but at any rate it cannot be said that in any way it prevented Ali Asghar from offering the money to the mortgagee on the 28th of April 1896 either by tendering it to her or by making a deposit in Court. I have already mentioned that the learned Subordinate Judge found that the difference between the sum actually due on the mortgage and deeds of previous charge on the date just mentioned came to Rs. 48-9-1 more than Rs. 7,331 left with Ali Asghar. I see no reason for supposing that this account is incorrect. It agrees substantially with a similar account which was made by the other Subordinate Judge in the suit which was brought by Mazhar Ali against Ali Asghar. I have now to notice another point in the case relating to an item of Rs. 309. In order to understand the dispute regarding this sum it is necessary to refer to the language of the deed of mortgage executed in 1891. It seems that when this mortgage was executed, the term of the old settlement was shortly about to expire and the parties had in contemplation the possibility of an enhancement of the Government revenue at the time of the new assessment. It was agreed between the mortgagor and the mortgagee that any enhancement in the Government demand was to be payable by the mortgagor. It was also provided that if at the time of the new settlement the mortgagee who was in possession was put to any expenses in the matter of contesting liability to the new assessment, those costs were to be borne by the mortgagor also. So far as the question of liability for the enhancement of the Government demand is concerned, that is quite clear from the terms of the mortgage; the revenue was enhanced, the mortgagee had to pay a larger sum every year on account of revenue and cesses. This excess has been taken into account by the learned Subordinate Judge in determining the amount which was due to the mortgagee on the 28th of April 1896, and I have nothing more to say with regard to this point. There remains the question of the mortgagee's right to claim from the mortgagor any expenses incurred by her in contesting the new assessment. It is said that this sum came to Rs. 309 and that, therefore,

in making out the account of what was due to Husaini Jan on the 28th of April 1896 this sum of Rs. 309 ought to be added to the money due on account of principal, interest and excess revenue charges. The learned Subordinate Judge who has tried the suit out of which this first appeal has arisen refused to allow this item of Rs. 309 to be taken into account, on the ground that there was no proof on the record that such expense had actually been incurred by *Musammat* Husaini Jan. The other Court which tried the suit in which Mazhar Ali was the plaintiff seems to have given the mortgagee credit for this amount, and the question is which of the two Courts was right. The only evidence to which I have been referred in this connection is as follows. I have already mentioned that in the year 1901 Mazhar Ali wrote to his purchaser Ali Asghar demanding that he should make an attempt to redeem the mortgages held by Husaini Jan, and in that letter it seems that he mentioned that *Musammat* Husaini Jan was entitled to a sum of Rs. 419-15-0 on account of expenses of litigation incurred by her at the time of the new settlement. The other piece of evidence is to be found in the plaint which was filed by *Musammat* Husaini Jan when she brought her suit for her mortgage-money in the year 1911. In that plaint she mentioned this figure of Rs. 309 as being the sum which she was entitled to recover from the mortgagor on account of the settlement expenses. Mazhar Ali was the defendant in that case and he denied in his written statement that this sum was owing to *Musammat* Husaini Jan. These are the two pieces of evidence which we have to consider in discussing the question as to whether this sum of Rs. 309 is to be taken into account. There is, of course, the admission made by Mazhar Ali in the letter which he wrote to the plaintiff Ali Asghar. That admission may be taken for what it is worth, but it is not in any way conclusive; nor can it be said that Mazhar Ali or his representatives-in-interest are bound by it so as to raise an estoppel. The question is, what value attaches to this admission made in the year 1901. The learned Counsel who appears for respondents has suggested that the admission as evidence is really of no value at all, inasmuch as there is nothing to show that Mazhar Ali had or could have any personal knowledge of the extent to which his mortgagee *Musammat* Husaini Jan was out of pocket at the time of the new settlement. He also argues that in all probability this item was mentioned in Mazhar Ali's letter by way of bluff and in order to impress Ali Asghar with a sense of the loss which was being incurred by reason of the delay in redeeming the mortgage. On the other hand it is pointed out that when *Musammat* Husaini Jan filed a plaint in the year 1911 and claimed Rs. 309 for settlement expenses, this portion of her claim was denied by Mazhar Ali. The matter was never put to proof inasmuch as the suit was compromised, and consequently there is no evidence on the record to establish that this was the sum which Husaini Jan was actually bound to part. After a careful consideration of the arguments in this connection I have come to the opinion that the Subordinate Judge came to a right conclusion and that he properly refused to allow this sum of Rs. 309 to be added to the amount which he found to be due to the mortgagee on the 28th of April 1896. The result of all this is, therefore, that, in my opinion, the judgment of the Subordinate Judge is substantially correct and is not liable to be interfered with and consequently I dismiss this First Civil Appeal No. 38 of 1915 with costs to the respondents.

This leaves me with the other case to dispose of, namely, Second Civil Appeal No. 252 of 1914. I have already dealt with the nature of this claim and referred to the fact that it was dismissed by both the lower Courts on the ground that the duty of redeeming the mortgages lay upon Mazhar Ali the vendor and not upon the purchaser Ali Asghar. The Subordinate Judge, as I have said, held that if the duty of redemption lay upon Ali Asghar then Mazhar Ali was clearly entitled to the sum which he was claiming in this suit. As I have now found for the reasons above stated that Ali Asghar was in default and not Mazhar Ali, the result is that I hold that Mazhar Ali was entitled to have a decree in his favour. Accordingly I allow Second Civil Appeal No. 252 of 1914

and setting aside the decree of the Court below I direct that the plaintiff's claim be decreed in full with costs in all three Courts

*Appeal allowed.*

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CALCUTTA HIGH COURT.
CIVIL RULE No. 694 OF 1916.
August 28, 1916.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

MONMOTHO NATH MITRA—PETITIONER

*versus*

DISTRICT JUDGE, 24-PERGANAS—OPPOSITE PARTY.

Putni *Regulation* (*VIII of* 1819), *s.* 15, *cl.* 2, *whether affected by Act VIII B. C. of* 1865, *s.* 3.

Clause 2 of section 15 of the *Putni* Regulation has not been affected by section 3 of Act VIII B. C. of 1865, so that a purchaser of a *putni* tenure seeking to proceed under that clause must apply to the District Judge, and not to the Collector. [p. 369, col. 1.]

Rule against an order of the District Judge, 24 Perganas, dated the 21st August 1916.

Babu *Narendra Chandra Bose*, for the Petitioner.

Babu *Ram Charan Mitra*, for the Opposite Party.

JUDGMENT.—This Rule raises an important question of first impression as to the true effect of section 3 of Act VIII of 1865 B. C. upon the second clause of section 15 of Regulation VIII of 1819. The clause in question describes the procedure to be followed in case of opposition to the new purchaser of the *putni*, when he proceeds to take possession of the land covered by his purchase. The clause lays down that if the late incumbent himself or the holders of tenures or assignments derived from the late incumbent and intermediate between him and the actual cultivators shall attempt to offer opposition or to interfere with the collections of the new purchaser from the land composing his purchase, the latter shall be at liberty to apply immediately to the Civil Court for the aid of the public officers in obtaining possession of his rights. Section 3 of Act VIII of 1865 B. C. provides that the sale for the recovery of arrears of rent of *putni taluks* and other saleable under-tenures of the nature defined in clause (2) of section 8 of Regulation VIII of 1819 shall be conducted by the Collector of land revenue in whose jurisdiction, as defined by Act VI of 1853, the lands lie, and all acts *preparatory to or connected with* the sale of such under-tenures as aforesaid, which by Regulation VIII of 1819 and Regulation I of 1820 the Judge is required to perform, shall be performed by the said Collector. The question thus arises, whether the effect of section 3 is to make it obligatory upon the purchaser, when he seeks to proceed under the second clause of section 15 of the Regulation, to apply not to the District Judge but to the Collector.

The answer to the question in controversy depends upon the true meaning of the expression "*acts preparatory to or connected with the sale*," in section 3 of Act VIII of 1865 B. C. Instances of acts preparatory to or connected with the sale were contained in sections 8 and 9 of the Regulation as originally framed. Section 8 required the *zemindar*, when he desired to sell a *putni* for arrears of rent, to present a petition to the Civil Court of the District and a similar one to the Collector. Section 9 contained a provision that the sale should be made by the Registrar of the Civil Court, or in his absence, by the person in charge of the office of Judge or of Magistrate of the District. These were clearly acts preparatory to or connected with the sale, and the effect of section 3 was to render these provisions nugatory and to transfer the functions to the Collector. Now, can it be reasonably maintained, in the case before us, that what the petitioner asks the District Judge to do is an act connected with the sale? We are of opinion that the question should be answered in the negative. The sale took place on the 16th May 1910. Proceedings were taken to annul the sale and have terminated in favour of the purchaser. The sale has consequently become for all purposes final and conclusive. The purchaser now alleges that he is resisted in his attempt to take possession of the lands comprised in the tenure purchased by him. Can it be said, when he seeks the assistance of the District Judge under the second clause of section

15 of the Regulation, that the act to be performed is connected with the sale? Clearly not. It is an act subsequent to the sale, an act which can be performed only on the basis of a valid and concluded sale, no longer liable to be impeached. We must hold accordingly that clause 2 of section 15 of the Regulation has not been affected by section 3 of Act VIII of 1865 B. C. The view we take is confirmed by two circumstances. In the first place, Act VIII of 1865 B. C., as is explained in the preamble, was enacted because "doubts have arisen in consequence of the repeal of section 16 of Regulation VII of 1832 as to the authority by whom *putni taluks* and other saleable under-tenures of the nature defined in clause 1 of section 8 of Regulation VIII of 1819 are to be sold for arrears of rent due to the proprietor on account thereof." There is no indication here that the Legislature intended that any alteration should be effected in the second clause of section 15. In the second place, that the Legislature had no such intention is conclusively proved by the provisions of Act XVI of 1874. That Act was passed for the purpose of repealing certain obsolete enactments, because, as explained in the preamble, "the enactments mentioned in the Schedule to the Act had ceased to be in force otherwise than by express and specific repeal." In the Schedule we find that certain expressions in sections 8 and 9 of the *Putni* Regulation which had become obsolete by reason of the provisions of section 3 of Act VIII of 1865 B. C. are expressly repealed. But clause 2 of section 15 is left untouched. If the Legislature had thought in 1874 that the provisions of clause 2 of section 15 had been affected by section 3 of Act VIII of 1865 B. C, no doubt that section also would have been suitably altered.

On these grounds we hold that the view taken by the District Judge is erroneous and that he has failed to exercise the jurisdiction still vested in him by law, that is, under clause 2 of section 15 of the *Putni* Regulation. The Rule is made absolute and the order of the District Judge is set aside; the petition will be transmitted to the District Judge in order that he may take necessary steps thereon in accordance with law.

*Rule made absolute.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 101 OF 1916.

January 18, 1917.

*Present*:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

*Chaudhuri* SADHO CHARAN PRASAD—PLAINTIFF—APPELLANT

*versus*

*Lala* RAM RATAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Father, transfer by—Mortgage for legal necessity—Interest, onerous—Mortgagee, position of—Court, duty of—Decree on mortgage obtained against father alone—Sons, position of.*

Where a Hindu father makes a mortgage for legal necessity at an onerous rate of interest, the sons, although bound by the mortgage, are not bound by the rate of interest, unless the mortgagee establishes that such rate of interest was justified by the legal necessity of the family. If the mortgagee fails to prove this fact, the Courts not only have a discretion but are under an obligation to vary the rate of interest to a reasonable limit. [p. 370, col. 2.]

Where a decree is obtained by the mortgagee against the mortgagor alone on the basis of a mortgage executed by a Hindu father and carrying interest at an onerous rate, his sons, who were no parties to the said decree, can, in a subsequent suit against the mortgagee decree-holder, be granted relief to the effect that if they pay to the mortgagee the principal mortgage-money together with interest thereon at a reasonable rate and costs of his suit by a certain date, the mortgage decree shall not be executed against the mortgaged property. [p. 371, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 6th June 1916.

Babu *Aditya Prasad* and Pandit *Jagmohan Nath Chak*, for the Appellant

Babu *Basdeo Lal*, for the Respondents.

JUDGMENT.—Chaudhri Audesh Rai executed on 19th June 1908 a deed of simple mortgage for Rs. 2,500 in favour of Ram Ratan Lal and Mahabir Prasad by which he hypothecated a two-annas share in Maddo, a two annas share in Deoria, and a four annas share in Manjhari. The deed carried 24 per cent. compound interest with quarterly rests. The amount of consideration was

made up of two items, one for Rs. 2,448-6-0 due to the mortgagees on account of a balance of the amount due to them from the mortgagor on the basis of a promissory note and the other for Rs. 51-10-0 paid in cash. The mortgagees instituted a suit on the basis of the deed against the mortgagor alone and obtained a decree on 26th February 1914 for Rs. 2,500 principal, Rs. 5,826-6-3 interest, costs and future interest. To these proceedings the present plaintiff-appellant was no party. In execution of the decree they have brought the mortgaged property to sale but it has not yet been sold. Sadho Charan Prasad son of the mortgagor instituted on 19th January 1916 a suit for a declaration that the decree in question was of no effect against him as a son of Chaudhri Audesh Rai and a member of a joint Hindu family governed by the Mitakshara Law as he had been no party to the execution of the mortgage of 19th June 1908 and was a minor on the date when it was executed. He asked that the decree should be set aside or in the alternative that if the decree be not set aside he should be given an opportunity of saving the property attached from sale on the payment of a sum to be fixed by the Court. This suit was instituted in the Court of the Subordinate Judge of Gonda who dismissed it by a judgment dated the 6th June 1916. The present appeal is preferred against the dismissal.

The learned Counsel for the appellant has withdrawn a great portion of the pleas stated in the grounds of appeal. He has admitted in argument that an amount of Rs. 2,448-6-0 was owing to the mortgagees on the balance due on the promissory note executed by his father and that his father had borrowed Rs. 3,100 on the said promissory note. He further withdrew the plea that the loan of Rs. 3,100 was tainted with immorality. He did not contest the position that the amount of Rs. 2,448-6-0 was an antecedent debt due from his father and binding on himself, and he further admitted that the amount of Rs. 51-10-0 had been devoted to the costs of execution of the deed of mortgage of 19th June 1908 and that that amount was also binding on him. He thus took the position that his client was legally bound in respect of the principal of Rs. 2,500 and confined his arguments to the one ground, that although a legal necessity had been made out for the execution of the deed on the principal amount, he was not bound to pay compound interest at 24 per cent. with quarterly rests but only such interest as the Court might consider to be reasonable. To this argument we must accede. The learned Subordinate Judge apparently overlooked the point though it was clearly before him upon the issues. Their Lordships of the Privy Council laid down in the case of *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (1) that when a Hindu widow was borrowing in a case of necessity it was for the plaintiff in that case to see whether there was really and fairly a ground of necessity, and that it was further for the plaintiff to see whether there was a necessity to borrow at a certain rate. They say: "If it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent., he ought not to have charged her that rate." This finding applied to the case of a Hindu widow; but the principle has equal application to the case of a head of a joint family. In June last year Sundar Lal, J., decided that Hindu sons who were bound by a transfer executed by their father were not bound by the onerous rate of interest to which their father agreed. This decision will be found in *Padam Singh* v. *Ram Rup* (2), and one of the members of this Bench decided in the following July in *Sarabjit Singh* v. *Gur Bakhsh Singh* (3) that the burden of proof was on the persons in whose favour deeds of mortgage had been executed to establish that satisfaction of both the principal and the interest was justified by the legal necessity of the family and that Court not only had discretion but were under an obligation to vary the rate of interest if it were not established that the necessity of the family justified as high a rate. The learned Counsel for the respondents has not seriously endeavoured to meet the argument. We, therefore, accede to the appellant's plea upon this point and it remains only to be seen what rate of interest should be awarded. We are of opinion that, taking all the circumstances of the case into consideration, the value of the security, and the relation-

(1) 18 C. 311 at pp. 315, 316; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. J. 642; 9 Ind. Dec. (N. S.) 207.
(2) 36 Ind. Cas. 217; 14 A. L. J. 772.
(3) 36 Ind. Cas. 916; 19 O. C. 159.

ship of the creditors and debtor, the right rate of interest should be simple interest at 12 per cent. We have then to see what relief should be awarded to the plaintiff-appellant. There is a decree outstanding against the family property. Although it would have been open to us, had he shown that such a decree could not be binding against his interest in the family property, to give him a declaration to that effect, we are precluded from modifying the decretal amount upon our finding. We cannot say that the decree shall be binding against the family property only to the extent of the amount that the appellant is liable to pay and that any balance of sale-proceeds over and above that amount shall go to the mortgagor. But we can give the plaintiff-appellant the alternative relief which he sought in his plaint. We can declare that if he pay a certain amount by a certain date the decree to which he was not a party shall not be executed against the family property. We propose to give relief in this manner. We direct that if the appellant pay Rs. 2,500 principal, Rs. 2,575 simple interest at 12 per cent. from 19th June 1908 to date, and Rs. 718-10-0 costs of the suit—total Rs. 5,793-10-0 with future interest at 12 per cent. on Rs. 2,500 from to-day till date of payment, to the holders of the decree, the decree of 26th February 1914 shall not be executed by sale against the family property. As the appellant has partly failed and partly succeeded in these proceedings we direct that the parties pay their own costs throughout the whole proceedings.

*Appeal partly allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2704 OF 1913.

July 12, 1916.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

AFSAR SHAIK AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

SAURAVA SUNDARI DASI—DEFENDANT—RESPONDENT.

*Evidence Act* (*I of* 1872), *s.* 92, *applicability of*—*Mortgage by conditional sale*—*Mortgagee taking possession of mortgaged property*—*Transfer of Property Act* (*IV of* 1882), *s.* 76—*Mortgagee taking possession on failure of mortgagor to pay mortgage money*—*Liability of mortgagor.*

When during the continuance of a mortgage by conditional sale, the mortgagee takes possession of the mortgaged property with the consent of the mortgagor, on the failure of the latter to pay the mortgage-money on the due date, the nature of the contract between the parties is not altered and the conditional mortgage is not transformed into a usufructuary mortgage; but what happens in essence is that the parties adopt a certain mode of satisfaction of the mortgage. Consequently no question arises in such a case as to the effect of section 92 of the Evidence Act. [p. 372, col. 1.]

The possession of the mortgagee thus taken cannot extinguish the title of the mortgagor till a decree absolute is made in a foreclosure suit properly framed for the purpose, and the mortgagee who remains in possession in this way is bound to appropriate his receipts from the mortgaged property towards the reduction of the mortgage-debt in view of the provisions of section 76 of the Transfer of Property Act. [p. 372, col. 2.]

Appeal against the decree of the District Judge, Murshidabad, dated the 14th May 1913, reversing that of the Munsif, Berhampur, dated the 9th August 1912.

Babu *Hemendra Nath Sen*, for the Appellant.

JUDGMENT.—This is an appeal by two of the defendants in a foreclosure suit. On the 2nd December 1908, the first defendant executed in favour of the plaintiff an instrument which was a mortgage by conditional sale within the meaning of clause (*c*) of section 58 of the Transfer of Property Act. The mortgagor ostensibly sold the mortgaged property on condition that on default of payment of the mortgage-money on the 14th May 1909, the sale would become absolute. The principal amount was Rs. 41 and carried interest at the rate of $37\frac{1}{4}$ per cent. per annum. The document further recited that the mortgagor retained possession of the property. The case for the plaintiff is that the mortgage-money was not re-paid on the due date, with the result that from the 15th May 1909, she entered into possession of the mortgaged property with the consent of the mortgagor. She continued in peaceful occupation till she was dispossessed by force on the 1st April 1912, by the third defendant who had meanwhile succeeded to the interest of the mortgagor. On the 12th April 1912, she instituted the present suit for foreclosure She claimed to recover Rs. 41 as principal and Rs. 51-4-0 as interest

therein from the date of the mortgage to the date of the institution of the suit, and prayed that the usual foreclosure decree might be made as provided in Order XXXIV of the Civil Procedure Code. The defendants pleaded that the claim was entirely unfounded as the mortgage-debt had been fully satisfied by means of the profits received by the mortgagee during the period of her occupation of the mortgaged premises. The Court of first instance made a preliminary decree in the terms prescribed by the Code and directed the usual accounts to be taken. When accounts were taken, it transpired that the mortgage-debt, principal and interest, had been satisfied in full by the profits received by the plaintiff during her possession of the mortgaged properties. The result was that the Trial Court ultimately dismissed the suit. Upon appeal that decree has been reversed by the District Judge, on the ground that section 92 of the Indian Evidence Act precluded proof that the terms of the original mortgage were modified so as to change it into a usufructuary mortgage. The defendants have appealed to this Court and have argued that this conclusion is based upon a complete misapprehension of the relative rights of the mortgagor and mortgagee. In our opinion this contention is well-founded.

The plaintiff alleges in her plaint that she took possession of the mortgaged property, with the consent of the mortgagor, when the latter failed to pay the mortgage money on the due date. It is a mistake to suppose that this altered the nature of the contract beween the parties and transformed the conditional mortgage into a usufructuary mortgage; what happened in essence was that the parties adopted a mode of satisfaction of the mortgage [*Kamla Sahai* v. *Babu Nandan Mian* (1); *Lala Himmat Sahai Singh* v. *Llewhellen* (2)]; consequently no question arises as to the effect of section 92 of the Indian Evidence Act. The real point in controversy is, whether the sums received by the mortgagee during her possession of the mortgaged premises must be applied by her in reduction of the mortgage-debt. The answer must be in the affirmation in view of the provisions of section 76 of the Transfer of Property Act. Clause (*h*) of that section provides that where, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, his receipts from the mortgaged property shall, after deducting the expenses mentioned in clauses (*c*) and (*d*) [that is, revenue, public charges, rent, and cost of repairs], and interest thereon, be debited against him in reduction of the amount, if any, from time to time due to him on account of interest on the mortgage-money, and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money. It is perfectly plain that the plaintiff took possession during the continuance of the mortgage, for the default of the mortgagor to pay the mortgage-money on the due date, did not extinguish the equity of redemption and transform the title of the mortgagee into full ownership. The plaintiff cannot but be deemed to have taken possession as mortgagee without any reasonable ground for belief that he was entitled to hold in a different capacity [*Parkinson* v. *Hanbury* (3); *Gaskell* v. *Gosling* (4)]. The case does not fall within the class of decisions, where the mortgagee has been led into an honest belief that upon non-payment by the mortgagor of the money at the time fixed, he became the absolute owner of the property: [*Smyth* v. *Simpson* (5); *Anandrav* v. *Ravji* (6); *Ramshet Bachashet* v. *Pandharinath* (7)]. There was a valid mortgage in existence and in full operation when the mortgagee took possession; this, indeed, has been the common case of both the parties. The title of the mortgagors could not be extinguished till a decree absolute had been made in a foreclosure suit properly framed for the purpose. On the other hand, as the mortgagee, in the present litigation, claims interest for the full period between the execution of the mortgage and the institution of the suit, such claim can be sustained only on the theory that she has

(1) 2 Ind. Cas. 13; 11 C. L. J. 19.
(2) 11 C. 486; 5 Ind. Dec. (N. S.) 1053.
(3) (1867) 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642.
(4) (1896) 1 Q. B. 669 at p. 691 on appeal (1897) A. C. 575; 66 L. J. Q. B. 848; 77 L. T. 314.
(5) (1850) 7 Moore P. C. 205; 13 E. R. 859.
(6) 2 B. H. C. R. 214.
(7) 8 B. H. C. R. A. C. J. 230.

throughout this period retained the character of mortgagee. She is consequently bound to appropriate the profits, as mortgagee in possession in reduction of the mortgage-debt, on the principle recognised by the Judicial Committee in *Sri Raja Papamma Rao* v. *Sri Vira Pratapa* (8) and by this Court in *Ramawatar* v. *Tulsi Prosad Singh* (9); [*Robertson* v. *Norris* (10).] The true position is that the rents and profits are, in the view of a Court of Equity, incidents *de jure* to the ownership of the equity of redemption, and the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage debt.

If the contrary view were adopted, the result would be that the mortgagee would be allowed interest in addition to the profits retained by her, a position which cannot be justified on any conceivable ground of justice, equity and good conscience. We are clearly of opinion that the decree made by the Trial Court could not be successfully impeached; nothing was due to the plaintiff at the date of the institution of the suit, for the report of the Commissioner who took the accounts has ever been challenged.

The result is that this appeal is allowed and the decree of the Court of first instance restored. The suit will thus stand dismissed with costs in all the Courts

*Appeal allowed; Suit dismissed.*

(8) 19 M. 249; 23 I. A. 32; 6 M. L. J. 53; 7 Sar. P. C. J. 10; 6 Ind. Dec. (N. S.) 879.

(9) 11 Ind. Cas. 713; 14 C. L. J. 507; 16 C. W. N. 137.

(10) (1858) 1 Giff. 421; 65 E. R. 983; 114 R. R. 486.

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 144 OF 1916.

May 15, 1917.

*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Ryves.

JAGRUP SAHU AND OTHERS—APPELLANTS

*versus*

RAMANAND SAHU AND OTHERS—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 18 (3)—Court, power of—Sale,* benami, *by insolvent—Receiver, possession of—Jurisdiction.*

Under section 18 (3) of the Provincial Insolvency Act the Court is competent to order that the property of the insolvent should be placed in the possession of the Receiver and to enquire whether the property is in reality in the possession of the insolvent and whether the Receiver is entitled to obtain possession of it. Where a sale of the insolvent's property is a mere *benami* transaction, it is not necessary for the insolvent or the Receiver who steps into his shoes to have the sale set aside and cancelled in order to maintain his possession over the property. [p. 374, col. 1.]

Appeal from the order of the District Judge, Gorakhpur, dated the 3rd July 1916.

Dr. S. *N. Sen* and Mr. *Haribans Sahai*, for the Appellants.

Mr. *Jang Bahadur Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of an insolvency matter. In November 1913 Ramanand and Naurangi Lal, two brothers, applied to be adjudicated insolvents. The order of adjudication was not made until the 25th of August 1914 when a Receiver was appointed. The Receiver applied to the Court for possession of the property of the insolvents. Apparently he had been resisted by the present appellants who claimed to be the purchasers of the insolvent's property under the three sale deeds, dated respectively, the 1st of July 1911, the 13th of July 1911 and the 31st of August 1911. The learned Judge went into the matter, examined the evidence adduced on both sides, and come to the conclusion that the sale-deeds were mere fictitious and nominal documents executed by the insolvents in favour of their relatives, not as real transactions but merely as a blind to prevent the property being availed of by their creditors, that the insolvents themselves were in possession and that the so-called purchasers had never got possession. The learned Judge accordingly ordered that the Receiver should take possession of the property and deal with it as required by law. This appeal has been presented by three of the alleged purchasers. The first contention is that the Court below had no jurisdiction to deal with this matter in insolvency proceedings. Section 36 of the Provincial Insolvency Act has clearly no application to the present case inasmuch as the alleged transfers purported to have been made beyond two years prior to the date of ad-

judication in insolvency. Section 18 of the Act, however, provides in clause (*c*) that where the Court appoints a Receiver it may remove the person in whose possession or custody the property of the insolvent is, from the possession or custody thereof. If the property in question is in the possession of the insolvent, the Court undoubtedly has the power under this clause to remove the insolvent from the custody of the property and to put it in the custody of the Receiver. There is, however, a proviso to the clause to the effect that the provisions of the clause will not authorise the Court to remove from the possession or custody of the property any person whom the insolvent had not the present right to remove. If, as has been found in this case, the alleged sales were in reality no sales and the sale-deeds were mere waste paper, the insolvents could remove the purchasers, if they sought to take possession from the possession of the property. Therefore, acting under section 18, clause (3), the Court was fully competent to order that the property should be placed in the possession of the Receiver and to enquire whether the property was in reality in the possession of the insolvent and whether the Receiver was entitled to obtain possession of it. It is said that the insolvents were bound to bring a suit to set aside the sale within three years from the date thereof. We do not think that this is so. If there was no sale and if the transaction was a mere *benami* transaction, it was not necessary for the insolvents, and the Receiver, who had stepped into their shoes, to have the sales set aside and cancelled in order to maintain their possession over the property. The ruling of their Lordships of the Privy Council in *Petherpermal Chetty* v. *Muniandy Servai* (1) appears to be in point. The learned Judge of the Court below was, therefore, justified in holding that Article 91, Schedule I of the Limitation Act, had no application to the present case. In our judgment the plea that the Court below had no jurisdiction to enquire into this matter is without force. On the merits of the case we see no reason to come to a different conclusion from that at which the Court below arrived. The circumstances referred to in the judgment of that Court show that the sales were in reality mere sham transactions. As regards the deed of relinquishment of *sir* lands no argument was addressed to us in this appeal. Furthermore the case of the deed of relinquishment would come within the operation of section 36 of the Act. We dismiss the appeal with costs including fees on the higher scale.

*Appeal dismissed.*

(1) 35 C. 551; 10 Bom. L. R. 596; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1439 OF 1914.

January 30, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

MUHAMMAD HAMID ULLAH KHAN—DEFENDANT—APPELLANT

*versus*

MUHAMMAD MAJID ULLAH KHAN—PLAINTIFF—RESPONDENT.

*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 62, *applicability of—Suit by one brother against another for partition of cash left by their father—Funeral ceremonies, reasonable expenditure on—Test—Muhammadan Law—Wakf—Dedication, actual, necessity of—Gift, essentials of—Possession of property in occupation of tenant, mode of delivery of.*

Article 62 of the Limitation Act does not apply to a claim for a share of the cash forming part of the estate to be divided between co-heirs. [p. 375, col. 2.]

*Mahomed Riasat Ali* v. *Hasin Bano*, 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique and Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737, followed.

Funeral ceremonies of a Muhammadan should be performed in a manner suitable to the deceased's position in life and means. [p. 377, col. 2.]

In determining what is a reasonable amount in a particular case, the Court must take into consideration the social practices of the class to which the deceased belonged. [p. 377, col. 2.]

Under the Muhammadan Law no formality is required to be gone through for the purpose of creating a valid *wakf*, it is enough if the donor declares that he constitutes a property *wakf* or has constituted it *wakf*. There must, however, be not only a mere intention to dedicate property but an actual dedication. [p. 378, col. 1.]

The three essentials of gift under the Muhammadan Law are: offer by the donor, acceptance by or on behalf of the donee, and seisin. [p. 379, col. 1.]

As regards the delivery of possession what the law contemplates is that the possession required to be given must be such as the nature of the property permits. If the donor has done all that he could do to perfect the contemplated gift, which is attended with complete publicity, the mere fact that the donee was not present or that possession was obtained by him sometime after does not invalidate the transfer. [p. 379, col. 1.]

MUHAMMAD HAMID ULLAH KHAN v. MUHAMMAD MAJID ULLAH KHAN.

The possession of the property in the occupation of a tenant can be delivered by allowing the donee to collect rents and profits or by requesting the tenant to attorn to the donee. [p. 380, col. 1.]

*Mullick Abdool Guffoor* v. *Muleka*, 10 C. 1112; 5 Ind. Dec. (N. S.) 743, followed.

Where a deed of gift in respect of a vacant plot of land contained a recital as to delivery of possession and was subsequently registered:

*Held*, that under the circumstances, the donor could not be expected to do anything more to perfect the title and that the gift was, therefore, valid and binding. [p. 380, col. 1.]

First appeal from the decree of the District Judge, Delhi, dated the 14th April 1914, decreeing the claim in part as regards costs only.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Roshan Lal*, for the Appellant.

Rai Sahib Lala *Moti Sagar*, for the Respondent.

JUDGMENT.—This appeal and the cross-appeal No. 1510 of 1914 arise out of an action brought by the plaintiff Majid Ullah Khan against his elder brother Hamid Uullah Khan for the partition of moveable and immoveable property and cash left by their father *Maulvi* Sami Ullah Khan who died on the 7th April 1908. It is beyond dispute that the two sons are the heirs *ab intestato* to their father's estate, and that each of them is entitled to a moiety thereof. The suit was resisted by the defendant mainly on the ground that certain properties, claimed by the plaintiff did not form part of the estate, and were not consequently liable to partition. The District Judge has accepted this defence with respect to some properties, and, rejecting it in regard to others, has granted the plaintiff a preliminary decree directing the partition of the moveable and immoveable properties, which, in his opinion, constituted the estate of the deceased. Against this decree both the parties have preferred appeals to this Court, and these appeals may conveniently be disposed of by one judgment.

Before discussing the respective contentions of the parties in regard to each item of the properties in controversy we may state at once that several points, namely, misjoinder of causes of action, want of jurisdiction, etc., etc., which were mentioned in the defendant's memorandum of appeal, have not been argued before us; and we may, therefore, take it that the defendant does not dispute the finding of the lower Court on these points.

The question of limitation was raised with respect to moveable properties and cash, and it was originally contended that the suit, which was instituted on the 11th January 1912, more than three years after the death of the ancestor, was barred either under Article 49 or Article 62 of the First Schedule to the Limitation Act. Mr. Muhammad Shafi for the defendant subsequently admitted the plaintiff's right to a share in all the moveable properties specified in the decree and confined the plea of limitation to the claim to one-half share of the money received by the defendant from the Delhi and London Bank, Limited, after his father's death. The learned Counsel mentioned Article 62 as the one prescribing the period applicable to that portion of the claim, but did not cite any authority in support of his contention. Now, it appears that with the exception of some cash, which was privately divided between the parties, the entire estate of the father is the subject-matter of the suit, and we do not think that Article 62 is applicable to a claim for a share of the cash which forms part of the estate to be divided between the co heirs. In *Mahomed Riasat Ali* v. *Husin Banu* (1) a Muhammadan widow sued her deceased husband's brother for a declaration of her right to possess for life the estate of her husband in accordance with the local custom, and in the alternative for a share of the estate according to Muhammadan Law, and also for possession of her share, and the question arose whether the claim *qua* the moveables and cash left by the deceased was governed by Article 49 or Article 123. The Courts in India had differed on that point, and their Lordships of the Privy Council in applying Article 120 to this portion of the claim made the following observations :

"The next objection was that the claim to cash and moveables was rightly held by the First Court to be barred by limi-

(1) 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique and Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.).

tation. Their Lordships do not agree with either the Judicial Commissioner or the District Judge as to the Article in the Schedule to the Limitation Act which is applicable. This is not a suit for a distributive share of property (Article 123), nor a suit for specific moveable property wrongfully taken (Article 49). This latter Article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Article 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the Schedule. Their Lordships think this Article should be applied, unless it is clear that the suit is within some other Article, which in their opinion it is not, and consequently the suit as regards the moveable property is not barred."

It will be observed that money formed part of the estate in that case, and though Article 62 is not specifically referred to by their Lordships of the Privy Council, it is a legitimate inference from their judgment that if the aforesaid provision had been applicable, there would have been no room for the applicability of the residuary provision contained in Article 120. In the view, which we take, we are fortified by the decisions in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (2), *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* (3) and *Joti Parshad* v. *Sant Lal* (4). We accordingly concur with the District Judge in holding that the suit is not barred by limitation.

Of the different items of properties referred to in the memorandum of appeal preferred by the defendant, the learned Counsel has withdrawn all objections to the findings of the District Judge relating to the house at Aligarh, the furniture, horse and phaeton there, and four pieces of jewellery namely, gold watch, gold chain, gold buttons and silver watch; and we need not, therefore, deal with them. The dispute in the defendant's appeal is, therefore, narrowed down to the following four properties:

(*a*) Rs. 5,447 realised by the defendant from the Delhi and London Bank, Limited,

(*b*) Rs. 2,000 out of Rs. 3,000 left by the deceased with his servant Abdul Aziz,

(*c*) Six shops in *Gali* Batasha at Delhi,

(*d*) The residentiary house at Delhi now called "Hamid Manzil."

As regards the appeal preferred by the plaintiff, the dispute has been confined by Mr. Moti Sagar to three items of properties, namely,

(*e*) Certain shops in the Chandni Chauk at Delhi,

(*f*) A vacant plot of land in Darya Ganj at Delhi,

(*g*) The Government promissory notes of Rs. 30,000.

Taking these items seriatim, we think that the defendant has not substantiated his exclusive right to Rs. 5,447. It is admitted that he realised the money on 13th July 1908, about three months after the death of his father, from the Delhi and London Bank, Limited, and the question for determination is whether the money belonged to the defendant from the very beginning and, if not, whether it was gifted to him by the father. After hearing the learned Counsel on both sides we have no hesitation in holding that there is not a scintilla of evidence upon the record to support the contention that the money deposited by the father really belonged to Hamid Ullah Khan. Indeed the latter, when examined as a witness, expressed his inability to say to whom the money belonged, and we may take it that if it had been his property, he would have unhesitatingly supported his claim by making a clear and affirmative statement to that effect, and adduced evidence to show when he had paid the money to the father. It appears that on the 22nd June 1907 Sami Ullah Khan deposited the money with the Bank, and got a fixed deposit receipt payable to him, or to his son Hamid Ullah Khan, or to the survivor. The books of the Bank show that in pursuance of a direction conveyed by Sami Ullah Khan the money was made payable only to him during his lifetime, and it appears from the statement of Hargopal, a clerk employed by the Bank, that this entry was made in pursuance of a letter written by the

(2) 19 A. 169; A. W. N. (1897) 34; 9 Ind. Dec. (N. S.) 111.

(3) 6 Ind. Cas. 56; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447.

(4) 21 Ind. Cas. 919, 34 P. R. 1914; 13 P. L. R. 1914; 24 P. W. R. 1914

deceased on 26th August 1907 to the Manager of the Bank. This letter (printed record, page 120) which purports to be in the handwriting of Sami Ullah Khan, states in the clearest possible terms that during his lifetime "no one was entitled to any part of the money." The admissibility of this document has been objected to by the defendant on the ground that the plaintiff did not prove the alleged signature of the writer, but this objection is clearly a belated one and cannot be allowed. The letter was not only received in evidence by the Trial Judge, but also relied upon in support of his finding, and it is significant that no objection to its admissibility was taken either in the Court of First Instance or in the memorandum of appeal to this Court. But apart from the document it is clear from the entry in the Bank's books that the deposit was payable only to the father during his lifetime.

Now the various gifts made by the father to the defendant leave no doubt whatever that the former was very kind to the latter, and we consider it most unlikely that, if the money had really belonged to his son, he would have deposited it in the joint names and claimed entire control over its disposal during his lifetime. But all doubt on this point is dispelled by the fact that there was a similar deposit made by him in the joint names of himself and the plaintiff, and it is admitted that the money due on that deposit subsequently became a part of Sami Ullah Khan's estate. It may be that the father, to avoid the payment of succession duty leviable on the Succession Certificate or Letters of Administration, asked the Bank to mention in the deposit receipt the name of the defendant along with his own, but that fact alone does not establish that he made a gift of the money. Indeed the defendant himself does not in his statement rely upon the alleged gift, and his Counsel admitted before the District Judge that there was no gift, *vide*, page 269, line 5. Accordingly we uphold the finding of the District Judge on this point, and reject the defendant's claim.

As regards the item of Rs. 2,000, we are unable to endorse the opinion of the Trial Judge. It is common ground that Rs. 3,000 belonging to Sami Ullah Khan were, at the time of his death, in deposit with his agent, Abdul Aziz, and there can be little doubt that the entire sum, with the exception of Rs. 30 borrowed by the plaintiff himself was spent by Abdul Aziz upon his master's funeral rites and other ceremonies usually performed on the occasion of death and thereafter. Though the plaintiff was not expressly asked to give his consent to the various items of expenditure, it appears that he was present all the time at the place where the ceremonies were being performed, and was fully cognizant of what Abdul Aziz was doing on behalf of both the brothers, but did not raise the slightest objection on the ground of the expenses being excessive or unreasonable It is an undisputed fact that he instituted a suit against Abdul Aziz for his share of the money but failed to establish his claim. Upon these facts we do not think that the District Judge was justified in estimating the funeral expenses at Rs 1,000 and in holding the defendant responsible for the balance. The rule of Muhammadan Law, which is in no way different from that obtaining in other systems of law, is that the funeral ceremonies should be performed in a manner suitable to the deceased's position in life and means, and it seems to us that in determining what is a reasonable amount in a particular case, the Court must take into consideration the social practices of the class to which the deceased belonged. Now, Sami Ullah Khan was a person who had occupied a high office under the Government, and was a man of position and wealth. It is true that he had, during his lifetime transferred by gift the major portion of the property to his elder son, but that circumstance did in no way interfere with the position he occupied in society. His heirs were expected to perform in a suitable manner the different ceremonies usual on an occasion of this kind, and the reasonableness of the amount actually spent is demonstrated by the fact that the elder son expressly authorised it, and the younger one, though he saw the various sums being spent on different ceremonies, never expressed his disapproval or suggested in any way that the expenditure was unreasonable or unnecessary. In a matter of this character the conduct of the parties is a very important piece of evidence, and in view of the plaintiff's acquiescence and other circumstances we consider that he cannot now reasonably ask the Court to reduce the

sum which has been expended, or to make the defendant personally responsible for the alleged excessive expenditure.

The question of *wakf* in respect of six shops in *Gali* Batasha at Delhi need not detain us long. In support of his contention that the property was endowed by his father for the purpose of carrying out certain trusts the defendant places his reliance upon a letter dated the 10th of December 1894 written to him by the father and the draft of a deed of settlement. The letter in question contains a vague reference to Sami Ullah's intention to plant a garden near the tomb of his deceased wife, the defendant's mother, and advises the defendant to set apart some money for the benefit of their souls. The document was written in 1894, and it is significant that though the writer lived for nearly fourteen years thereafter, he did not take any steps to carry out his alleged intention. There is no mention therein of the property upon which the defendant seeks to impose the trust. As to the draft of the deed of settlement, Exhibit D-10 it will suffice to say that it does not bear any date, is not in the deceased's hand writing, and does not bear even his signature. Now, the deceased, who was a Judicial Officer of experience, must have been fully aware of the importance of a document to prove the nature of a transaction of this kind, and yet we are told that he ordered his servant Abdul Aziz to prepare a draft sometime in 1907 or 1908, but did not take any steps to execute a regular conveyance. Under the Muhammadan Law no formality is required to be gone through for the purpose of creating a valid *wakf*; it is enough if the donor declares that he constitutes a property *wakf* or has constituted it *wakf*. It is, however, clear that there must be not only a mere intention to dedicate property but an actual dedication. Now, in the present case, as pointed out above, there is no documentary evidence to satisfy the above test, and the oral evidence of Rafi-ud-din, a witness for the defendant, only shows that the intention of the deceased was to make *wakf* a portion of his property. He desired to make *wakf* for the spiritual welfare of religious preceptors, himself and his dear ones. The contents of the draft D-10 almost respresent his views". Whatever may be said as to the intention, it cannot be held that Sami Ullah dedicated the property in question or made any declaration of trust in respect thereof.

The next three items of properties have certain common features which may be mentioned briefly. These properties form the subject-matter of three deeds of gift executed by Sami Ullah in favour of his elder son, and the execution of the documents has not been contested before us. It appears that neither at the time of the execution, nor at the time of the registration, of the instruments the donor and the donee met each other, the former being at Aligarh and the latter at Hyderabad; and it is, therefore, argued by Mr. Moti Sagar for the plaintiff that to constitute a valid gift under the Muhammadan Law it is essential that the donor and the donee must come together and meet each other, and that in the absence of a meeting the gift is invalid. The learned Pleader invites our attention to a passage in Hedaya at page 482 which is in the following terms :

"A gift may be taken possession of on the spot where it is tendered, without the express order of the donor but not afterwards. If the donee take possession of the gift, in the meeting of the deed of gift, without the order of the giver, it is lawful, upon a favourable construction. If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful, unless he have had the consent of the giver so to do."

Baillie in his Digest of Muhammadan Law lays down a rule to the same effect, *vide* page 513 ;

"When the donee is neither expressly permitted nor forbidden to take possession, and does so at the meeting, the possession is valid on a favourable construction of law, though not so by analogy. But if possession is not taken till after separation from the meeting, the possession is not valid, either by analogy or on a favourable construction."

These extracts, no doubt, refer to the meeting of the donor and the donee but it is nowhere stated that if the parties do not come face to face, there cannot be

any valid gift by the one to the other. The learned Pleader is unable to cite any judicial authority in support of his contention and we do not think that the passages quoted above make it a *sine qua non* to the validity of the gift that the donor and the donee must meet each other. The rule of the Muhammadan Law on the subject of the delivery of seisin should be interpreted in the light of common sense and according to the exigencies and necessities of modern life. Surely it cannot be seriously argued that a father is unable to make a valid gift in favour of his son who happens to be absent at that time.

The three essentials of gift under the Muhammadan Law are : offer by the donor, acceptance by or on behalf of the donee, and seisin. An offer may be accepted either by the donee himself or by his agent, and it is nowhere laid down in so many terms that the donor and the donee must be present at one and the same place. As regards the delivery of possession what the law contemplates is that the possession required to be given must be such as the nature of the property permits. If the donor has done all that he could do to perfect the contemplated gift, which is attended with complete publicity, the mere fact that the donee was not present or that possession was obtained by him sometime after does not invalidate the transfer.

Now, the District Judge has held that there was delivery of possession in respect of items Nos. (*e*) and (*f*) referred to above, but there was no such delivery in respect of item (*d*); and the question arises whether his findings are justified by the facts and the law bearing on the subject. The shops in Chandni Chank, item (*e*), were in possession of tenants at the time of the gift, and several leases have been produced to show that after the registration of the deed of gift in 1906 the lessees attorned to the donee, and the finding on this point arrived at by the District Judge in favour of the defendant is not contested by the learned Pleader for the plaintiff. It is, however, urged that the ownership of tangible property in possession of a tenant cannot be transferred by way of gift unless and until the donor evicts the tenant, obtains physical possession of the property, and then delivers it to the donee. Now, we are fully aware of certain passages in Dur ul-Mukhtar and Fatawa-i-Alamgiri, which are usually cited in support of this extreme view. Whatever the exact significance of these passages may be, there can be no manner of doubt that this view has not been accepted by any judicial authority or any modern author on Muhammadan Law. The judgment of the Calcutta High Court in *Mullick Abdool Guffoor* v. *Muleka* (5) has settled the question beyond any reasonable doubt, and contains the following pertinent observations with respect to these texts: "We have been referred to several authorities, and amongst others, to Dur-ul-Mukhtar, Book on Gift, page 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of a usurper (or wrong-doer), or of a *lessee* or mortgagee, it cannot be given away; because in these cases the donor has not possession of the thing which he purports to give. But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it." Then after suggesting another explanation, the Court proceeds: "Whether this is the real meaning of the authorities, may be doubtful; but it is certain that such a state of the law in this country would render the transfer by gift of a *zemindari* or other landlord's interest simply impossible; lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the *zemindar* and the occupying *ryot*. What is usually called possession in this country is not actual or *khas* possession, but the receipt of the rents and profits; and if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of *zemindari* properties, would be invalidated. If we were disposed to agree with this novel view of Muhammadan Law (which we are not) we think we should be doing a great wrong to the Muhammadan community, by placing them under disabilities with regard to the transfer of property, which they have never

(5) 10 C. 1112: 5 Ind. Dec. (N. S.) 743.

hither to experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Suddar Dewany Adawlut (under the advice of the *Kazis*) and also by this Court, and it is directly opposed to the case of *Ameeroonnissa Khatoon* v. *Abedoonnissa Khatoon* (6) decided by their Lordships of the Privy Council."

The exposition of law contained in this judgment has our entire concurrence, and upon the rule laid down therein we have no hesitation in holding that the possession of the property in the occupation of a tenant can be delivered by allowing the donee to collect rents and profits or by requesting the tenant to attorn to the donee. The same view has been taken by the Bombay High Court in *Shaik Ibhram* v. *Shaik Suleman* (7) and *Khaver Sultan* v. *Rukha Sultan* (8). Mr. Moti Sagar frankly admits that there is not a single judgment laying down the opposite rule, and we must accordingly hold that the attornment by the tenants to the donee and the collection of rents by the latter constituted a valid delivery of possession in respect of the Chandni Chauk property, and that the gift thereof was a valid transaction and cannot be disputed.

The deed in respect of the plot of land in Darya Ganj was executed on the 9th of February 1908 and registered on the 10th March 1908, namely, a month before the death of the donor. It recites the delivery of possession, and considering that the property was a vacant plot of land, we do not think that the donor was expected to do anything else to perfect the title of the donee. Neither any tenant nor anybody else was in physical possession of the property, and it is quite clear that the donor ceased to exercise any right of ownership therein. It is a legitimate inference, though there is no direct evidence on the point, that the donee's agent at Delhi began to hold the land after the registration of the instrument, and we think that there was such a delivery of seisin as the nature of the property permitted.

Coming to the third property, which was the subject-matter of a deed of gift executed on the 9th of October 1905 and registered on the 6th November 1905, we notice that the learned District Judge has held the gift to be invalid because it was not perfected by delivery of possession, such as it is contemplated by Muhammadan Law. Now, the execution of the deed is admitted, and it appears that Sami Ullah Khan sent the document to Delhi, where the property was situate, for registration there, and that the registration was effected through his attorney Abdul Aziz. The instrument recites that the donor had surrendered possession and delivered it to the donee, and though such a recital is sometimes a purely formal affair, all the circumstances show that the donor ceased thereafter to have control over the property and that the donee stepped into his shoes. The property was assessed by the Municipal Committee to house-tax, and the document printed at pages 92 and 93 of the paper-book shows that in the house-tax register kept by the Municipal Committee mutation of names was effected in favour of Hamid Uullah Khan. The plaintiff himself as a witness admits, *vide* page 195, that his father Sami Ullah Khan placed on the main gate of the house a tablet-bearing the name "*Hamid Manzil*," and the witness refers to Hashmat Ullah as the person having knowledge on the subject. The latter's evidence shows that the father placed the tablet with the inscription thereon in order to show to the whole world that the property belonged to Hamid-Ullah. It is fully proved that the house-tax with respect to this property was paid in 1907 and 1908 by the donee and not by the donor (*vide* pages 62 and 130), at the time of the gift the tenement consisted of three parts, namely, the residential house, a vacant site, and some shops. It is established that on the vacant site the donee built a house called *Nimwali haveli* that the application for permission to build was made on his behalf, and that the sanction was granted to him. There is some evidence that the tenants occupying the shops paid rent to the donee, and the fact that the leases relating to the shops are not forthcoming does not necessarily show that the tenants did not attorn to him. It is further clear that he demolished the shops and built a room on

(6) 23 W. R. 208; 15 B. L. R. 67; 2 I. A. 87; 3 Sar. P. C. J. 423.
(7) 9 B. 146; 5 Ind. Dec. (N. s.) 98.
(8) 6 Bom. L. R. 983.

the site. As regards the residential portion it appears that neither the donor nor the donee was in occupation thereof at the time of the gift, but the mutation of names in the Municipal register and the placing of tablet referred to above and other circumstances show that the donee was in constructive possession thereof.

The learned District Judge bases his conclusion mainly upon two points, *first*, that Hashmat Ullah, the defendant's agent, deposes that Sami Ullah Khan, when asked to deliver possession of the property, replied "that he was a fool to take possession from owners." Now the word 'owners' is not quite a correct translation of the word *gharwalon* used in the varnacular, and it seems to us, that Sami Ullah Khan in using the expression was referring to his female relatives then occupying some rooms in the house. We do not think that it was essential to the transfer of possession that these ladies should have vacated the house. The second matter referred to by the learned Judge is that the plaintiff and his wife occupied some rooms in the house; but it is admitted before us that the plaintiff's marriage took place in 1907, and the defendant states that he himself asked his brother to leave the house of his father-in-law and come over and reside in the house in dispute. There is no adequate ground for rejecting this testimony, and in the circumstances the possession of the plaintiff must be deemed to be permissive and on behalf of the defendant.

Considering all the facts and the statements of the parties we are of opinion that the father did all he could reasonably do to deliver possession of the property to the donee and that the latter became full owner thereof.

The last item of property is the Government promisory notes of Rs. 30,000 and the essentials of gift with respect to it have, in our opinion, been established beyond all doubt. It is quite clear that Sami Ullah Khan sold an immoveable property called *mazid parcha*, utilized part of the price in purchasing the notes through Delhi and London Bank in 1906, and directed the Bank to endorse the notes in favour of the defendant. This direction was duly carried out, and the notes were sent to the defendant, and indeed the plaintiff himself does not dispute these facts. He, however, contends that the purchase of the notes was a *benami* transaction and that the father remained owner thereof all along. But all doubt on this point is set at rest by the father's letter Exhibit D-25 dated the 25th of April 1906 to the defendant, which may be quoted *in extenso*:—

"I give you Rs. 30,000 out of the sale proceeds of the *mazid parcha*. The money has been sent to you in notes through the Bank. I give away this to you by way of gift and not as an heir. Succession opens after the death of an ancestor. You should keep this letter with care."

This letter fully establishes the gift, and it is undeniable that the delivery of notes in pursuance thereof was made to the defendant.

The above discussion concludes the determination of all the points argued before us by the learned Counsel on both sides, and the result is that we dismiss Civil Appeal No. 1510 of 1914, and accepting Civil Appeal No. 1439 of 1914 we exclude Rs. 2,000 and the house described as *Hamid Manzil* from the list of the properties to be partitioned between the brothers. Having regard to all the circumstances of the case we leave the parties to bear their own costs in both the Courts.

*Appeal No.* 1510 *of* 1914 *dismissed.*
*Appeal No.* 1439 *of* 1914 *allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 270 OF 1916.

March 13, 1917.

*Present*:—Mr. Lindsay, J. C.

*Sheikh* KARIM BAKHSH—PLAINTIFF—APPELLANT

*versus*

IDU SHAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Contract Act* (*IX of* 1872), *s.* 55—*Mortgage of agricultural land—Redemption to be had in* Khali fasl jeth—*Time, whether essence of contract.*

In cases of mortgage with possession in respect of agricultural land, providing for redemption only at a particular season of the year known as *khali fasl Jeth*, time is of the essence of the contract, and the mortgagor, in order to maintain a suit for redemption, must show that he made a full offer to redeem in *khali fasl Jeth* and that such offer was refused. [p. 382, col. 2.]

KARIM BAKHSH *v.* IDU SHAH.

*Barma Bakhsh* v. *Suraj Singh*, 5 O. C. 127; *Sidh Gopal* v. *Nanhu Khan*, 6 O. C. 223, distinguished.

Appeal from the decree of the District Judge, Fyzabad, dated the 14th April 1916, reversing the order of the Additional Munsif, Fyzabad, dated the 30th July 1915.

Babu *Jiban Krishna Banerji*, for the Appellant.

Pandit *Harkaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—The argument for the plaintiff-appellant in this case is that the lower Appellate Court was wrong in dismissing the suit brought by him for redemption. In order to understand the point so raised it is necessary to refer to a few facts. The plaintiff in the case is a second mortgagee. The earlier mortgage of the property had been made in favour of two persons Rahim Bakhsh and Idu. That mortgage was a mortgage with possession, the mortgage money advanced being a sum of Rs. 500. The mortgage-deed provides for redemption in "*khali fasl Jeth*." The plaintiff having obtained the second mortgage of the property is entitled to seek redemption and in his plaint he stated that he had made an offer to the prior mortgagees which had been accepted by them. In the third paragraph of the plaint it is stated that Rs. 420 out of Rs. 500 had been paid to the first defendant and that Rs. 80 had been paid to the second defendant on the 7th of June 1914. The plaintiff alleged that after these payments had been made he had got back the mortgage-deed from the defendants who had agreed to his taking possession. He went on to allege that sometime after the month of *Asarh* when he wanted to take possession the defendants refused to deliver it to him. The first defendant confessed judgment. He admitted that he had received the sum of Rs. 420 from the plaintiff. The second defendant Idu denied that any payment of Rs. 80 had been made to him and it has been found as a matter of fact by both the Courts below that no such payment was made. It has further been found that the plaintiff got possession of the mortgage-deed acting in collusion with the first defendant. The case for the second defendant is that his share of the mortgage-money was not for Rs. 80 as alleged in plaint but Rs. 200 as set out in the mortgage-deed. The learned District Judge relying upon the decision of a Bench of the Allahabad High Court reported as *Muhammad Ali* v. *Baldeo Pande* (1) came to the conclusion that as it was proved that no adequate tender of the mortgage-money had been made the plaintiff had no cause of action for his suit for redemption. It has been contended here that this view of the law taken by the Allahabad High Court has not been accepted in this Court and reliance has been placed upon two judgments which are to be found in *Barma Bakhsh* v. *Suraj Singh* (2) and *Sidh Gopal* v. *Nanhu Khan* (3). It is true that in both of those cases it has been laid down that there can be no hard and fast rule that a mortgagor cannot maintain a suit for redemption except on proof that he has tendered to the mortgagee the sum due to him. Instances have been cited in both these reported cases in which redemption has been allowed although no tender had been made. The present case however, appears to me to be of a different nature. The mortgage as I have said was a mortgage with possession providing for redemption only at that particular season of the year which is known as *khali fasl Jeth*. As has been said in some of the Allahabad rulings, in a case of this kind time is of the essence of the contract and the mortgagor in order to maintain a suit for redemption has to show that he made an offer to redeem in *khali fasl Jeth* and that such offer was refused. In the present instance it has been proved that no proper tender of the money was made. On the finding of the Court below all that was tendered was a sum of Rs. 420. It is not open to the mortgagor to say that he was in doubt as to the proper amount of tender, for that is perfectly plain having regard to the terms of the deed. The only sum which could be payable is a sum of Rs. 500. As for proportion in which the original mortgagees are to receive their money, that is another matter, and does not seem to me in any way to concern the present plaintiff. He could have easily overcome any difficulty by going to Court and making a deposit of Rs. 500 under the provisions of section 83 of the Transfer of Property Act, leaving it for the mortgagees themselves to divide

(1) 34 Ind. Cas. 183; 14 A. L. J. 55; 38 A. 148.
(2) 5 O. C. 127.
(3) 6 O. C. 223.

the money as they thought proper. I think there can be no doubt that what has happened in this case is that the plaintiff has entered into collusion with one of the mortgagees and that this suit was a collusive suit. I am not prepared, therefore, to interfere with the judgment of the Court below. I think the suit was rightly dismissed. The plaintiff will be entitled to redeem the property if he seeks redemption in the proper way by making a full tender at the proper time of the year.

The appeal is dismissed with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

CIVIL APPEAL No. 36 OF 1916 IN
CIVIL SUIT No. 353 OF 1915.
February 7, 1917.

*Present*:- Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MADHORAM HURDEODASS --
DEFENDANT—APPELLANT
*versus*
G. C. SETT AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

*Contract Act (IX of* 1872), *s.* 56—*Performance rendered impossible by outbreak of war—Rights and liabilities of parties—Contract of affreightment with alien enemy before war, whether subsits after outbreak of war —C. I. F. contract, incidents of—Executory contract, dissolution of—Estoppel—Vendor and purchaser.*

Under a C. I. F. contract the defendants (vendors) sent out an order to Europe for supply of certain goods to the plaintiffs (purchasers) in Calcutta. The goods were shipped on the 2nd July 1914 in a German vessel which was on the high seas when war broke out between England and Germany, and the vessel was captured by the Government as an enemy ship and brought before the Ceylon Court of Admiralty. On the 25th August 1914 the ship was condemned as a lawful prize, but the cargo was released on condition that on its conveyance by the Crown to its destination the Crown would be authorised to recover certain expenses against the cargo released and delivered in Calcutta. On the arrival of the goods in Calcutta, the defendants asked the plaintiffs to take delivery on payment of those expenses. On the plaintiffs' refusal to do so the defendants disposed of the goods in the market, whereupon the plaintiffs instituted a suit for recovery of damages for failure of the defendants to deliver the goods in terms of the contract:

*Held*, that the plaintiffs were not entitled to recover damages, as the contract between them and the defendants became void under section 56 of the Contract Act, inasmuch as by the outbreak of the war, one essential element of the contract, namely the contract of affreightment, became unlawful and the fact that the defendants at one stage offered to deliver the goods to the plaintiffs on certain terms did not estop them from pleading that the contract had become void under section 56 of the Contract Act. [p. 388, cols. 1 & 2; p. 392, cols. 1 & 2.]

The incidents of a C. I. F. contract explained. [p. 387, col. 1; p. 390, col 1.]

An executory contract made with an alien enemy in peace time is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy or if it is in its nature incapable of suspension. [p. 390, col. 2.]

A contract is deemed in its nature incapable of suspension, if its proper performance necessitates intercourse with the enemy during the war or where time is of the essence of the contract, or the parties cannot on the restoration of peace be put on a footing of equality. [p. 390, col. 2.]

A contract of affreightment may be dissolved without execution not only by act of the parties, but in many cases, by the act of the law. If the voyage becomes unlawful or impossible to be performed, or if it is broken up, either before or after it has actually commenced, by war or interdiction, complete or partial of commerce with the place of destination, the contract is dissolved. [p. 391, col. 1,]

Per *Mookerjee, J.*—Where a ship is condemned as a prize but the cargo is released, the Crown is entitled to impose the payment of freight as a condition of its release and has a lien on the goods till it is paid. [p. 392, col. 1.]

The ultimate conveyance of the goods by the condemned ship to its destination is in no sense a continuation of the original voyage in fulfilment of the contract of affreightment but is essentially a new voyage under new conditions. [p. 392, col. 1.]

Appeal against the judgment of Mr. Justice Chaudhuri in Civil Suit No. 353 of 1915 dated the 14th February 1916 reported as 33 Ind. Cas. 540.

Messrs. *C. C. Ghose, B. C. Mitter* and *K. P. Khaitan*, for the Appellants.

Messrs. *S. R. Das* and *B. L. Mitter*, for the Respondents.

### JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendants Madhoram Hurdeo Dass against the decision of Chaudhuri, J., whereby he gave judgment for the plaintiffs for Rs. 2,500 as damages for breach of contract and costs.

The contract was contained in a letter written by the defendants to the plaintiff, and dated 2nd February 1914, as follows:—

*Calcutta, 2nd February* 1914.

"MESSRS. G. C. SETT & B. R. SETT,
"DEAR SIRS, Calcutta.

We beg to enter as having sold you through Broker P. N. Mookerjee 150 tons Basic Steel bars with usual 10 per cent. 2nd class extras at £ 5-7-6 per ton C. I. F. *i.e.*, free Hooghly. Shipment in three monthly lots commencing June, *i.e.*, June, July, August 1914. Delivery to be completed within three days from the date of the landing of

the goods. Terms 45 days credit from the date of the delivery of the goods, failing which due date will be calculated from the due date of the delivery, *i.e.*, three days of the landing of the goods.

This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged on any money unpaid after the due date and rebate for payments before the due date will be allowed at the same rates. You have the option to have the goods weighed so as to arrive at the actual weighment and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from the jetty, and the invoice weight shall be accepted by you as the correct one.

Please confirm.

Yours faithfully
MADHORAM HURDEODASS".

The July consignment was shipped by the Belgo-Asiatic Trading Company, from whom the defendants had bought the goods, on the 2nd July 1914 at Antwerp on board the ss. "*Steinturn*" which was a German vessel. Some of the goods were made in Belgium, others were made in Germany as appears from the invoices in respect of the goods. Neither the Bill of Lading nor the Policy of Insurance was produced in Court, but it was assumed for the purpose of the appeal by both sides that the Bill of Lading was made out in the name of the defendants and that the contingency which happened, *viz.*, the capture and condemnation of the ship and the consequent expenses were not covered by the Policy of Insurance.

At the time of the declaration of war against Germany, namely on the 4th August 1914, the "*Steinturn*" was at sea, and at sometime subsequently, which has not been proved, she was captured by a British ship and taken to Colombo. The "*Steinturn*" was condemned by the Prize Court but the cargo in question was released, and inasmuch as the ship was carrying a general cargo consigned to Madras, Calcutta and Chittagong, it was ordered on the 19th November 1914 by the Prize Court that in the event of the Crown in the exercise of its power under a previous order, dated 2nd September 1914, consigning the said cargo to Madras and Calcutta—the Crown be authorised to recover against all cargo released and delivered at Madras and Calcutta in respect of freight Rs. 15·50 per ton and in respect of agency charges such reasonable expenses as might be incurred.

Consequently the consignment in question was carried in the "*Steinturn*" under the above mentioned order and arrangement to Calcutta and arrived there on or about the 2nd January 1915. The freight for the carriage from Colombo to Calcutta was Rs. 818-14-0 as is shewn from the bill dated the 23rd February 1915, in addition there were Rs. 82 for charges in respect of release from the Prize Court and other expenses in consequence of the capture of the "*Steinturn*" and the conveyance of the cargo from Colombo to Calcutta.

The course of events may be taken from the learned Judge's summary of what he describes as the undisputed facts of the case as follows:—

"That the plaintiffs failed to pay the price of the June shipment and a suit had to be instituted against them which was decreed on the 26th January 1915: That copies of three invoices were sent to the plaintiffs by the defendant firm of the goods per ss. *Steinturn*. In or about the end of September 1914, the defendant firm asked the plaintiffs to keep themselves in readiness to pay for the goods in cash against shipping documents on arrival of the steamer. See their letter dated 24/30th September 1914. Apparently there was a mistake in the invoice as regards the weight, and the plaintiffs called upon the defendants to correct it, but the defendants stated that they were not liable to make any corrections. On the 2nd January 1915 the defendant firm intimated to the plaintiffs that the vessel had arrived in Port and requested them to take delivery of the goods by paying for them as early as possible. The cause of late arrival was the seizure of the steamer at Colombo.

By an order dated 25th August 1914 on the application of the Crown, the steamer was handed over by the Colombo Prize Court to the custody of the principal

Collector of Customs, and the following undertaking and decree was entered on record, namely, "the Solicitor General on behalf of the Crown undertakes that the Crown will restore the ship to its present place, whenever it is called upon to do so by this Court, if the Government of Ceylon on behalf of the Crown are allowed to take charge of the ship, and moves that the Crown be allowed to take charge of the ship, on these terms. It is ordered and decreed that the application be allowed and that the Marshal be directed to let the Government of Ceylon have possession of the ship, after the cargo, goods, wares and merchandise have been warehoused. It is further directed that the Marshal shall require from any person taking over the ship on behalf of the Government an authority to do so signed by His Excellency the Governor or by the Colonial Secretary." The President of the Prize Court appears to have made an order on the 19th November 1914 that inasmuch as the steamer contained general cargo sent to Madras, Calcutta and Chittagong, it was for the interest of all persons concerned that the cargo entitled to release, which was consigned to Calcutta, should be delivered at Calcutta; it was further ordered that "in the event of the Crown in the exercise of its powers conveying the said cargo to Calcutta, the Crown was authorised to recover against all cargo released and delivered certain expenses, namely,

"In respect of freight Rs. 15·50 per ton weight or measure. In resepct of agency charges, such reasonable expenses as may be incurred."

"And that the steamer was not to depart from Colombo until after the expiration of three weeks from the date of that order."

On the 2nd September 1914 the Prize Court on hearing the Attorney-General made the following order, "that the Marshal be authorized for the purpose of warehousing the cargo to put the cargo in the hands of the Crown, the Attorney-General undertaking on behalf of the Crown that in the event of the cargo or any part of it being removed out of the jurisdiction of this Court, it was to be brought back within the jurisdiction upon the order of the Court." What happened was that Messrs. Graham & Co., merchants of Calcutta, were employed as agents on behalf of the Crown to give delivery of the goods consigned to Calcutta to the consignees. Graham & Co., thereupon, communicated with the defendant firm in respect of the July shipment of the goods which had come out in that steamer, and these goods arrived, as stated above, on the 2nd January. The defendant firm had to pay certain charges for freight and commission to Messrs. Graham & Co. for these goods. The defendants allege that by the said letter dated 23rd February 1915, they gave particulars of the costs and charges incurred by them in respect of the consignment, including therein the charges occasioned by the seizure and release. That prior to that date and after the arrival of the goods in Calcutta some correspondence ensued. The defendant firm wrote to the plaintiffs on the 4th January 1915, that unless the plaintiff firm immediately sent the price of the goods of the June shipment which had already been delivered to them, as also the price of the goods per ss. "*Steinturn*", they would be compelled to re-sell the goods on the plaintiffs' account. The plaintiffs wrote on the same date that they were prepared to pay for and take delivey of all the goods with the exception of 22 pieces of Basic Steel bars, the weight of which had been incorrectly stated in the invoice. They said that if they (defendants) failed to make over the Bill of Lading for the goods they would not be liable for any wharf rent, if incurred. On the 8th January the plaintiffs said that they were prepared to pay the full price of the three lots which had come per ss. "*Steinturn*" on the defendant firm handing over to them the Bills of Lading and other documents. They offered to pay the necessary charges for obtaining delivery of the goods from the jetties, and asked for information as to the exact amount payable by them. There was no reply to this letter. On the 19th January they offered Rs. 4,370 as being the price of the goods including the usual charges. On the 27th January Charu Chandra Bose, Attorney for the defendants, wrote to the plaintiffs' Attorneys

the following letter:—"As arranged my clients are now ready to deliver the goods demanded by you on receipt of the price, godown rent and charges." It will be noticed this letter was written the day after the decree above referred to. It was a consent decree and the defendants say that terms arranged between the parties were that the goods of the July shipment would be taken delivery of by the plaintiffs after payment of all dues, that Nepal Chunder on behalf of the plaintiffs agreed to pay all costs in respect of the July shipment, freight, etc, that is to say, the extra freight and other charges incurred in respect of the consignment. This arrangement is entirely denied by the plaintiffs. No reply was sent by the plaintiffs to that letter until the 4th February 1915, when they said that nothing had been arranged as suggested by the defendants. They said that the defendants were not entitled to godown rent, and refused to pay same. They complained that the defendants had not specified what charges they were claiming, and expressed their readiness and willingness to pay the price of the goods and the duty, landing and proper charges in respect thereof as were usual in the case of delivery ex-jetty. On the 4th February the defendants' Attorney said that if the goods were not taken delivery of within three days, the defendants would re-sell on the plaintiffs' account. Apparently these two letters crossed each other. On the 9th February the defendant firm said that the price and charges to be paid were mentioned in their bills sent to the plaintiffs. Over and above that, the plaintiffs would have to pay godown rent and cartage for the removal of the goods and unless the plaintiffs took delivery of the goods within three days, the defendants would re-sell the goods on the plaintiffs' account and risk. On the 12th January the plaintiffs denied that any bills had been submitted to them for payment and refused to pay godown rent and other incidental charges. Nothing further was done by the plaintiffs until the 8th March, when their Attorneys wrote a letter to the defendants' Attorney asking for a statement of the charges the defendants claimed in respect of the said goods and if they found the same reasonable and proper, they would ask the plaintiffs to take delivery. On the 10th March they were informed that the defendants had sold the goods to a third person.

The action was brought for breach of contract caused by the failure of the defendants to make over the Bill of Lading or to deliver the goods, and the main point which was urged in this appeal was not taken by the defendants until the trial, when the learned Judge allowed the defendants to amend their defence as follows:—

"With further reference to paragraph 3 of the plaint herein the defendant firm state that the goods forming the July shipment referred to in the said paragraph were shipped from Antwerp on or about the 2nd day of July 1914 per ss. "*Steinturn*". On the outbreak of war between His Britannic Majesty's Government and the German Empire on the 4th day of August 1914 the said steamer, which was on the high seas, became liable to seizure by the naval forces of His Majesty's Government and as a matter of fact the said steamer was captured, seized and detained by His Majesty's Government at or near Colombo and was subsequently condemned with all the cargo on board by the Colombo Prize Court. The defendant firm submit that on such condemnation of the said steamer and of the cargo therein including the said goods, the contract with the plaintiffs became impossible of performance."

It is clear from the order of the Prize Court that though the ship was condemned, the cargo in question was not condemned. It was, however, argued that although the cargo was eventually released the outbreak of war rendered the performance of the contract of 2nd February 1914 impossible or at all events it rendered the contract of affreightment, which was an implied part of the contract, unlawful and consequently by reason of the provision of section 56 of the Indian Contract Act, 1872, the contract was void.

This defence necessitated an examination of the terms of the contract.

After some discussion during the argument it appeared that there was little, if any, material difference between the interpretations placed upon the contract by the learned Counsel appearing for the plaintiffs and defendants; and both argued the case on the assumption that the contract was

an ordinary C.I.F contract, with this variation that the payment specified in the contract was not to be made as usual against the documents and was not to be made in this case until 48 days after the landing of the goods, that having regard to the specipal terms of this contract it was not the duty of the defendants to hand over the documents relating to the goods as soon as the documents arrived but that they were entitled to retain them until the goods arrived, when it would be the duty of the defendants to hand over the documents to the plaintiffs for the purpose of taking delivery or for the defendants to take delivery themselves in the first instance and that payment would become due 48 days after the landing of the goods.

The question, therefore, arises what were the incidents of the defendants' undertaking in such a contract: The variation of the terms as to the time of payment does not in my judgment alter the nature of the contract as C.I.F. contract.

Taking the well-known incidents of such a contract the defendants' had, *firstly*, to ship at the port of shipment goods of the description contained in the contract, *secondly*, to procure a contract of affreightment under which the goods would be delivered in the Hooghly; *thirdly*, to arrange for an insurance upon the terms current in the trade which would be available for the benefit of the buyers; *fourthly*, to make out an invoice; and *finally*, to tender these documents and by reason of the special terms of this contract, to tender such documents upon the arrival of the goods.

It may be assumed for the purpose of this case that the goods were of the description contained in the contract and that a contract of affreightment was procured under which in ordinary circumstances the goods would have been delivered in the Hooghly and that a sufficient insurance was arranged.

But it was argued on behalf of the defendants that although the goods eventually arrived and were capable of physical delivery in the Hooghly, they did not so arrive under the contract of affreightment procured by them in pursuance of their contract of 2nd February 1914 with the plaintiffs, that the original contract of affreightment of which the Bill of Lading was evidence came to an end as soon as war broke out, that though the goods were in fact carried by the "*Steinturn*" to the Hooghly, they were carried by her, after she had been condemned by the Prize Court in Ceylon and under an arrangement made in pursuance of an order of that Court, by which further freight and expenses became charged upon the cargo, and that inasmuch as the defendants could not deliver the goods under the original contract of affreightment the performance of their contract was impossible.

In my judgment this contention should be adopted: It was an implied part of the contract of 2nd February 1914 that the defendants should procure a contract of affreightment, under *which the goods would be delivered in the Hooghly*. That contract of affreightment was procured, and it was represented by the Bill of Lading in the name of the defendants.

But the operation of war on such a contract of affreightment made before, but which remained unexecuted at the time war was declared, made the further execution, so far as the defendants, British subjects, were concerned, unlawful, it being a contract with an alien enemy, and the contract of affreightment thereby became dissolved. *Esposito* v. *Bowden* (1).

Further the capture of ss. "*Steinturn*" prevented the delivery of the goods under the contract of affreightment procured by the defendants in pursuance of their contract with the plaintiffs, and the goods could not be delivered in the Hooghly except by the payment of further freight and expenses which by the order of the Prize Court in Ceylon had become charged on the goods.

The Bill of Lading which under a C. I. F. contract is tendered by the seller to the buyer would be such as would procure delivery of the goods from the ship. In this case the Bill of Lading, if tendered by the defendants, would not by itself have enabled the plaintiffs to obtain delivery of the goods from the ship. Something

(1) (1857) 7 El. & Bl. 763 at p. 783; 27 L. J. Q. B. 17; 3 Jur. (N. S.) 1205; 5 W. R. 732; 29 L.T. (O. S.) 295; 119 E. R. 1430; 110 R. R. 822.

more would have been necessary to enable the plaintiffs to get delivery, *viz.*, the authority of the agents of the Crown, which authority could only be obtained by the payment of the freight from Colombo to the Hooghly and certain other charges.

For these reasons it appears to me that the contract between the plaintiffs and the defendants included the performance of an act (*viz.*, the procuring the contract of affreightment under which the goods would be delivered in the Hooghly), which after the contract was made became impossible by reason of the outbreak of the war, within the meaning of section 56 of the Indian Contract Act and consequently the contract of 2nd February 1914 was void.

I think also that the procuring of the further execution of the contract of affreightment, which was an implied part of the contract of 2nd February 1914, became unlawful by reason of an event which the defendants could not prevent, *viz.*, the outbreak of war and consequently the contract of 2nd February 1914 became void by reason of the provisions of section 56.

The learned Counsel for the plaintiffs pressed us with the argument that the property in the goods had not passed to the plaintiffs, by reason of the fact that no appropriation of these goods, to which the plaintiffs assented, to the contract in question had taken place until August or September 1915, *i.e.*, after the capture and condemnation of the ss. "*Steinturn*" and that the plaintiffs' contract, therefore, was not affected by the fact that the goods had been carried in a German vessel at the outbreak of war.

I do not think it is necessary to express any opinion on this point, for in my judgment it is immaterial to the question whether the performance of an integral part of the contract between the plaintiffs and the defendants was rendered impossible or unlawful by the outbreak of war.

It was further urged that the contract of affreightment did not relate to the goods, the subject-matter of the contract of 2nd February 1914. This point, as far as I understand, was not raised at the trial, and I think there can be no doubt that the contract of affreightment did *in fact* relate to the goods the subject-matter of the contract.

But then it was said, even if that be so in point of fact, it cannot be said in law that the contract of affreightment was in pursuance of the contract between the plaintiffs and the defendants until something is done which binds the plaintiffs, such as assent by the plaintiffs.

Having regard to what I consider is the material question in this case, as intimated already, I cannot agree to the last proposition. I think the assent of the plaintiffs was immaterial and it was merely a question of fact whether the contract of affreightment did really relate to the subject-matter of the contract of 2nd February 1914 and having regard to the date of the invoice, the description and quantities of the goods contained therein, there can be no doubt that in point of fact the contract of affreightment related to the subject-matter of the contract of 2nd February 1914.

As already stated, the defendants did not take up the position now relied upon until the trial of the action, and the defendants on the 2nd January 1915 had called on the plaintiffs to take delivery. It was contended that the defendants by reason of such action were estopped from relying on the above-mentioned defence.

The plaintiffs were not able to point to any respect in which they had altered their position by reason of the alleged representation of the defendants that they were in a position to give delivery in accordance with the contract, and I do not think that the defendants are estopped from taking the defence upon which they now rely. That defence, for the reasons given above, is, in my judgment, a good one, and, therefore, this appeal should be allowed, and judgment entered for the defendants with costs in this Court and in the Court of first instance.

Any extra costs necessitated by the amendment of the defence or costs thrown away by reason thereof to be paid by the defendants to the plaintiffs.

Money in Court to be paid out to the defendants.

MOOKERJEE, J.—This is an appeal by the defendants in a suit for damages for breach of contract. On the 2nd February 1914, the defendants agreed to sell to the plaintiffs 150 tons Basic Steel bars to be

shipped in June, July and August 1914 in equal proportions. The terms of the contract were set out as follows in a letter addressed by the defendants to the plaintiffs:—

"We beg to enter as having sold you, through broker, P. N. Mookerjee, 150 tons Basic Steel bars, with usual 10 per cent. second class extra, at £5-7-6. per ton, C. I. F., *i. e.*, free Hooghly. Shipment in three monthly lots, commencing June, *i. e.*, June, July and August 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days credit from the date of the delivery of the goods, failing which, due date will be calculated from the due date of the delivery, *i. e.*, three days from the landing of the goods. This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged on any money unpaid after the due date, and rebate for payments before the due date will be allowed at the same rate. You have the option to have the goods weighed so as to arrive at the actual weighment, and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But, in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from the jetty, and the invoice weight shall be accepted by you as the correct one. Please confirm."

On the 14th February 1914, the plaintiffs supplied the specifications; and on the 19th February, the defendants sent out an order to the Belgo-Asiatic Trading Co. of Brussels for supply of the goods, which were partly of Belgian and partly of German manufacture. The June shipment was received by the defendants in due course and was delivered to the plaintiffs. We are now concerned with the July shipment. The goods were shipped from Antwerp on the the 2nd July 1914 in ss. "*Steinturn*" a German steamer which was on the high seas when war broke out between England and Germany on the 4th August 1914. The hip was captured by the naval forces of His Majesty as an enemy ship, and was brought before the Ceylon Court of Admiralty. On the 25th August 1914, the ship was condemned as lawful prize, but the cargo was released. On the 19th November 1914, the Prize Court ordered that, in the event of the Crown conveying the cargo to destination, the Crown be authorised to recover against all cargo released and delivered at Calcutta the following expenses, namely Rs. 15·50 in respect of freight per ton weight or measure, and such reasonable expenses as may be incurred in respect of agency charges. The Government of Ceylon took possession of the cargo on behalf of the Crown, and Graham & Co. were employed to act as their agents. The goods arrived in Calcutta on the 2nd January 1915 and the defendants took delivery on payment of freight and agency charges to Graham & Co. Meanwhile, the defendants had, on the 30th September 1914, intimated to the plaintiffs that they had received invoices for the goods (copies whereof were enclosed); no mention, however, was made of the seizure of the ship; indeed, there is nothing to show that either party was, at that date, aware of what had happened. On arrival of the goods in Calcutta, there was some controversy between the parties as to whether the plaintiffs or the defendants were liable to bear the charges imposed by the Prize Court. The plaintiffs denied their liability in this respect, with the result that the defendants disposed of the goods in the market. On the 18th March 1915, the plaintiffs instituted the present action for the recovery of Rs. 3,553-14 6 as damages for failure of the defendants to deliver the goods in terms of the contract. The defendants resisted the claim substantially on the ground that the contract became void when war broke out on the 4th August 2914. Mr. Justice Chaudhuri has overruled this contention and has given the plaintiffs a decree for damages, which he has assessed at Rs. 2,500. On the persent appeal, the defendants have reiterated the ground which they urged unsuccessfully in the Court below to enable them to escape from liability under the contract. The solution of the question raised clearly depends upon the nature of the contra and the effect thereon of well-establish. legal principles,

MADHORAM HURDEODASS *v.* G. C. SETT.

The agreement between the parties constitutes what is known as a C. I. F. or C. F. I. (cost, freight and insurance) contract, subject to an important variation. The rights and liabilities of the parties to a C. I.F. contract were formulated by Hamilton, J., in *Biddell Brothers* v. *Clemens Horst Company* (2), in the following terms, which were approved by Kennedy, L. J., in his celebrated dissentient judgment in the Court of Appeal, *Biddell Brothers* v. *Clemens Horst Company* (3), which was upheld by the House of Lords and characterised by Lord Loreburn, L. C., as a remarkable judgment illuminating the whole field of controversy, *Clemens Horst & Company* v. *Biddell Brothers* (4): "A seller under a contract of sale containing such terms has, *firstly*, to ship at the port of shipment goods of the description contained in the contract; *secondly*, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; *thirdly*, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; *fourthly*, to make out an invoice as described by Blackburn, J., in *Ireland* v. *Livingstone* (5), or in some similar form; and *finally*, to tender these documents to the buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that, against tender of these documents, the Bill of Lading, Invoice and Policy of Insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." [See also *Houlder* v. *Public Works Commissioners* (6).] In the case before us, there was this departure from the normal incidents of a C. I. F. contract that the payment was to be made, not against the documents, but forty-eight days after the goods had been landed. It follows accordingly that the defendants were under no obligation to hand over the documents to the plaintiffs immediately on receipt thereof; they could tender the documents on arrival of the goods or might take delivery themselves and make over the goods to the plaintiffs. The defendants argue that, in these circumstances, the contract became void on the 4th August 1914, inasmuch as, on that date, one essential element thereof, namely, the contract of affreightment, became unlawful by reason of the outbreak of the war and consequently void. This contention raises the question of the effect of the outbreak of war on an executory contract made with an alien enemy before the war. Such a contract is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy [*Furtado* v. *Rogers* (7)] or if it is in its nature incapable of suspension [*Griswold* v. *Waddington* (8)]. A contract is deemed in its nature incapable of suspension if its proper performance necessitates intercourse with the enemy during the war [*Esposito* v. *Bowden* (1) *The William Bagaley* v. *United State* (9)] or where time is of the essence of the contract, or the parties cannot, on conclusion of peace, be made equal [*New York Life Insurance Co.* v. *Statham* (10), *Janson* v. *Driefontein Consolidated Mines Limited* (11)]. The principle which underlies this doctrine is best stated in the words of Lord Tenterden quoted by Willes, J., in *Esposito* v. *Bowden* (1): "Another general rule of law furnishes a dissolution of these contracts" (*i. e.*, for the carriage of goods in merchant ships) "by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or

(2) (1911) 1 K. B. 214; 80 L. J. K. B. 584.
(3) (1911) 1 K. B. 934 at p. 954; 16 Com. Cas. 197; 80 L. J. K. B. 584.
(4) (1912) A. C. 18 at p. 22; 81 L. J. K. B. 42; 105 L. T. 563; 56 S. J. 50; 28 T. L. R. 42; 17 Com. Cas. 55; 12 Asp. M. C. 80.
(5) (1872) 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79.
(6) (1908) A. C. 276 at p. 296; 77 L. J. P. C. 58; 98 L. T. 684; 11 Asp. M. C. 61.
(7) (1803) 3 Bos. & Pul. 191; 127 E. R. 105; 6 R. R. 752.
(8) 15 Jhonson 57; 16 Jhonson 438.
(9) 5 Wallace 397 at p. 407; 18 Law. Ed. 583.
(10) 93 U. S. 24, 19 Am. Rep. 512.
(11) (1902) A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 18 T. L. R. 796; 7 Com. Cas. 268.

hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unload his goods, and the owners find another employment for their ship, and probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage." Chancellor Kent adopts the same conclusion, for the reason that war, making performance unlawful or impossible either before or after its commencement, dissolves the contract of affreightment. "The contract of affreightment may be dissovled without execution, not only by the act of the parties, but in many cases, by the act of the law. If the voyage becomes unlawful or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war or interdiction of commerce with the place of destination, the contract is dissolved. There is no difference in principle between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one, in relation to the merchandise on board, which prevents it being landed. The contract of affreightment in respect to the goods is dissolved, for the shipper cannot demand the delivery of the goods if the landing of them would expose the vessel to seizure. And if the voyage be broken up by capture on the passage, so as to cause a complete defeasance of the undertaking, the contract is dissolved, notwithstanding a subsequent re capture." (Commentaries, Volume III, page 248. See also Volume I, page 66 The contrary rule seems to have been formulated in the French Code de Commerce, sections 276, 277). This was recognised in *Avery* v. *Bowden* (12), which shews that a contract of affreightment may at once become void by the declaration of war. [See note to *Clemontson* v. *Blessing* (13).]

The doctrine that a contract entered into before war is dissolved by the outbreak of war, when its performance would involve "trading with the enemy", has been recognised in the recent cases of *Duncan Fox & Co* v. *Schrempft & Bonke* (14), *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (15) and *The Parcheni* (16), and an instructive application is furnished by the decision in *Nissim Isaac Bekhor* v. *Sultanalli Shustary* (17), which further adopts the view taken in *Groom* v. *Barber* (18), that the seller is not bound, in a C. I. F. contract, to provide the purchaser with a policy covering war risks. The decision in *In re Weiss & Co.; Weiss & Co., Ld.* v. *Credit Colonial et Commerical, Antwerp* (19) is not in conflict with the principle already enunciated, and is clearly distinguishable on the ground that the goods had been captured by the enemy before tender of the documents. I see no escape from the position, in the case before us, that the contract of affreightment was dissolved on the date of the outbreak of the war as the sellers could not thereafter insist on its performance by an alien enemy. In this view, the conclusion is inevitable that the contract for supply of goods also became void on that date.

The plaintiffs contend, however, that no question of the complete execution of the contract of affreightment properly arises in this case, inasmuch as the goods were in fact ultimately brought to their destination by *ss.* "*Steinturn*". This argument is obviously fallacious. The substance of the matter is that the goods were not and could not be carried to the port of destination under the original contract of afferightment. This is manifest from the proceedings in the Prize Court. The ship and cargo were seized, and although the ship alone was condemned while the cargo was released, the release was conditional on the payment of freight and charges as determined by the Prize Court. That the cargo was properly released is clear from the decision in *In re Cargo, Ex. ss. Rappenfels* (20),

(12) (1855) 5 El & Bl 714; 25 L. J. Q. B. 49; 1 Jur. (N. S.) 1167; 4 W. R. 93; 27 L. T. (O. S.) 19; 119 E. R. 647; 106 R. R. 695 on appeal 6 El & Bl. 953; 26 L. J. Q. B. 3; 3 Jur. (N. S.) 238; 5 W. R. 45; 28 L. T. (O S.) 145; 119 E. R. 1119; 106 R. R. 882.

(13) (1855) 11 Ex. 135; 3 W. R. 510; 105 R. R. 451; 156 E. R. 775.

(14) (1915) 1 K. B. 365; 84 L. J. K. B. 780; on appeal (1915) 3 K. B. 355; 84 L. J. K. B. 2206.

(15) (1915) 2 K. B. 386; 84 L. J. K. B. 1673; on appeal (1916) 1 K. B 495; 85 L. J. K. B. 665.

(16) 1 Trehern P. C. 579.

(17) 28 Ind. Cas. 433; 40 B. 11; 17 Bom. L. R. 249.

(18) (1915) 1 K. B. 316; 84 L. J K. B. 318.

(19) (1916) 1 K. B. 346; 85 L J K. B. 533.

(20) 30 Ind. Cas. 174; 42 C. 334.

as the property in the cargo had at the time of capture vested in the consignees, British subjects [see the observations of Kennedy, L. J., in *Biddell Brothers* v. *Clemens Horst Co.* (3)]; but it is equally clear that the Prize Court and the Prize Court alone had jurisdiction to determine the question of freight and the conditions whereon the cargo should be released [*The Corsican Prince* (21)]. As explained by Sir Samuel Evans, the Prize Court deals with such claims in accordance with the Law of Nations and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; it may, indeed, discard the contract rate altogether even as a basis for assessment or calculation [*The Twilling Riget* (22)] It is further indisputable that where the ship is condemned but the goods released, the Crown is entitled to impose the payment of freight as a condition of their release and has a lien on them till it is paid [*The Fortuna* (23), *The Diana* (24), *The Vrow Anna Catharina* (25), *The Vrow Henrietta* (26), *The Roland* (27), *The Parchim* (26)]. Consequently, the fact that the goods were brought to Calcutta ultimately by ss. "*Steinburn*" is of no assistance to the plaintiffs: it was essentially a new voyage under new conditions; it was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment, in the language of Chancellor Kent, that voyage was broken up by capture so as to cause a complete defeasance of the undertaking. The original Bills of Lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court; they would be useful for identification of the consignee in whose favour the Prize Court had decided to release the goods, but they had ceased to be operative legal documents, and delivery on their basis could not be claimed as a matter of right. I hold accordingly that the contract of affreightment and therewith the C. I. F. contract of sale became void on the 4th August 1914. Consequently, the rights and liabilities of the parties thereafter must be determined with reference to the second paragraph of section 56 of the Indian Contract Act. That paragraph, so far as it applies to the present case, provides that a contract to do an act which, after the contract is made, becomes unlawful by reason of some event which the promiser could not prevent, becomes void when the act becomes unlawful. As pointed out in *Karl Ettlinger* v. *Chagandas & Co.* (28), this provision deals with a case where the act to be done was at the time the contract was made lawful but a legal prohibition has supervened before the performance of the contract. In such a case, the contract becomes void, and no question of damages for breach thereof arises. The plain language of section 56 thus renders unnecessary a discussion of the refined distinctions observed in English Law in cases of impossibility of performance, as illustrated by the recent decisions in *Horlock* v. *Beal* (29) and *Tomplin Steamship Co.* v. *Anglo-Mexican Petroleum Co.* (30). From this standpoint, the correspondence between the parties as to the delivery of the goods is of no assistance to the plaintiffs. The defendants no doubt, at one stage, offered to deliver the goods to the plaintiffs on certain terms, on the assumption that the contract was then in full operation. The proposed terms, however, were not accepted; there was thus no new agreement, nor did the principle of estoppel become applicable, as the plaintiffs are not shown to have altered their position in any manner by reliance on the conduct of the defendants. The claim of the plaintiffs is thus based on an alleged breach of an agreement which had become void long before the date when the breach is said to have taken place. In my opinion, such a claim cannot be sustained.

On these grounds, I agree that this appeal must be allowed and the suit dismissed with costs.

*Appeal allowed.*

(21) (1916) P. 195; 1 Treheyn P. C. 178.
(22) 5 C. Rob. 82; 1 E. P. C. 430.
(23) (1802) 4 C. Rob. 278; 1 E. P. C. 392.
(24) (1803) 5 C. Rob. 67, 1 E. P. C. 424.
(25) (1806) 6 C. Rob. 269; 1 E. P. C. 552.
(26) 5 C. Rob. 75; 1 E. P. C. 427.
(27) 1 Trehern P. C. 188.
(28) 33 Ind. Cas. 205; 17 Bom. L. R. 1087; 40 B. 301.
(29) (1916) 1 A. C. 486.
(30) (1916) App. Cas. 397.

ABU BAKAR ABDUL RAHIMAN & CO. *v.* RAMBUX.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE NO. 17-B OF 1916.

November 29, 1916.

*Present*:—Mr. Stanyon, A. J. C.

ABU BAKAR ABDUL RAHIMAN & Co. —DEFENDANTS—APPLICANTS

*versus*

RAMBUX—PLAINTIFF—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1908), *ss.* 22, 23, 24, *scope of—Transfer of case to Court not subordinate to same High Court, whether competent.*

Section 24, Civil Prccedure Code, 1908, is exhaustive of the judicial power to transfer suits, and no Court has jurisdiction to transfer any suit from one Court to another unless both Courts are subordinate to it. [p. 393, col. 2.]

Even where a High Court has power to declare whether or not a suit shall proceed in a Court subordinate to it, it has no power to compel its institution in any Court beyond its jurisdiction. [p. 395, col. 1.]

The transfer of a suit from one Court to another is something entirely different in character and legal effect from making an order for the return of a plaint by one Court with a view to its being presented in another. [p. 394, col. 2.]

The Hon'ble Mr. *M. V. Joshi* and Mr. *V. V. Chitole*, for the Applicants.

JUDGMENT.—The plaintiff Rambux carries on business at Khamgaon in West Berar. The defendants are a firm carrying on business in Bombay, where the defendants constituting the firm personally reside. The defendants have acted as commission agents of the plaintiff, and it is said that the business was this that the plaintiff was to buy cotton, have it ginned and pressed into bales at Khamgaon, and then consign it to the defendants who were to sell it for him in Bombay. According to the defendants, who are the applicants before me, this business, carried on partly in Khamgaon and partly in Bombay, resulted in Rs. 4,123-4-3 being due to them by Rambux in *Sambat* 1970 (1913-14 A. D.) and to a balance of Rs. 41-2-9 against him in *Sambat* 1971 (1914-15 A. D.)

On the 13th July 1916, Rambux filed a suit against the defendants in the Court of the Subordinate Judge of Khamgaon, claiming Rs. 5,000 as due to him. The defendants have raised a plea that the Subordinate Judge has no jurisdiction and the plea has been disallowed. Before me it is conceded that the Khamgaon Court has jurisdiction over the plaintiff's suit, but an application is now made with the object of obtaining a transfer of the suit to the Bombay High Court on its original side. The application purports to be made under section 23 (3) of the Civil Procedure Code, 1908, as applied to Berar.

Having heard the applicants, I am of opinion—

(1) that I have no power to direct any transfer of a suit to any Court not subordinate to this Court:

(2) that even though I may have power to declare whether or not the suit in this case shall proceed in the Court of the Subordinate Judge of Khamgaon, I have no power to compel its institution in any Court beyond my jurisdiction: and

(3) that no sufficient ground is made out for a declaration that the suit shall not proceed in the Khamgaon Court.

Sections 22 and 23 of the above Code lay down the procedure to be followed where a suit may be instituted in more than one Court, and the power of the Court to which application is made is limited to a power to 'determine in which of the several Courts having jurisdiction the suit shall proceed." Section 24 of the same Code is exhaustive of the judicial power to transfer suits, and no Court is given jurisdiction to transfer any suit from one Court to another, unless both such Courts are subordinate to it. Section 25 deals with a special case of transfer by the Governor-General in Council with which we have no concern here, since this is not the case of a suit "pending in a High Court presided over by a single Judge." Thus it is clear that no order could be made by this Court directing the transfer of the suit from the Court of the Subordinate Judge of Khamgaon to any Court in the Presidency of Bombay, and least of all to the Bombay High Court itself.

Then, as regards the power under sections 22 and 23 (3), the law seems to be singularly inapt and inconclusive. The marginal heading to section 22 describes it as giving a power to *transfer* suits which may be instituted in more than one Court, but this is clearly misleading in respect of cases where the several Courts are not subordinate to the same jurisdiction. It seems expedient, therefore, to reproduce section 22, and to

consider it in the light of the connected section 23. Section 22 is in these terms:—

"Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed."

It will be seen that no express power is given in this section to make the transfer. The Court to which application is made is required to select one of the several Courts having jurisdiction. But when, as a result of that selection falling on a Court other than that in which the suit has been instituted, a transfer becomes necessary, then the Court must proceed under section 24.

Section 23 indicates under three heads the Court to which an application under section 22 is to be made. (1) Where the several Courts are subordinate to the same Appellate Court, the application goes before the latter; (2) where the several Courts are subordinate to different Appellate Courts but to the same High Court, the application must go to the High Court; and (3) where the several Courts having jurisdiction over the suit are subordinate to different High Courts, the application must be made to the High Court having authority over the Court in which the suit has been instituted. In the first two of these cases, the Court empowered to decide under section 22 also has jurisdiction to transfer under section 24. But in the third case there is no power of transfer, and the question is whether section 22, under which the application to be made is one for *transfer*, can be interpreted to mean that, in a case like the present, the Court to which the application is made, being powerless to transfer, may nevertheless direct that the plaint be returned to the plaintiff for presentation to some Court under another provincial jurisdiction. No doubt that was a course considered possible under section 22 of the 1882 Code (between which and the present section 22 the difference is purely syntactical) by Straight and Mahmood, JJ., in *Tula Ram* v. *Harjiwan Das* (1). I do not think that the law is made any clearer by the fact that what was once a separate section (24 in the 1882 Code) has now been made a part of section 23 of the present Code. Indeed, it has only added to the confusion: for section 23 deals with applications for *transfer* under section 22, and, in connection with sub-section (3), such an application becomes an absurdity, since no High Court can order a transfer into the jurisdiction of another High Court. The device, under Act VIII of 1859, by which such transfers were made subject to an agreement among the High Courts concerned, was not reproduced in the Codes of 1877 and 1882. Apparently there are reasons why a power of transfer, similar to that given to the Governor-General in Council under section 527 of the Criminal Procedure Code, 1898, should not be incorporated in the Code of Civil Procedure, except to the very limited extent enacted by section 24, which applies only to cases pending in a High Court presided over by a single Judge, *e. g*, the Court of the Judicial Commissioner of the N.-W. F. Province, or of Chota Nagpur. The result is that, in dealing with transfers of suits, the Legislature has reached an *impasse* or *cul-de-sac*, and it has added sub-section (3) for whatever it may be worth. To my mind, its value for the purposes of procedure is *nil*.

To transfer a suit from one Court to another is something entirely different in character and legal effect from making an order for the return of a plaint by one Court with a view to its being presented in another. A transfer can never raise a question of limitation: but a suit is only duly instituted so as to stop the running of time when the plaint is presented to the proper Court. Suppose a suit is instituted in a Central Provinces or Berar Court on the last day allowed by the Limitation Act, and, on an application made by the defendant, a decision is made by this Court that such suit should proceed in a Court in Bombay which also has jurisdiction over it. In the absence of a power of transfer this Court then orders that the plaint should

(1) 5 A. 60; A. W. N. (1882) 164; 3 Ind. Dec. (N. S.) 55.

be returned for presentation to the Bombay Court. When the plaint is presented to that Court the suit will be time-barred, and it does not seem right that the plaintiff should be left to the chance of saving time under section 14 of the Limitation Act.

Moreover, the decision provided for by section 22 is a decision for the immediate purpose of a transfer for which the defendant applies under that section. Where the Court has no power to transfer it seems logical to argue that it has no power to decide, notwithstanding that sub-section (3) of section 23 permits the making of a useless application. A decision by me that the suit now in question is a suit within the Original Civil Jurisdiction of the Bombay High Court and shall proceed in that Court would not bind that tribunal in any way. It may be that by implication I have power also to decide that the suit shall *not* proceed in the Khamgaon Court. But, while such a decision would be intelligible where, by transfer, I could find a substitute Court for the plaintiff, it becomes arbitrary and unjust where I merely refuse him access to a jurisdiction to which he is legally entitled to resort, and give him nothing in return for it. I, therefore, hold that I am not empowered under section 22 of the Code of Civil Procedure to order that the suit shall proceed in the Bombay High Court: and I seriously doubt whether I am competent to decide that the suit shall not proceed in the Khamgaon Court which has jurisdiction over it, unless I can send the suit for trial by some other competent Court subordinate to this Court.

Finally, supposing that I am competent to close the doors of the Khamgaon Court to the plaintiff after evicting him therefrom without opening the doors of another Court for him, I have to see whether the defendants have made out a case to justify me in doing so. The grounds advanced are these:—

(1) that the plaintiff has sued on the dealings of *Sambat* 1971 without bringing into account a cross-claim for over Rs. 4,000 which the defendants have against him in respect of the dealings of *Sambat* 1970;

(2) that the dispute between the parties arises mainly out of that part of the business which was transacted in Bombay;

(3) that a settlement of accounts once took place in Bombay;

(4) that the defendants' books of account and witnesses are in Bombay;

(5) that the trial can be held more conveniently in Bombay.

I can find no reason here for taking the very exceptional course asked for, even though, had transfer been permissible, I might, subject to the contentions of the plaintiff, have been disposed to order a transfer. Books can be brought to Khamgaon, witnesses can be examined on commission, and there is no reason for preferring the convenience of the defendants to that of the plaintiff.

For the above reasons the application is dismissed without notice to the other side. The suit will proceed in the Khamgaon Court.

*Application dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1500 OF 19 4.

June 23, 1916.

*Present*:—Mr. Justice Fletcher and Mr. Justice Teunon.

*Rai* NALINAKHYA BASU *Bahadur* AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Hon'ble Maharajadhiraj* SIR BIJOY CHAND MAHATAP *Bahadur* AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Village Chaukidari Act* (*VI B. C. of* 1870), *s.* 51—Chowkidari Chakran *lands*—Putnidar, *liability of, to pay additional rent.*

Where there is nothing to suggest in the terms of a *putni* lease that in any event a larger or smaller rent is to be paid for the *putni*, the *putnidars* are not liable to pay any additional rent in respect of the *chowkidari chakran* lands resumed and transferred to the *zemindar* under section 51 of Act VI of 1870, which the *putnidars* have a right to hold as forming part of their *putni*. [p. 397, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 25th of February 1914, modifying that of the Subordinate Judge, 2nd Court of that district, dated the 17th August 1912.

NALINAKHYA BASU *v.* BIJOY CHAND MAHATAP.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"Certain *chakran* lands were resumed under the Chowkidari Act and settled with the *zemindar*, who is the Maharaja of Burdwan. The lands are in *Mouza* Chakta which forms a part of the *putni* Nispi Kella. The plaintiffs are the *putnidars*. It appears that after resumption there was some proposal of settling the lands with the *putnidars*, but it fell through and the lands were settled with the original holders of the service lands. The plaintiffs brought this suit to enforce their rights. The Subordinate Judge who tried the suit decreed it. The Maharaja of Burdwan has appealed.

It is argued that the terms of the contract are exactly the same as in the case of *Girish Chandra Roy* v. *Hem Chandra Roy* (1) and in the case of *Trailakhya Nath Chowdhury* v. *Ramdoyal Samanta* (2). The judgment of the District Judge in the latter case has been produced and it appears that the terms are the same. It does not appear, however, that it was brought to the notice of the Judges that there were two classes of *chakran* lands in those days.

The learned Pleader for the appellant relies on the case of *Nitya Nund Hazra* v. *Maharajadhiraj Bejoy Chand Mohatab* (3). In *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (4) the *zemindar* won the suit because he was in enjoyment of the *chowkidars'* services and had the power to appoint them. On the other hand the fact that the *zemindar* was entitled to appoint *chowkidars* was held, in the case of *Girish Chandra Roy* v. *Hew Chandra Roy* (1) quoted above, not to have created in him an interest in the lands held by the *chowkidars* and it was held that the *putnidar* was entitled to the lands. My impression is that in those days the parties as a rule were not very particular as to who had the right to appoint. In this case the *zemindar* reserved the right, but 16 years afterwards gave up that right cheerfully. There was no thought of any resumption proceedings. But inasmuch as the *putnidar* is entitled to all the lands, and inasmuch as the lands had not been excepted from the *putni* lease, I am of opinion that the *putnidar* is enti led to the lands. I am, therefore, in agreement with the finding of the learned Subordinate Judge.

As to the right of the *zemindar* to a share in the profits, I am of opinion that the *zemindar* is entitled to a share. As has been held in certain cases the *putnidar* cannot look upon the lands as a sort of windfall. In this case particularly all we have to go upon is that the *zemindar* did not reserve the *chowkidari* lands for himself. He reserved the right to appoint *chowkidars* but gave it up. There was no contemplation at the time of any resumption proceedings. There is nothing to show that the *chowkidari chakran* lands were taken into account when the *putni* was created, nor do we know of the mode in which the rent was assessed at the inception of the *putni*. There are no materials, however, to come to a decision on the point. There was one case in which the Judges divided the profits half and half. The Courts have to set up an arbitrary standard but since by the *putni* the *zemindar* parts with all the lands, a fairer distribution would be to give the *zemindar* one-third of the profits. I shall give the *zemindar* one-third. Rs. 138-4 annas goes to the *chowkidari* fund. The *zemindar* will get that from the plaintiffs. He will get also one-third of Rs. 138-4-0, *i.e*, Rs. 46-1-3 as additional rent. With this modification the appeal fails."

Babus *Bepin Behary Ghose, II*, *Lalit Mohan Ghose* and *Satindra Nath Mukerjee*, for the Appellants.

Babus *Sarat Coomer Bose*, *Sajani Kanto Sinha* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the learned District Judge of Burdwan, dated the 25th February 1914, modifying the decision of the Subordinate Judge of that place. The suit was brought for possession of certain resumed *chowkidari chakran* lands by the *putnidars* against the landlord and the persons with whom he had settled the lands after resumption. Various defences were raised in the suit, but we are not concerned with them in the present appeal. The *putnidars* held under a document in writing, one portion of

(1) 5 C. L. J. 28.
(2) 10 C. W. N. lxvii (67).
(3) 7 C. L. J. 593.
(4) 12 C. W. N. 459; 7 C. L. J. 439; 35 C. 346.

which, namely the *kabuliat*, is before the Court. Both the lower Courts have found that the resumed lands were, in fact, included in the *putni* lease which was granted to the plaintiffs. Under section 51 of Act VI (B. C.) of 1870, on an order for resumption being made, "such order shall operate to transfer to such *zemindar* the land therein mentioned subject to the amount of assessment therein mentioned and subject to all contracts theretofore made in respect of, under or by virtue of which any person other than the *zemindar* may have any land." That being so, the only question that arises in this appeal is whether, under the terms of the contract which created the *putni*, the *putnidars* are liable to pay any additional rent in respect of the resumed lands which both the lower Courts have found were comprised in the *putni*. The decisions that have been cited before us do not really assist the case at all. In those cases, the facts are not reported and we have not the terms of the contracts creating the *putnis* in those cases. In this case we have got to construe the contract which is before us and that construction is not assisted by the construction put upon the other leases because we have not got the terms of those leases before us. In the present case there is the finding, which we must assume to be correct, that those lands form part of the lands let out in *putni*. The rent is a fixed rent and there is nothing to suggest on the terms of this document that in any event a larger or smaller rent is to be paid. In fact the document expressly states that in certain events the land being rendered unfit for use for the purposes for which it was granted, the *putnidars* would obtain no remission of the rent. There is nothing on the terms of the contract that can possibly suggest that the landlord, in any particular event, is to get any increased rent in respect of the land that is comprised in the *putni*. What were the terms of the contracts in the cases referred to, we do not know. In this case it is quite clear on the terms of the contract that the landlord is not entitled to get any increased rent with respect to the property let out. That being so, we must set aside the decree of the learned District Judge and restore the decree of the Subordinate Judge. The respondents who have appeared in this appeal must pay the costs of the appellants in this Court as well as in the proceedings in the lower Courts.

*Appeal allowed.*

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CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 15 OF 1917
WITH RULE No. 51 OF 1917.
February 13, 1917.

*Present*:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

URMILA SUNDARI DASI—APPELLANT

*versus*

RATI KANTA SAHA AND MINOR HIRNMOY SAHA, BY HIS GUARDIAN RATI KANTA SAHA—RESPONDENTS—OPPOSITE PARTIES.

*Guardians and Wards Act (VIII of 1890), ss. 32, 43—Guardian, suspension of, effect of—Court, power of, to suspend guardian—Construction of s. 32.*

The words of section 32 of the Guardians and Wards Act are wide enough to cover an order of suspension of the guardian by the Judge, as suspension is in effect a total restriction for a time of the powers of the guardian. [p. 399, col. 1.]

The suspension of a guardian for a time does not deprive the Court of power to deal with him subsequently. [p. 399, col. 1.]

Until a guardian has actually been removed or discharged, he remains a guardian even though his powers may have been curtailed and the Court has authority under the Act to pass such orders on him as are necessary for the protection of the minor's property. [p. 399, col. 1.]

**Appeal against the orders of the District Judge, Nadia, dated the 16th December 1916 and 10th January 1917, respectively.**

**FACTS** of the case appear from the judgment.

Babu *D. N. Chakraburtty*, (with him Babu *Baranasibasi Mukherjee*), for the Appellant.—The appellant claims the estate as a legatee under her husband's Will. The adoption did not divest her interest. In the petition shewing cause why she should not be removed from guardianship, she distinctly set up her interest as a legatee with respect to her husband's estate. She said she had been in possession in her own right and not as guardian for the minor. The orders restraining her from exercising acts of possession are *ultra vires*. The Judge must

have passed the orders under section 43, clause 1. After the Judge had suspended the guardian and she had repudiated her character as such, she was no longer subject to the jurisdiction of the Court as "a guardian appointed or declared by the Court."

The Judge in guardianship proceedings has no jurisdiction to interfere with the possession of a person claiming title to the estate. He may ask the newly appointed guardian to institute a suit for determination of the title. It is evident that the lady's brother after having succeeded in persuading her to adopt his son is now trying to turn her out of possession of her husband's estate.

Babu *Ram Chandra Mazoomdar* (with him Babu *Upendra Narain Bagchi*), for the Respondents.—The Judge had ample jurisdiction to pass the orders complained of. The guardian has not as yet been removed or discharged, she has only been suspended. Her powers would cease only by death, removal or discharge (section 41). She is, therefore, still subject to the jurisdiction of the Court and the Court can define or restrict her powers (section 32).

Babu *Baranasibasi Mukherjee*, in reply.—Section 32 has no application. It presupposes the continuance of guardianship. The appellant had renounced her character as guardian and claimed an independent title to the property. She has subsequently expressly prayed for a discharge and the Judge has accepted her resignation.

[BEACHCROFT, J.—The application for a discharge was subsequent to the orders complained of]

We shall be satisfied if your Lordships say that those orders have no longer any binding effect upon the appellant.

Besides, the words in section 32 "define or restrict" can only apply to taking away from the guardian some of his powers while retaining others. They cannot mean in their ordinary sense taking away all powers of the guardian and giving them to a different person, *viz.*, the temporary guardian appointed under clause 1 of section 12. This is clear also from the context. Section 32 says that the Court can either "extend" the powers or "define and restrict", that is to say, curtail the powers. Section 12 says in so many words that the temporary guardian cannot dispossess a person in possession [*vide* clause 3 (*b*), section 12, Act VIII of 1890].

JUDGMENT.

BEACHCROFT, J.—One Haripada Shaha died in 1897. He left a Will by which he gave his widow the power to adopt. In 1907, his widow, Urmila Sundari, adopted Hiranmoy Shaha, the son of her late husband's brother. In 1911, on her own application, she was appointed guardian of the person and property of the minor. In 1916, for reasons into which it is unnecessary to enter, the District Judge called upon her to show cause why she should not be removed from the guardianship, and on the 24th July 1916, he passed an order suspending her guardianship in these words: "The guardianship of Urmila Sundari Dasi is suspended and Rati Kanta Shaha is appointed guardian provisionally."

It was alleged that in spite of this order Urmila continued to deal with the minor's property. The District Judge, therefore, on the 15th December passed an order issuing a notice to her. warning her against realising rents from the tenants of the minor as her guardianship had been suspended. He also had a notice put in the local paper warning the tenants not to pay rent to her *gomastas*. He added that the present proceeding would be confined to a consideration of the fitness of Urmila for guardianship. Apparenly a further complaint was made against her and on the 10th January of this year, the Judge passed another order restraining her from the acts alleged against her and ordering her not to interfere with the reailsation of rents from the minor's tenants.

The present appeal is lodged against these two orders of the 16th December and 10th January. There is also a Rule for setting aside the same orders in case it is held that there is no right of appeal.

The only argument which has been addressed to us is that, in view of the learned Judge's order suspending the widow from acting as guardian, the Court had no jurisdiction to pass the orders complained of, which orders, it is suggested, must have been passed under section 43 of the Act, and could only be passed against the widow on the footing that she continued to be the guardian. In reply it was suggested that the Court has inherent jurisdiction to pass any orders which would be for the protection of the

interests of the minor, irrespective of the actual terms of the Statute. And though the appellant did not attack the order of suspension, for which order the Act does not in specific terms provide, it was suggested that that order also could have been passed in the exercise of the Court's inherent powers. It was further argued that the Court's jurisdiction over the guardian did not cease until the discharge of the guardian.

It seems to me that it is not necessary to invoke the inherent jurisdiction of the Court in this case, for I am of opinion that the words of section 32 are wide enough to cover the Judge's order of suspension. That section provides that "the Court may from time to time, by order, define, restrict or extend his (*i. e.*, the guardian's) powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject."

The order of suspension of the guardian seems to me to be covered by these words, for suspension is in effect a total restriction for a time of the powers of the guardian.

Then it seems to me impossible to hold that the effect of such a restriction of the guardian's powers is to deprive the Court of power to deal with the guardian. Until the guardian has actually been removed or discharged, he remains the guardian even though his power may have been curtailed and the Court has authority under the Act to pass such orders as are necessary for the protection of the minor's property. The orders of 16th December and 10th January may be looked upon as enforcing in detail the order of suspension. Whether they were passed under section 32 or under section 43 is immaterial: so far as they dealt with the minor's property they were clearly within the competence of the Judge to make.

It is unnecessary to consider the question of the guardian's subsequent resignation in this proceeding. Indeed it would be out of place to do so.

This appeal, in my opinion, ought to be dismissed with costs. We assess the hearing fee at three gold *mohurs*.

The Rule is discharged. We allow no *ex parte* costs.

WALMSLEY, J.—I agree.

*Appeal dismissed; Rule discharged.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 47 OF 1916.

January 26, 1917.

*Present*:—Mr. Lindsay, J. C.

SUGHRA BEGAM—JUDGMENT-DEBTOR—APPELLANT

*versus*

LACHHMI NARAIN, MINOR, UNDER THE GUARDIANSHIP OF *Musammat* INDRANI AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

*Execution*—Pardanashin *lady*—*Fraudulent conduct.*

The mere fact that a judgment-debtor, who is a *pardanashin* lady, keeps her door closed is *per se* no evidence at all of fraudulent conduct on her part, unless there is anything to show that she deliberately does so or attempts to do so against the executing officer. [p. 400, col, 1.]

Appeal against the order of the Additional Judge, Lucknow, dated the 12th September 1916, upholding that of the Subordinate Judge, Lucknow, dated the 26th May 1916.

Mr. *Muhammad Wasim*, for the Appellant.

Babus *Salig Ram* and *Hari Kishen Dhaon*, for the Respondents.

JUDGMENT.—The question to be determined in this case is whether it has been proved that the appellant judgment-debtor, *Musammat* Sughra Begam, prevented by fraud the execution of a money-decree against her held by the respondent Lachhmi Narain.

The question arose in connection with an application for execution made more than twelve years after the date of the decree. The decree-holder alleged that the judgment-debtor had rendered previous applications for execution, elven in number, infructuous by conduct amounting to fraud.

The fraud alleged was (1) that *Musammat* Sughra Begam kept the door of her house shut against the process-servers who went to attach her property, and (2) that she had dishonestly removed her property so as to put it beyond the reach of any process of attachment.

The burden of proving fraud lay upon the decree-holder and the point to be decided is whether or not that burden was discharged. Both the Courts below have found that fraud was committed: the argument in second appeal is that there is no evidence to support the finding. The only direct evidence in the case consists of the deposition of a process-server, Ram Dulare, the substance of whose

statement is that having on three or four occasions been entrusted with warrants of attachment, he went to the judgment debtor's house and found the door closed. He admits that he was able to get it opened with the assistance of some man who used to sit outside and whom he at first described a servant of the judgment debtor. He had to admit, however, in cross-examination that he was unable to say whether the man was a servant or not. He further deposes, though his statement is very vague in this respect, that since the enactment of the present Civil Procedure Code which authorises the breaking open of an outer door for the purpose of attaching property he has always found the lady's door open when he has gone to execute the decree. A further statement he makes is that when he has gained admittance to the premises he has never found any property worth taking, only a few beds, earthen vessels and tin utensils.

As for the circumstantial evidence all we have is that nine out of eleven attempts to execute prior to the present one have been fruitless: the door seems on most occasions to have been found closed according to the returns made by the executing officer.

The only other cricumstance to be mentioned is that the lady, as a *wasiqadar*, is entitled to a monthly pension of Rs. 200. I am not prepared on these materials to hold that there is any proof of conduct on the part of the judgment-debtor amounting to fraud. The fact that she keeps her door closed is *per se* no evidence at all of fraudulent conduct. That is conduct which would be perfectly natural in the case of a *pardanashin* woman living in a city like Lucknow and is quite consistent with the theory that she is an honest woman, a presumption to which she is entitled in law. There is nothing at all to show that she deliberately closed her door or attempted to keep it closed against the executing officer: on the contrary Ram Dulare's statement, the only direct evidence in the case, goes to show that he could always manage to get the door opened.

Then it is said by the lower Courts that the judgment-debtor is a woman of means (she is entitled to draw Rs. 200 a month) and that it necessarily follows that if she lives in the state of squalor represented by the possession of a charpoy or two and a few cheap pots and pans, she must be dishonest and must have concealed property so as to keep it out of the reach of the law. I am not prepared to allow that this is the necessary, or even a valid, conclusion to be drawn from the circumstantial evidence. She may, if she actually receives this allowance, choose to live in a poor way—many people similarly situated do live in a miserly manner or more probably, as was stated on her behalf, she receives very little of the allowance which is drawn for her by a so-called *mukhtar*. All I need say is that such evidence as on the record tends neither way: the woman may be dishonest but the evidence does not prove that.

I hold that there is no evidence to support the finding that Sughra Begam has committed fraud in order to keep the respondent out of his money.

I allow the appeal, set aside the order of the Courts below and direct that the application for execution be dismissed with costs.

The appellant is entitled to her costs both here and in the lower Appellate Court.

*Appeal allowed.*

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PUNJAB CHIEF COURT.

CIVIL REVISION NO. 890 OF 1916.

April 19, 1917.

*Present*:—Mr. Shah Din, Chief Judge.

MUNSHI RAM—DEFENDANT—PETITIONER

*versus*

MALAVA RAM—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. IX, r. 13—Suit against principal and surety—Decree ex parte against principal whether can be set aside without discharging surety—Plaintiff withdrawing suit against principal, effect of.*

A decree was passed against a principal debtor and his surety, the decree being *ex parte* against the principal debtor. He thereupon applied to have the decree set aside. Plaintiff consented to have his suit against the principal debtor dismissed on condition that he was allowed to execute his decree against the surety. The Small Cause Court Judge passed an order in these terms:

*Held*, (1) that the Judge was in error in setting aside the decree against the principal debtor without setting it aside against the surety as well; [p. 401, col. 2.]

MUNSHI RAM *v.* MALAVA RAM.

(2) that the plaintiff having withdrawn his suit against the principal debtor, his suit against the surety was liable to be dismissed. [p. 401, col. 2.]

*Maung Pyo Tha* v. *Ko Min Pyu*, 1 L. B. R. 150, followed.

*Nathabbai Tricamlal* v. *Ranchodlal Ramji*, 27 Ind. Cas. 165: 39 B. 52; 16 Bom. L. R 696, distinguished.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 27th April 1916, decreeing the claim.

FACTS.—Plaintiff brought a suit for Rs. 550, on the basis of an agreement. Narinjan Das defendant No. 1 was the principal debtor, and Munshi Ram defendant No. 2 was the surety. On the day of hearing the principal debtor did not appear, and the surety pleaded payment. The Court passed a decree for Rs. 550, the decree being *ex parte* against Narinjan Das defendant No. 1.

Defendant No. 1 then made an application to have the *ex parte* decree set aside. Plaintiffs agreed to the *ex parte* decree being set aside and the suit against defendant No. 1 being dismissed, on the condition that he was allowed to execute the decree against defendant No. 2. The Small Cause Court Judge decided that the decree in favour of the plaintiff still subsisted and was capable of execution against defendant No. 2 and dismissed the plaintiff's suit as against defendant No. 1. Defendant No. 2 applied to the Chief Court in revision.

Mian *Haq Nawaz* (with him Lala *Amar Nath*), for the Petitioner.—The decree against both the defendants was a joint decree. When it was set aside against the principal debtor it ceased to be operative against the surety. Further, the suit against the principal debtor having been ultimately dismissed, the surety was discharged. Section 134, Contract Act, *Maung Pyo Tha* v. *Ko Min Pyu* (1).

Mian *Abdul Rashid* (with him Lala *Tirath Ram*), for the Respondent.—The decree against the defendants was joint as well as several, and it could be set aside against one defendant without becoming inoperative against the other defendant. Order IX, rule 13, Civil Procedure Code, *Sham Lal* v. *Sohnu Shah* (2) and *Singer Manufacturing Co.* v. *Muhammad Din* (3).

A gratuitous concession to the principal debtor does not discharge the surety unless the concession amounts to a novation of contract between the creditor and the principal debtor. Section 135 to 137, Contract Act, *Subramania Aiyar* v. *Gopala Aiyar* (4), *Ranjit Singh* v. *Naubat* (5).

Besides the plaintiff consented to have his suit dismissed against defendant No. 1 conditionally. If that condition was not fulfilled, this Court should remand the case allowing the plaintiff to proceed against both the defendants.

JUDGMENT.—After hearing Counsel for the parties, I am of opinion that the Judge, Small Cause Court, was in error in setting aside the decree, dated the 27th April 1916, against Narinjan Das alone without setting it aside against Munshi Ram also. The decree passed in this case appears to me to fall within the purview of the proviso to rule 13 of Order IX of the Civil Procedure Code, which is to the effect that where the decree is of such a nature that it cannot be set aside as against one defendant (who applies to have it set aside) only, it may be set aside against all or any of the other defendants also. This proviso embodies the principle laid down in *Mahomed Hamidulla* v. *Tohurennissa Bibi* (6).

Further, it seems to me that since the plaintiff, after the *ex parte* decree against Narinjan Das had been set aside by order dated the 26th June 1916, withdrew his suit against Narinjan Das, who was the principal debtor, his suit was liable to be dismissed not merely against Narinjan Das but also against the surety, Munshi Ram. The principle applicable to this case is that laid down by the lower Burma Chief Court in the case of *Maung Pyo Tha* v. *Ko Min Pyu* (1). The decision of the Bombay High Court in *Nathabai Tricamlal* v. *Ranchodlal Ramji* (7) is clearly distinguishable from the present case, inasmuch as there the principal debtor's name was struck off and the suit dismissed against him under Order IX, rule 5, Civil Procedure Code, and the plaintiff

(1) 1 L. B. R. 150.
(2) 9 Ind. Cas. 742; 98 P. L. R. 1911; 14 P. W. R. 1911.
(3) 27 Ind. Cas. 251; 246 P. L. R. 1914; 166 P. W. R. 1914.
(4) 7 Ind. Cas. 898; 33 M. 308; 20 M. L. J. 633; 8 M. L. T. 321.
(5) 24 A. 504; A. W. N. (1902) 166.
(6) 25 C. 155; 1 C. W. N. 652, 13 Ind. Dec. (N. S.) 105.
(7) 27 Ind. Cas. 165; 39 B. 52; 16 Bom. L. R. 696.

had a right to bring a fresh suit against him because the period of limitation had not yet expired.

It has, however, been argued by the plaintiff's Counsel that the application filed by the plaintiff in the lower Court offering to withdraw his claim against Narinjan Das was a conditional one; in other words, that the suit was withdrawn against Narinjan Das on condition that the decree passed on the 27th April 1916 stood intact against Munshi Ram. It is urged that if the decree against Munshi Ram is set aside and the case re-opened, it must be re-opened against both the defendants and the order dismissing the suit against Narinjan Das does not hold good. I think this contention is sound and must be allowed. The Counsel for the petitioner has no objection to the case being re-opened against both the defendants.

I accordingly accept this revision, set aside the lower Court's decrees dated the 27th April 1916 and 17th August 1916 and send the case back for re-decision on the merits. The parties will pay their own costs throughout.

*Revision allowed:*
*Case remanded.*

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OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 129 OF 1915.

May 31, 1916.

*Present:*—Mr. Kendall, A. J. C.

MAHABIR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

MATA BADAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage—Redemption—Construction of document—Possession, loss of, authorising mortgagee to claim principal with interest—Revenue to be paid by mortgagee—Profits, enjoyment of, in lieu of interest—Conduct of mortgagee—Mortgagee, position of—Ouster, period of, interest for—Excess revenue, claim for.*

Under the terms of an usufructuary mortgage-deed, the mortgagee was to pay the revenue (the amount of which was mentioned in the deed) assessed on the mortgaged property and to retain the balance of the profits in lieu of interest on the mortgage-money, and was further entitled to claim his money with interest thereon at a certain specified rate immediately on a loss of possession over the property or on the accrual of any other injury. The mortgagee remained in possession for five years from the date of the mortgage, and lost possession for two years after this, but owing to no fault of the parties to the mortgage. He waited till possession was restored to him, but this time the revenue of the property was considerably enhanced. Nevertheless, he remained in possession for seventeen years, paying the enhanced revenue and enjoying the net profits of the property. Then on a redemption suit having been brought, he claimed, in addition to his mortgage-money, interest on it at the stipulated rate for the period of his dispossession, and the excess revenue that he had had to pay since the restoration of possession, together with interest thereon:

*Held*, that, in view of the terms of the mortgage-deed and the conduct of the mortgagee, he was entitled to interest on his mortgage-money for the period of his ouster, but only at a reasonable, and not at the stipulated, rate; and that he was not entitled to the excess revenue paid by him, nor to any interest on the same. [p. 403, col. 2; p. 404, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 25th January 1915, upholding that of the Officiating Subordinate Judge, Partabgarh, dated the 6th July 1914.

The Hon'ble Syed *Wazir Hasan* and Syed *Ali Mohammad*, for the Appellants.

The Hon'ble Mirza *Sami Ullah Beg*, for the Respondents Nos. 1 to 3.

JUDGMENT.—The three plaintiffs, two of whom are appellants in this Court, were given a permanent, heritable and transferable lease of certain property in consideration of Rs. 3,200 in 1913. In this property the lessor had under-proprietary rights. Rupees 2,400 of this sum was left with them to discharge a mortgage, usufructuary, of 1890. The plaintiffs deposited Rs. 2,400 under section 83, Transfer of Property Act, but the money was not accepted. They then instituted the suit for redemption out of which this appeal has arisen.

It is admitted that for two years, from 1895 to 1897, the land became *kurk tahsil* owing to no fault of any of the parties to this suit, and that the mortgagees were, for those two years, out of possession.

It is admitted that by the terms of the mortgage-deed, the mortgagees were to pay the revenue to the superior proprietors, and to retain the balance of the profits in lieu of interest.

It is admitted that the amount to be so paid was originally Rs. 68 which was set out in the mortgage-deed: and that from 1895

that was enhanced, at a new settlement, to Rs. 110-14-7.

The assignee of the mortgagees has claimed that they are entitled, in addition to Rs. 2,400, the original mortgage-money, to Rs. 1,152, two years' interest at 2 per cent. per month, for the period when they were out of possession; and to Rs. 2,459-12-6, which represents the sum of Rs. 42-14-7, excess revenue, paid annually to the superior proprietor, and interest thereon.

The Courts below have decreed the claim for payment of Rs. 1,152 in addition to Rs. 2,400. Hence this appeal by two of the three plaintiffs. Cross-objections have also been filed by the assignee of the mortgagees, in respect of Rs. 2,400 out of Rs. 2,459-12-6.

The question raised by the appellants is one to be dealt with, it seems to me, on the principles of justice, equity and good conscience. There is a provision in the mortgage-deed to the effect that if for any reason the mortgagees loose possession, the mortgagors will make an effort to pay the mortgage-money at once: and if they delay, the mortgagees will be entitled to recover their money, with interest at 2 per cent. per month by a suit, from the person and all the property, moveable and immoveable, of the mortgagors. There was to be, in fact, if the mortgagees took this course, no charge remaining upon any specific property. The possession of the mortgagees was ousted for two years. Neither did the mortgagors pay up, nor did the mortgagees resort to the extreme measure of calling in their money. They waited till the revenue was paid and possession restored: the mortgagees then in 1897 re-entered upon the land, and have enjoyed its profits ever since. It is sought to apply the doctrine of acquiescence as a bar to the claim of the mortgagees: but the doctrine of acquiescence surely has nothing to do with the present situation. The mortgagees could have sued and obtained a simple money-decree with 2 per cent. per. mensem interest: but they preferred to carry on as before, finding the transaction, apparently, not unprofitable: and the time when they could have sued for a simple money-decree has long passed. It may indeed be doubted whether, both parties having, in 1897, agreed to resume the position as it existed prior to 1895, the mortgagees would have been found entitled in equity to enforce the contract which gave them a right to sue for their mortgage-money. They have made no complaint, in the last seventeen years, as to their loss by dispossession. No doubt they can claim, in an account upon the mortgage, some allowance for the two distant years when their money lay unproductive. But I do not agree that 2 per cent. per month, the interest they were to receive on a prompt assertion of their claim, is a proper measure of the sum to be awarded to them. They did not look upon their loss as serious enough to call for any action: and they have retained possession for seventeen years more: and have only now put in a claim, in response to the mortgagors' claim to redeem.

In the circumstances I am of opinion that 12 per cent. per annum on the mortgage-money will be a sufficient solatium to them.

As for the cross-objections, the Courts below have refused to entertain the claim, because it is an assignee of the mortgagees who is dealing with the mortgagors, and not the mortgagees themselves. Into the correctness of this view it is unnecessary for this Court to go. *Prima facie* it is necessary to see what the mortgage-deed says: "We will pay the revenue, Rs. 68, to the *sarkar*, and will retain the balance of profits in lieu of interest as long as the mortgage lasts..... .....the mortgagors will have no claim for profits, nor shall we have any claim for interest."

Reading this as a whole and considering the attendant circumstances, I have no doubt that it provides that the mortgagees shall enjoy net profits in lieu of interest. I do not think the reference to Rs. 68 is a considered reference to a specific sum of money, which, and no more, is to be paid to the *sarkar*. Had that been so, it would have been expected that the amount to be paid would have been given a prominent position and not thrown in, in brackets, so to speak; and also that there would have been some provision to meet an addition to, or reduction of, that amount. The mortgage-deed provided for an immediate claim for the mortgage-money, not only on a loss of possession but on the accrual of any injury. An increase of over 50 per cent. in the sum to be paid annually as revenue would surely be an injury to the mortgagees. But for seventeen years they

have been paying without a word, year by year. The increased revenue, it will be remembered, was payable at the time when possession was surrendered by the Deputy Commissioner in 1897, but the mortgagees cheerfully accepted the new burden, when they had the option of getting back their whole mortgage-money with heavy interest.

I have no doubt that not only did the mortgage-deed provide that the mortgagees were to enjoy the net profits after payment of the revenue, but that the mortgagees understood this well, and have been paying it accordingly.

I, therefor, dismiss the cross-objections.

I allow the appeal to the extent of Rs. 576 and reduce the amount decreed by the Courts below from Rs. 3,552 to Rs. 2,976 with proportionate costs. Three months' time is given. In the circumstances the parties may bear their own costs in this Court.

*Appeal partly allowed.*

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1247 OF 1915.

March 3, 1917

*Present:*—Mr. Justice Ratique and Mr. Justice Piggott.

ACHHAIBAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Musammat* RADHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mortgage, usufructuary—Redemption—Hypothecation by way of simple mortgage—Limitation.*

An usufructuary mortgage was executed in February 1891 and in September of the same year a further advance was made by the mortgagee to the mortgagor on the security of the same property, which was hypothecated by way of simple mortgage with a further covenant that the simple mortgage should be paid off before the redemption of the usufructuary one. The plaintiff claimed to redeem the usufructuary mortgage without paying any sum due under the simple mortgage of September 1891:

*Held*, that as a suit on the mortgage-deed of September 1891 would be barred, the plaintiff was entitled to redeem the usufructuary mortgage without paying off the simple mortgage. [p. 404, col. 2, p. 405, col. 1.]

*Nesar Kunwar v. Kasha Ram*, 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634, followed.

Second appeal against the decision of the District Judge, Ghazipur, dated the 11th June 1915.

Dr. *S. N. Sen* and Mr. *P. L. Banerji*, for the Appellants.

Messrs. *Gokul Prasad* and *Lakshmi Narain*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for redemption. The memorandum of appeal purports to raise two substantial points; but one of these, namely, that relating to the sum payable under a decree of the 9th of December 1892, is concluded by an adverse finding of fact of the lower Appellate Court. There remains only one substantial point. The mortgage sought to be redeemed is of the 28th of February 1891. On the 4th of September 1891 a further advance was made by the mortgagee to the mortgagor on the security of the same property. The property in question was hypothecated by way of simple mortgage, and there was a further covenant to the effect that this simple mortgage should be paid off before the usufructuary mortgage is redeemed. The plaintiffs claim to redeem the usufructuary mortgage without paying any sum due under the simple mortgage of the 4th of September 1891. The lower Appellate Court has maintained the claim of the plaintiffs upon a line of reasoning based on the fact that a portion of the property hypothecated consisted of an occupancy holding, the transfer or alienation of which was forbidden by the law in force at the time, namely, by section 9 of Act XII of 1881. The point is an arguable one, and it does not seem altogether easy to reconcile some of the decisions of this Court which have been laid before us. The plaintiffs-respondents, however, undertake to support the decree of the Court below on a slightly different ground. The learned Counsel on behalf of the respondents says that whether the mortgage in question was of an occupancy holding or of a fixed rate holding, and whether or not the present plaintiffs are estopped from denying that it was a mortgage of a fixed rate tenancy, nevertheless the plaintiffs are entitled to redeem on payment of the debt due under the usufructuary mortgage only. This plea is based upon the fact that the mortgage-deed of the 4th of September 1891 was barred by limitation at the time when the present suit

was brought, so that the mortgagee could not have maintained a suit for the recovery of any money due under the same. This contention is supported by authority of this Court, namely, the case of *Kesar Kunwar* v. *Kashi Ram* (1). One of us was a party to that decision and we are in any case not prepared to re-consider it. This rejoinder, therefore, on the part of the plaintiffs-respondents must prevail. We dismiss this appeal with costs, including fees on the high scale.

*Appeal dismissed.*

(1) 30 Ind. Cas. 777; 13 A. L. J. 889; 37 A. 634.

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## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1913.

December 8, 1916.

*Present*:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

JERAMDAS—APPELLANT

*versus*

WADERO SHAH ALI AND OTHERS—RESPONDENTS.

*Contract Act* (*IX of* 1872), *ss.* 45, 38—*Payment to one of several joint promisees, whether valid discharge*—*Civil Procedure Code* (*Act V of* 1908), *O. XLI, rr.* 26, 31—*Failure to file objections—Court, duty of.*

A payment to one of several joint promisees does not operate as a complete discharge of the debt. [p. 406, col. 1.]

*Mannava Annapurnamma* v. *Uppala Akkayya*, 19 Ind. Cas. 12; 36 M. 544; 13 M. L. J. 268; (1913) M. W. N. 328; 24 M. L. J. 333; *Barber Maran* v. *Ramana Goundan*, 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327, dissented from.

*Ramaswamy* v. *Muniandy Servai*, 5 Ind. Cas. 343; 20 M. L. J. 709; 7 M. L. T. 253; (1910) M. W. N. 550, *Husainara Begum* v. *Rahmannessa Begum*, 8 Ind. Cas. 837; 38 C. 342; 13 C. L. J. 3, relied upon.

The omission of a party to file objections against a finding, under rule 26 of Order XLI of the Civil Procedure Code, does not relieve an Appellate Court of the duty imposed upon it by rule 31 of the order to give its decision on the issue. [p. 405, col. 2.]

*Mumtaz Begam* v. *Fateh Husain*, 6 A. 391; A. W. N. (1884) 129; 4 Ind. Dec. (N. S.) 61; *Subbayya* v. *Rami Reddi*, 22 M. 344; 8 Ind. Dec. (N. S.) 245, relied upon.

Appeal against the decision of the first class Subordinate Judge, Sukkur.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Wadhumal Oodharam*, for Respondents Nos. 1 to 3, 5, 7 and 8.

Mr. *Mulchand Thawardas*, for Respondent No. 4.

### JUDGMENT.

PRATT, J. C.—The issue referred to the lower Court was whether on the date of the last execution application, *i. e.*, the 11th January 1909, a valid discharge could have been given by the other joint decree holders without the concurrence of the minor, either under Hindu Law or the Law of Contract.

The lower Court has found that the discharge could not have been given under Hindu Law as the joint decree-holders were not members of an undivided Hindu family and the correctness of its decision on this point has not been questioned.

The lower Court has also found that such a discharge could have been given under the general Law of Contract.

Mr. Kimatrai seeks to question the correctness of the finding, and Mr. Wadhumal contends that he is debarred from so doing as no objections have been filed under Order XLI, rule 26. It is true that Mr. Kimatrai has no right to be heard, but his omission to file objections does not relieve us of the duty imposed upon us by Order XLI, rule 31, to give our decision on the issue: *Mumtaz Begam* v. *Fateh Husain* (1), *Subbayya* v. *Rami Reddi* (2) and the judgment of this Court in First Appeal No. 42 of 1913.

As Mr. Kimatrai's arguments will assist us in coming to our decision we have allowed him a hearing.

The issue involves the general question as to whether payment to one of several joint promisees is a complete discharge.

Section 45 of the Contract Act refers to co-promisees and section 42 to co-promisors.

Section 45 gives to all co-promisees the right to claim performance. In other words, the promisor is liable to all the co-promisees.

Section 42 makes a similar provision as to co-promisors and all co-promisors are liable to the promisee.

But section 42 is followed by section 43, which enacts that each co-promisor is

(1) 6 A. 391; A. W. N. (1884) 129; 4 Ind. Dec. (N. S.) 61.

(2) 22 M. 344; 8 Ind. Dec. (N. S.) 245.

also liable while there is no corresponding section following section 45 to deal with the converse case of co-promisees.

Thus if *A* and *B* promise to pay *C*, a payment by *A* alone discharges the debt. But if *C* promises to pay *A* and *B* there is no provision that the debt is discharged by a payment to *A* alone.

It seems clear that the Act does not make a payment to one co-promisee a discharge because that is not a performance of the contract. *C* had promised to pay *A* and *B* and a payment to *A* alone is not in accordance with the contract.

The only other sections of the Act which are relevant are sections 38 and 165.

The last paragraph of section 38 enacts that tender to one co-promisee has the same legal consequences as tender to all the co-promisees. Now if payment to one co-promisee were complete performance there would have been no occasion to have enacted this provision as to tender, for the tender to one would have been a complete and perfect tender. The object, therefore, seems to be a special exception in favour of an inchoate and imperfect tender. If the promisor cannot conveniently pay all the co-promisees he may relieve himself of future interest by a tender to one. If the tender is accepted it will not be a discharge and if the promisor has to pay over again he has remedy against the co-promisees he has overpaid.

Section 165 allows a bailee to deliver goods back to one of several joint bailors. Here again if the general law as to co-promisees made delivery to one equivalent to delivery to all, this section would have been redundant. It must, therefore, be intended as an exception giving a privilege available only in cases of bailment.

The English Law as to co-promisees is that payment to one is good discharge against all: *Wallace* v. *Kelsall* (3). This is, however, subject to the rule that when a person is seeking equitable relief he will not be entitled to plead such a payment—though valid in Common Law—unless it appear in fact that the co-promisees were joint tenants and not tenants-in-common *Steeds* v. *Steeds* (4) and *Powell* v. *Brodhurst* (5). Mr. Wadhumal contends that section 38 was intended to reproduce the English Common Law rule and that the equity declared in cases subsequent to the Act, was not and could not have been present in the minds of the framers of the Act.

But the English Law affords no guide to the solution of the question, for it has been deliberately departed from in sections 42, 43 and 44 dealing with co-promisors. Moreover both sections 42 and 45 by inclusion of the representatives of deceased co-promisors and co-promisees adopt the equitable presumption of tenancy-in-common as opposed to the Common Law presumption of joint tenancy. And lastly it has recently been pointed out by the Privy Council in the case of *Ramdas Vithaldas Durbar* v. *Amerchand & Co.* (6) that the Contract Act is in some respects in advance of the English Law.

I differ from the case of *Krishnarav Ramchandra* v. *Manaji* (7), for it proceeds wholly on the English Law. The later Indian cases have been conflicting. In *Mannava Annapurnamma* v. *Uppala Akkayya* (8) and in *Barber Maran* v. *Ramana Goundan* (9), it was held that a payment to one co-promisee was a valid discharge as against all. These cases treat section 38 as conclusive of the law as to performance. Sankaran Nair, J, said at page 549 of the former case:—

"It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor

(3) (1840) 56 R. R. 707; 7 M. & W. 264; 10 L. J. Ex. 12; 8 Dowl. P. C. 841; 4 Jur. 1064; 151 E. R. 765.

(4) (1889) 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378.

(5) (1901) 2 Ch. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L R 501.

(6) 35 Ind. Cas. 954; 20 C. W. N. 1182; (1916) 2 M. W. N. 110; 18 Bom. L. R. 670; 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 342; 14 A. L. J. 045; 85 L. J. P. C. 214; 24 C. L. J. 320; 40 B. 630 (P C.).

(7) 11 B. H. C. R. 106.

(8) 19 Ind. Cas 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 833.

(9) 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327.

cannot be held to be liable to pay over again to the other promisees what he has already paid."

I see no such difficulty. Section 38 deals with tender, that is, with *attempted* performance. But if the offer is accepted why should the promisor not pay one co-promisee and so save interest running? If he has to pay over again he has a right of recovery from the promisee he paid in the first instance. If this paragraph of section 38 was intended to enact the law as to performance between a promisor and several co promisees, surely its place would have been after section 45. I concur in the conclusion arrived at in the dissenting judgment of the Chief Justice in *Mannava Annapurnamma* v. *Uppala Akkayya* (8) and in the cases of *Ramaswamy* v. *Muniandy Servai* (10) and *Husainara Begum* v. *Rahmannessa Begum* (11).

I am, therefore, of opinion that a valid discharge cannot be given under the Law of Contract by one of several co-promisees; and decide that in this case a valid discharge could not have been given without the concurrence of the minor.

The application is, therefore, not time-barred except as to instalments payable more than twelve years previously. This amount in time is found by the lower Court to be Rs. 8,109-1 7 and this finding is not challenged.

We reverse the order of the lower Court and direct execution to proceed for the above amount. Appeal allowed. No order as to costs.

HAYWARD, A. J. C.—I concur in this judgment.

*Appeal allowed.*

(10) 5 Ind. Cas. 343; 20 M. L. J. 709; 7 M. L. T. 253; (1910) M. W. N. 550.

(11) 8 Ind. Cas. 837; 38 C. 342; 13 C. L. J. 3.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 18 OF 1917.

May 2, 1917.

*Present*:—Justice Sir George Knox, KT.

SHANKAR LAL—PLAINTIFF—APPLICANT

*versus*

ABDUL RAHMAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s 2. (11)—Legal representatives, suit against—Estate not in hands of legal representatives, effect of.*

A suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased. [p. 408, col. 1.]

Civil revision against the order of the Additional Munsif, Judge, Small Cause Court, Dehra Dun, dated the 13th October 1916.

FACTS of this case are as follows:—

One Abdul Khalik executed a bond for Rs. 114 in favour of the plaintiff-appellant Shankar Lal. He died after the execution of the bond. The plaintiff then instituted a suit on his bond against *Musammat* Mahammadi and Abdul Rahman, the widow and son of Abdul Khalik, deceased, on the allegation that the defendants were the legal representatives of Abdul Khalik and were in possession of the assets of the deceased and thus liable for the debt. The defendants denied the execution of the bond and receipt of any assets of the deceased. The Court of Small Causes, Dehra Dun, dismissed the suit and delivered the following judgment:—

(1) It is proved that the bond in suit was executed by Abdul Khalik. I, therefore, decide the issue in the plaintiff's favour.

(2) It is not satisfactorily proved that any assets came in the hands of the defendants, or that they are likely to come in their hand. They are, therefore, not liable to the plaintiff. Suit dismissed with costs. Defendants to get their costs.

From this judgment and decree the plaintiff came to the High Court in revision.

Mr. *Gulzari Lal*, for the Applicant, submitted that the Court acted illegally in dismissing the plaintiff's suit. It was admitted that the defendants were the legal representatives of Abdul Khalik. The execution of the bond was duly proved against them,

The Court, therefore, should have passed a decree in plaintiff's favour. The decree should have been for payment of money out of the assets of Abdul Khalik and if the plaintiff could prove that the defendants had any assets, he would realise his decree. It was not for this Court to decide the question of assets. There was a very old ruling which supported this contention. He referred to *Madho Ram* v. *Dilbur Mahul* (1), which was on all fours with the present case.

Dr. *S. M. Sulaiman*, for the Respondents, submitted that it had not been held in the case that consideration passed on the execution of the bond. The Court below had held that there was no satisfactory proof that any assets came to the hands of the defendants. Under these circumstances they were not liable for the debt. He referred to *Jafri Begam* v. *Amir Muhammad Khan* (2) in support of his contention.

Mr. *Gulzari Lal*, in reply, submitted that the ruling referred to by the Counsel for the respondent really supported him. He referred to the same case [*viz.*, *Jafri Begam* v. *Amir Muhammad Khan* (2)] and said that the case reported as *Madho Ram* v. *Dilbur Mahul* (1) had been followed here.

JUDGMENT.—The Court of Small Causes at Dehra Dun should have followed the case of *Madho Ram* v. *Dilbur Mahul* (1). The decree of the Court below is set aside. The case will be returned to the Munsif of Dehra Dun, who will place it upon his file of pending suits and dispose of it according to law. Costs will follow the event.

*Appeal allowed.*

(1) 2 N. W. P. H. C. R. 419.

(2) 7 A. 822 at p. 841; A. W. N. (1885) 248; 4 Ind. Dec. (N. s.) 636.

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 99 OF 1914.

March 16, 1916.

*Present*:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Beachcroft.

DANESH MOLLA, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES ABDUL AUDOOD AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

DHANANJOY BISWAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 11, *O. XXIII, r.* 1—Res judicata—*Relinquishment of portion of claim without leave, consequence of.*

In a suit for recovery of possession of land, the plaintiff included within the boundaries described in the plaint two parcels A and B, and put forward his claim for ejectment in respect of both on the allegation that the defendants had dispossessed him therefrom, but before the Commissioner at the local enquiry, and at the trial, the plaintiff relinquished his claim without leave of the Court in respect of the parcel B, with the result that the suit was dismissed with regard to that parcel:

*Held*, that a subsequent suit for recovery of possession of parcel B against the same defendants was *res judicata* and was also barred under Order XXIII, rule 1, Civil Procedure Code, as the dispossession which was the cause of action in both the suits was in reality the same, although the plaintiff falsely alleged, in his plaint in the subsequent suit, dispossession at a later date. [p. 411, cols. 1 & 2.]

Appeal under section 15 of the Letters Patent, from the judgment of Mr. Justice D Chatterjee, dated the 17th July 1914, in Appeal from Appellate Decree No. 2129 of 1913.

FACTS material to the report will appear from the following judgment of

D. CHATTERJEE, J.—Two points have been argued in this appeal. The *first* is that the subject-matter of this suit was the subject-matter of a previous suit between the same parties and that the decision in the previous suit which dismissed the claim of the plaintiffs in respect of the lands claimed in this suit is a bar to the maintenance of the present suit by the rule of *res judicata*, and the *second* is that the plaintiffs came to Court on an allegation that, while in possession, they had been dispossessed and that it was, therefore, the duty of the plaintiffs to prove that they were in possession within twelve years of the institution of the suit. In this case, however, the learned Judge has, it is contended, applied Article 144 and

tried the question whether the defendants have proved adverse possession for more than twelve years. I think that both these contentions must fail.

The previous suit, as instituted, no doubt, included the lands in dispute in the present case. The eastern boundary in the previous suit was given as the river Madhumati and the disputed land in this case lies between what was shown as the disputed land in that case and the river Madhumati. It was, therefore, within the land claimed in the plaint in that suit. At the time of the local investigation held in that case, however, the plaintiffs showed only the land to the west of the disputed land in this case as the land that they had claimed in that suit and the learned Munsif in the previous case said: "I should mention here that at the time of the local investigation by the Civil Court Commissioner, the plaintiff disclaimed his right to a portion of land on the bank of the Madhumati which is covered by the boundaries given in the plaint. The piece of land which has been shown in yellow colour in the Commissioner's map and which the plaintiff has pointed out to him as belonging to him (plaintiff) is now treated and described as the disputed land." It seems, therefore, that although the disputed land in this case was included within the boundaries of the plaint land in that case, the western portion of the same only which was shown to the Commissioner as the disputed land was treated as the disputed land. It cannot, therefore, be said that any dispute as to this piece of land to the east of the land marked yellow in the previous suit was the subject of investigation and decision in that case. There is no doubt that the decree made by the Munsif dismissed the claim of the plaintiffs in that case to the lands to the east of the yellow portion, but nevertheless, what was the subject of investigation and decision in that case was the yellow portion and nothing else. It would have been better if the plaintiffs in that case had made an amendment in their plaint; and that might have prevented a good deal of dispute in the present case. But that was not done, nevertheless that only will be considered as the subject of dispute which was treated as such in that case and the decision of that case must be confined to that land only. It has further been found by the learned Judge in this case that, at the time of the institution of the previous suit, the land which is now in suit was not in existence as culturable land. It was then covered by the river and, therefore, the plaintiffs had at the time of the institution of that suit rightly described the yellow portion of the disputed land in that case as being bounded by the Madhumati on the east. In this view of the case I am unable to accede to the learned argument of the appellants' Vakil that the decree in the previous suit, simply by reason of its dismissing the claim of the plaintiffs in respect of lands which answer to the boundaries of the present suit, should be considered as a final decision in respect of these lands.

With regard to the question of limitation, it is true that the plaintiffs' suit was brought on the allegation of possession and dispossession. But it is found in this case that "the land on the east side, *i.e.*, the present disputed land, was not fit for cultivation and so was not in the possession of any one," that is about the time of the dispossession alleged in the previous case, and then again the learned Judge says: "I do not think that they could dispossess the plaintiffs from this land before *Agrahayan* 1306, in the time of dispossession regarding the land in previous suit which is within twelve years." Although the judgment is not as clear as it could be expected, I think that this means that the plaintiffs must be taken to have been in possession in or about the year 1306 when these lands became culturable and if that be so, the plaintiffs have proved their possession within twelve years. Notwithstanding, therefore, the finding of the learned Judge that there was no satisfactory evidence that the defendants or their lessor or vendor had possession of the land in suit for more than twelve years, I think that there is sufficient in the judgment from which it can be made out that the learned Judge found that the plaintiffs were in possession within twelve years. In this view of the case I think that the plea of limitation also fails.

In view of the fact, however, that the

plaintiffs failed to take sufficient measures for ensuring certainty in the previous case by making an amendment in their plaint in respect of the land which appeared after the institution of their suit, each party should bear his own costs in this Court.

Babu *Jyotish Chandra Sircar*, for the Appellants.

Babu *Mohini Mohan Chakrabarty*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice D. Chatterjee in a suit for recovery of possession of land. The Court of First Instance dismissed the suit. Upon appeal the Subordinate Judge reversed that decision and on appeal to this Court the decree of the Subordinate Judge has been confirmed. The defendants contend that the suit should have been treated as barred under section 11 and Order XXIII, rule 1 of the Code of Civil Procedure, 1908. To determine the validity of this objection, we must bear in mind the facts of a previous litigation between the parties.

On the 3rd January 1902, the present plaintiffs instituted a suit against the defendants for recovery of possession of what we may briefly describe as two parcels of land A and B. The plaintiffs then alleged that they had been dispossessed by the defendants on the 1st January 1900. A Commissioner was appointed to survey the disputed lands. The plaintiffs confined their claim to plot A alone before the Commissioner and from the report of the Commissioner it appears that whereas the plaintiffs pointed out parcel A as the disputed land, the defendants pointed out parcels A and B as the disputed lands. The Commissioner further found that the defendants were at the time in possession of both parcels of land. In the judgment of the Trial Court in that suit we find a statement to the effect that at the time of the local investigation by the Civil Court Commissioner, the plaintiffs disclaimed their right to "a portion of the land on the bank of the Madhumati, which is covered by the boundaries given in the plaint," that is, what we have called B. The Court came to the conclusion that the suit should be decreed in part, that is, with regard to plot A alone, and then proceeded to state explicitly that the claim so far as it relates to the remaining portion of the land included in the boundaries of the plaint, that is, what we have called B, be dismissed. The defendants appealed and in the judgment of the Subordinate Judge we find the statement repeated that at the time of the local enquiry by the Commissioner the plaintiffs gave up their claim in respect of what we have called plot B and confined their claim to the portion coloured yellow in the map, that is, what we have called A. The Subordinate Judge reversed the decree of the Court of First Instance and dismissed the suit in its entirety. The plaintiffs preferred a second appeal to this Court, and the result was that the decision of the Subordinate Judge was reversed and that of the Court of First Instance restored on the 5th June 1906. On the 30th March 1911, the plaintiffs commenced the present litigation in respect of plot B. Objection was forthwith taken that there was a two-fold bar to the suit, namely, bar of *res judicata* and bar from withdrawal or abandonment of claim without leave of the Court. In our opinion, there is no answer to the objection.

Section 373 of the Code of 1882, which was in force when the previous suit was decided and has since been reproduced as Order XXIII, rule 1 of the Code of 1908, provides as follows: "If the plaintiff withdraws from the suit or abandons part of his claim without such permission, he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part." Here the plaintiff undoubtedly abandoned a part of his claim. We are not concerned with the reasons which induced him to adopt this course, nor does a statement of such reasons appear in the proceedings of that suit. But we do know this that although the parcels A and B were included within the boundaries described in the plaint and although the claim for ejectment was put forward in respect of both the plots on the allegation that the defendants had dispossessed the plaintiffs therefrom, before the Commissioner and at the trial they

relinquished their claim in respect of one of these parcels, with the result that the suit was dismissed with regard to that parcel. In such circumstances, we cannot appreciate how the plaintiffs can possibly escape from the bar provided by the second paragraph of section 373. Reliance, however, has been placed upon the decision of this Court in the case of *Kamini Kant Roy* v. *Ram Nath Chuckerbutty* (1). That case is clearly distinguishable. There *A* instituted a suit to establish his right to sell a certain property in satisfaction of a decree against *B*. He withdrew the suit without leave obtained to bring a fresh suit. *A* subsequently instituted another suit to establish his right to sell the same property in execution of another decree against *B*. The Court held that the second suit was not barrred by the provisions of section 373, as it could not be deemed a fresh suit in respect of the matter covered by the previous suit. Here, however, the position is entirely different. We observe that a comprehensive view has been taken of the scope of section 373 by the Madras High Court in the cases of *Achuta Menon* v. *Achutan Nayar* (2), *Machana Ujhala* v. *Gorugantulu* (3) and *Sennava Reddiar* v. *Venkatachala Reddiar* (4), where in the determination of the question whether the matters in controversy in two suits were or were not identical, reference was made not merely to the right claimed by the plaintiff but also to the right set up by the defendant. These cases, however, must be deemed materially qualified, if not actually overruled, by the Full Bench decision in *Pandillapalli Singa Reddi* v. *Yeddula Subba Reddi* (5), which accords with the decision in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* (6), and it is not necessary for our present purpose to attribute to section 373 such a wide scope, for, even upon a more limited view, the suit is barred by section 373. We must also hold that the suit is barred under the provisions of section 11 of the Code of 1908. The plaintiffs put forward a claim to the land now in dispute in the earlier litigation; that claim was dismissed. It is obviously impossible for them to maintain another suit to enforce the identical claim: the dispossession, which is the cause of action in this suit, is in reality the dispossession urged in the previous litigation, although the plaintiffs in view of the possibility of objections under section 11 and Order XXIII, rule 1, falsely alleged in the plaint dispossession at a later date.

The result is that this appeal is allowed, the decrees of this Court as also of the Court of Appeal below set aside and that of the Court of First Instance restored. The suit will stand dismissed with costs in all the Courts.

*Appeal allowed.*

(1) 21 C. 265; 10 Ind. Dec. (N. S.) 809.
(2) 21 M. 35; 7 Ind. Dec. (N. S) 381.
(3) 8 Ind. Cas. 1036; (1910) M. W. N. 782; 9 M. L. T. 468.
(4) 28 Ind. Cas. 91; 2 L. W. 177.
(5) 35 Ind. Cas. 185; 31 M. L. J. 48; 20 M. L. T. 62; (1916) 2 M. W. N. 1; 4 L. W. 1; 39 M. 987.
(6) 4 C. W. N. 110.

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 24 AND 25 OF 1915.

May 26, 1916.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

LASKARI AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ABBAS BEPARI—DEFENDANT—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1908), *O. XLI, rr.* 24, 25—*Issues, re-settling of—Framing new issue—Remand—Procedure*

The Court of First Instance decided a case on framing a material issue as: "Have the plaintiff and his co-villagers their alleged right of way by necessity, grant or prescription". The Judge in the First Appellate Court, coming to the conclusion that the issue which was really material had not been stated in the Court below, framed the issue thus: "Has the plaintiff acquired the right of user over the disputed path by virtue of any custom," and then purporting to act under Order XLI, rule 24, Civil Procedure Code, dealt with the case on the evidence as it stood, without taking any further evidence or remanding the case for further evidence:

*Held*, that the Judge acted wrongly as he did not realise that he was not re-settling the issues, but was framing an entirely new issue, and that the proper course for him to take was to proceed under Order XLI, rule 25, Civil Procedure Code. [p. 413, col. 2.]

Appeals under section 15 of the Letters Patent, against the decision of Mr. Justice Mullick, dated the 1st February 1915, in Appeal from Appellate Decree No. 1938 of

1912, against the decree of the Subordinate Judge, 1st Court, Tipperah, dated the 18th April 1912, modifying that of the Munsif, 1st Court at Comilla, dated the 20th March 1911.

FACTS appear form the following judgment of

MULLICK, J.—The plaintiff and defendant No. 1 are co-sharers. The plaintiff sues on behalf of his co-villagers for a declaration of a right of way 12 cubits wide over some land which is in the defendant's separate possession.

The Commissioner deputed to make a local investigation found a path of varying width running through the village from north to south. He considered that an uniform width of 7 to 8 cubits was necessary to the villagers. The Munsif came to the conclusion that as regards the northern and southern portions of the path shown on the Commissioner's map, the plaintiff had no cause of action inasmuch as the defendant had in no way interfered with the use thereof but that in respect of that portion which lay between stations Nos. 5 to 9 the defendant had by levelling some land to the east raised an apprehension of injury in the plaintiff's mind; that the plaintiff had acquired an easement of necessity in the whole length of the existing path and that between stations Nos. 5 to 9 where the width varied from 3 to 6 cubits, the alleged obstructions being more than twelve years old, the claim for a way of greater width was barred by limitation. The Munsif, therefore, partially decreed the suit by declaring "a right of way as a village path by necessity over the disputed path as laid down in the Commissioner's map" and by restraining "the principal defendants from interfering with the existing breadth between stations Nos. 5 to 9 by encroachment and by obstruction."

Both sides appealed against this decree, with the result that the learned Subordinate Judge dismissed the defendant's appeal but partially decreed the plaintiff's appeal. He found that the plaintiff had established a customary right to a village path 7 cubits in width and that the decree for an easement of necessity could not be supported. He accordingly directed that "the plaintiffs do recover possession thereof by removing all obstructions, if any, put up or created by the defendant thereon."

The present second appeal is preferred by defendant No. 1. It is conceded by the learned Vakil for the appellant that he is not concerned to resist the learned Subordinate Judge's decree in respect of any portion other than that lying between stations Nos. 5 to 9. The substance of his appeal is that the learned Subordinate Judge has made a new case of custom and has taken him by surprise. Now the plaintiff claims not a public way but a village path or, as he puts it in his plaint, a semi-public way and he bases his title on grant, prescription, twenty years' user and necessity. The Munsif finds that a grant, express or implied, is neither proved nor capable of being presumed. He, therefore, rightly holds that the plaintiff cannot base his title on grant or prescription.

The learned Munsif next finds more than twenty years' user of the existing path proved but his judgment is silent upon the question whether the plaintiff has acquired a title under section 26, Limitation Act. It would seem from their omission to mention this aspect of the case that both the Munsif and the Subordinate Judge were of opinion that the character of the plaintiff's enjoyment does not fulfil the conditions of that section. The learned Munsif, therefore, falls back upon necessity. But, as the learned Subordinate Judge has very properly observed, if no grant can be presumed, then there can be no way of necessity and the learned Munsif's decree cannot be sustained. The learned Subordinate Judge, therefore, thinks that the proper issue which arises in the case is whether any customary right is established. Now although the plaint does not allege any custom I agree that it would be unfair to scrutinise *mufussil* pleadings with too much rigour and I cannot, under the circumstances, say that the Subordinate Judge was wrong in framing the issue, "Have the plaintiffs acquired the right of user over the disputed path as a village path by virtue of any custom." But the defendant was clearly entitled to adduce rebutting evidence and the omission to give him a chance of doing so was an error of law. There is nothing to show that the evidence which he gave upon the question of immemorial user was intended to suffice for the trial of an issue

on custom or even that the possibility of such an issue was present in his mind. The learned Vakil for the respondent draws my attention to a sentence in the learned Munsif's judgment which runs as follows:

"The evidence of P. W. No. 4 and P. W. No. 5 precludes the presumption of a *gopath* or path by dedication, custom or immemorial user."

In my opinion these words are not sufficient to establish that the question of custom was directly and substantially litigated before him. I think, therefore, that there must be a remand. It is necessary to note that the learned Subordinate Judge is right in holding that the obstruction complained of is a continuing wrong and that the learned Munsif's view that the claim to a width in excess of the existing path is barred, contravenes the provisions of section 23, Limitation Act. It will be open, therefore, to the lower Courts to determine what is the width of way to which a customary right has been established.

The learned Subordinate Judge's decree will be set aside and the case remanded to him, with a direction that he will send down the 2nd and 3rd issues framed by him to the Court of First Instance for a finding returnable within two months of the record reaching the latter Court. It will be open to both parties to adduce such additional evidence as they may require. On the receipt of the 1st Court's finding the Lower Appellate Court will dispose of the appeal without delay.

It is admitted by both sides before me that no other issues are open and that if the plaintiff fails to prove the custom alleged his whole suit must be dismissed. Costs will abide the result.

Babu *Upendra Kumar Roy*, for the Appellants in No. 24 and the Respondents in No. 25.

Maulvi *Nuruddin Ahmed*, for the Respondent in No. 24 and the Appellant in No. 25.

JUDGMENT.

SANDERSON, C. J.—In these cases the issue which is material for us to consider was framed in the Court of first instance in this way: "Have the plaintiff and his co-villagers their alleged right of way by necessity, grant or prescription." Evidence was taken with regard to that issue. When the cases came before the learned Judge in the First Appellate Court, he came to the conclusion that the issue which was really material had not been stated in the Court below; and consequently he framed the issue himself, which was in these terms, "Have the plaintiffs acquired the right of user over the disputed path by virtue of any custom." He purported to act under Order XLI, rule 24, Civil Procedure Code, which I need not read; but he purported to deal with it as the re-settling of the issues; and, thereupon, as he thought, having re-settled the issues, he dealt with the cases upon the evidence as it stood, without taking any further evidence or remanding the cases for further evidence. In my judgment, with great respect to the learned Judge, I think he made a mistake. I do not say for a moment that he made a mistake when he said that this was the real issue between the parties. What I mean by saying that he made a mistake is that he did not realise that he was not re-settling the issues, but was framing an entirely new issue which was quite different from any one of those which were tried by the learned Munsif. Therefore he came within Order XLI, rule 25, Code of Civil Procedure, which runs in these terms: "where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits." That is what the learned Judge thought in these cases. Evidently he came to the conclusion that that was the issue which was essential for the right decision of the cases—then what were his powers? "The Appellate Court may, if necessary, frame issues and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required." I think that is the course which the learned Judge ought to have taken.

Mr. Justice Mullick has directed as follows: "The Subordinate Judge's decree will be set aside and the case will be remanded to him with a direction that he would send down the 2nd and 3rd issues framed by him to the Court of

First Instance for a finding returnable within two months of the record reaching the latter Court. It will be open to both parties to adduce such additional evidence as they may require. On receipt of the First Court's finding the Lower Appellate Court will dispose of the appeal without delay." I think that is a proper and right order to make in these cases. The result will be that in my judgment both these appeals will be dismissed and Mr. Justice Mullick's order will stand. Inasmuch as neither side has succeeded, there will be no order for costs of these appeals.

MOOKERJEE, J.—I agree.

*Appeals dismissed;*
*Case remanded.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2565 OF 1913.

February 6, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

PUMULLI MANAKAL NARAYANAN NAMBUDRIPAD—PLAINTIFF—APPELLANT

*versus*

VENKITAJELA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1, s. 99—Mortgage—Redemption, suit for—Adverse claimants, joinder of, whether irregular—Misjoinder—Practice—Procedure.*

In a suit for redemption of a mortgage, it is not irregular to implead persons claiming title to the mortgaged property adversely to the mortgagor. [p. 414, col. 2.]

*Krishnaswami, In re*, 8 Ind. Cas. 885; 9 M. L. T. 173, followed.

*Radha Kunwar* v. *Reoti Singh*, 35 Ind. Cas. 939; 38 A. 488; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303, 5 L. W. 456 (P. C.), distinguished.

Even if the joinder of such persons amounts to misjoinder and the Trial Court does not take the necessary steps to cure the defect before deciding the suit, the Appellate Court should not reverse the decision of the Court of First Instance on the ground of misjoinder alone, unless such misjoinder has affected the merits of the case or the jurisdiction of the Court. [p. 414, col. 2.]

The question whether merits or jurisdiction have been affected should not be assumed but should be deduced from the facts of each case, the evidence and the course of the trial in the Court of First Instance. [p. 415, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Palghat, in Appeal Suit Nos. 320 and 360 of 1911, preferred against the decree of the District Munsif, Palghat, in Original Suit No. 321 of 1908.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *K. P. Govinda Menon*, for the Respondents.

JUDGMENT.—The Privy Council has, no doubt, held in *Radha Kunwar* v. *Reoti Singh* (1) that in a suit *by a mortgagee for sale*, it was irregular to have joined as defendants parties who claimed portions of the mortgaged properties adversely to the mortgagors.

But whether in a suit *for redemption*, it would be irregular to add persons claiming title to the mortgaged property or portions thereof was not directly decided in that case. In *In re Krishnaswami Pathan* (2) Mr. Justice Krishnaswami Aiyar held that such a course was not obnoxious to the rules of joinder. The present case seems analogous to the case of *In re Krishnaswami Pathan* (2).

Even if *In re Krishnaswami Pathan* (2) was wrongly decided and it was, therefore, the duty of the Court of First Instance to have taken the necessary steps to cure the defect of misjoinder before deciding the suit, the Appellate Court ought not to have reversed the decision of the Court of First Instance on the ground of misjoinder alone, unless such misjoinder had affected "the merits of the case or the jurisdiction of the Court" [section 99 of the Code of Civil Procedure and *Vasudeva Ravi Varma* v. *Athikottil Eazhuvan Kannanur* (3).] The Lower Appellate Court has assumed on general observations found in some of the decisions, that the alleged misjoinder in this case must have affected the merits. The grounds of the appeal to the Lower Appellate Court preferred by the 1st defendant and the grounds in the memorandum of objections presented by the 19th defendant in that Court do not allege that the merits or the jurisdiction of the Court

(1) 35 Ind. Cas. 939; 38 A. 488; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 5 L. W. 456 (P. C.)

(2) 8 Ind. Cas. 885; 9 M. L. T. 173.

(3) 26 Ind. Cas. 51.

were affected. It is on the facts of each case, the evidence and the course of the trial in the Court of First Instance that the question whether merits or jurisdiction have been affected should be decided. In the present case, we think that there is no question of the jurisdiction having been affected and if the merits have been affected at all, the justice of the case could be fully met by allowing the defendants Nos. 1 and 19 to let in any further evidence on the question of improvements and on the title to the lands claimed by the 19th defendant, which the Lower Appellate Court thinks would have been adduced or is necessary to be allowed to be adduced for deciding the case satisfactorily.

We, therefore, set aside the Lower Appellate Court's decision and direct the Appeals Nos. 320 and 360 of 1911 on the file of that Court with the connected memorandum of objections to be restored to file and direct that Court to re-hear the appeals and to pass a fresh decision according to law after allowing an opportunity to the defendants Nos. 1 and 19 to adduce fresh evidence on the points above mentioned, the plaintiff being at liberty to adduce rebutting evidence so far as it is permitted by the law. Costs in all Courts will be provided for in the revised decision of the Lower Appellate Court.

*Appeal allowed; Case sent back.*

V.R.P.

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 52 AND 55 OF 1916.

March 19, 1917.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

In No. 52 of 1916

ATIKULLA MUNSHI—DEFENDANT—APPELLANT

*versus*

AZIMUDDIN HAJI—PLAINTIFF—RESPONDENT.

In No. 55 of 1916

AZIMUDDIN HAJI—PLAINTIFF—APPELLANT

*versus*

ATIKULLA MUNSHI—DEFENDANT—RESPONDENT.

*Sonthal Pergannas Regulation (III of 1872), s. 6—Contract for evading provisions of section, whether enforceable—Sonthal Pergannas.*

In the Sonthal Pergannas a contract between a borrower and a lender for the repayment with interest of the principal sum borrowed, which is really a subtle device for the purpose of evading the provisions of section 6 of Regulation III of 1872, is not invalid, and the Court ought to enforce the contract in accordance with the provisions of the Regulation regulating the rate at which interest is to be allowed. [p. 417, col. 1.]

Rs. 550 were borrowed in the Sonthal Pergannas on condition of repayment by 550 maunds of paddy within four months. It was found that on the due date of repayment the price of paddy was Rs. 2 per maund:

*Held*, that though the condition contravened the provisions of Regulation III of 1872, still having regard to the real meaning of the contract the plaintiff was entitled to recover the principal and 25 per cent. interest from the date of the loan up to the date of repayment mentioned in the contract and in addition interest at 12 per cent from the date of repayment mentioned in the contract up to the date on which the suit was instituted and then from the date of the institution of the suit at the rate of 6 per cent. per annum until realisation. [p. 417, col. 2.]

Appeals under section 15 of the Letters Patent, against the judgment of Mr. Justice Newbould, dated the 27th January 1916, in Appeal from Appellate Decree No. 4150 of 1913.

FACTS of the case appear from the judgment of

NEWBOULD, J.—In this suit the appellant claimed Rs. 1,100 on a mortgage-bond executed by the defendant. The defendant had borrowed Rs. 550 in cash from the plaintiff in *Kartick* 1315 and undertook to re-pay 550 maunds of paddy in *Magh* the same year and mortgaged 20 *bighas* odd land as security. The plaintiff sued to recover Rs. 1,100 on the ground that the price of paddy in *Magh* 1315 was Rs. 2 per maund. Both the lower Courts have held that this was contrary to the provisions of section 6 of Regulation III of 1872, the Sonthal Pergannas Settlement Regulation, and granted a mortgage-decree for the principal amount only without any interest.

I agree with the learned District Judge that the agreement to repay the money lent by paddy of greater value was an agreement to repay the loan with interest and that the provisions of section 6 of the Regulation are applicable. But I cannot agree with him that the agreement is contrary to the provisions of that Regulation or a device to evade its provisions and the contract is, therefore, void under section 23 of the Indian Contract Act. A

similar case came before this Court, the case of *Shama Charan Misser* v. *Chuni Lal Marwari* (1), in which the effect of an agreement to pay compound interest, which is also referred to in section 6 of the Regulation, had to be considered. It has been pointed out in that case that there is no law or Regulation laying down that an agreement between any two persons living in the Sonthal Pergannas to pay compound interest upon the amount borrowed is "unlawful" within the meaning of section 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. *Mutatis mutandis* this decision is equally applicable to an agreement to pay interest at a higher rate than two per cent. per mensem. There is nothing illegal in such a contract but it will not be enforced by any Court at the higher rate. The contract in question must be regarded as a contract to pay interest at a higher rate. But no Court on that agreement can allow interest at a higher rate than two per cent. per mensem as provided in section 6. The suit was brought three years and nine months after the contract was entered into and interest at the statutory rate for that period amounts to Rs. 495 (rupees four hundred and ninety-five only). The plaintiff is entitled, therefore, to recover the principal and the interest for the same, Rs. 1,045 (rupees one thousand and forty-five only) in all and the decrees of the Court below will, therefore, be varied by increasing the amount decreed from Rs. 550 to Rs. 1,045. The appellant will get his costs in all the Courts.

Babu *Manmatha Nath Roy*, for the Appellant in No. 52.—The suit was brought on a mortgage-bond executed by the defendant-appellant. The money lent on the bond was only Rs. 550. There was no stipulation to pay interest, but the mortgagor agreed in the mortgage-bond to deliver, about three months after the mortgage, 550 maunds of paddy to the mortgagee. This agreement for the delivery of 550 maunds of paddy in lieu of interest was nothing but a device to get rid of the provisions of section 6 of the Sonthal Pergannas Regulation III of 1872, which restricts the right of the mortgagee to realise interest on the money advanced at more than a certain rate specified in the section. The Hon'ble Judge was wrong in allowing interest at 24 per cent. per annum from the date of loan to the date of suit. The plaintiff did not claim any interest after the due date. He only claimed the value of the paddy agreed to be paid, which was Rs. 1,100. My client is not liable to pay interest at 24 per cent. per annum upto the date of suit. He is not liable to pay interest to the plaintiff for the period subsequent to the due date of delivery, as there is no such stipulation in the mortgage-bond to that effect. The English and Indian cases go to show that interest as such cannot be allowed in the absence of any agreement to that effect.

Then as regards the contract to pay 550 maunds of paddy in lieu of interest, I submit that the contract is void and unenforceable because it is in contravention of section 6 of the Sonthal Pergannas Regulation III of 1872. The effect of the contract is to give the plaintiff more than what he can demand under the law, and to make the defendant liable to pay an amount which he is not liable to pay under the law. The object of the law would be defeated if the plaintiff be allowed to enjoy the effect of this ingenious device. So the defendant was fully justified in refusing to deliver 550 maunds of paddy.

The plaintiff can, no doubt, claim damages, which should be assessed at a reasonable rate. It cannot be 24 per cent. per annum.

Maulvi *A. Ahmad*, for the Respondent in No. 52.—My client does not claim interest. There is a simple contract in the mortgage-bond for the delivery of paddy for the breach of which the plaintiff is entitled to get damages. The amount that has been awarded, whether call it interest or damages, is reasonable.

As regards Regulation III of 1872, I submit that it does not apply when there is a contract to deliver paddy on a certain date. The Regulation can be made applicable to a case where there is a loan with a stipulation to pay interest on the money lent. The case of *Shama Charan Misser* v. *Chuni Lal Marwari* (1) lays down that a contract in contravention of section 6 of the Regulation is valid. The stipulation has

(1) 26 C. 238; 13 Ind. Dec. (N. S.) 757.

never been found by any of the Courts below as a device to avoid the provisions of the Sonthal Pergannas law.

Babu *Manmatha Nath Roy*, in reply.

JUDGMENT.

SANDERSON, C. J.—This appeal from the judgment of my learned brother Mr. Justice Newbould raises a point which is somewhat out of the ordinary.

I do not suppose that the decision that I am about to give will be a precedent in other cases, because I imagine that the particular form of the contract in the present case is not a usual one. The borrower of Rs. 550 entered into an agreement dated the 10th of *Kartick* 1315, reciting that he borrowed on that day Rs. 550 "for the purpose of purchasing hide within the month of *Magh* of the current year which is the period fixed for repayment." Then instead of undertaking to repay the money, the method of repayment was as follows:—

"I shall pay off by 550 maunds of dried autumnal paddy by weighing them on the same day, at the rate of one maund per rupee, and I shall have it entered on the back of this deed;" so that, the method of repayment was by delivery of certain paddy which is to be 550 maunds at the rate of one maund per rupee. Then the borrower said: "If I fail to pay the paddy I shall be liable to make good the gain which would accrue to you by purchase and sale with the said money."

Now, the learned Judge in the first Appellate Court came to the conclusion that this was really a subtle device for the purpose of evading the provisions of Regulation III of 1872, a Regulation for the peace and good government of the territory known as the Sonthal Pergannas. He based this conclusion on the fact that it was proved that the price of pady in *Magh* 1315 was Rs. 2 per maund, *i.e.*, the sum repayable was Rs. 1,100, the result being that the Rs. 550 was to double itself in three months. I think that is a conclusion which he was justified in coming to upon the terms of this agreement. It was in effect an agreement to repay the principal sum which was borrowed and interest at the rate of 100 per cent. on the date of repayment, namely, *Magh* 1335. Having come to the conclusion that it was a device to evade the Regulation, what is the result?

It was argued by the learned Vakil for the appellant that the whole contract was invalid. Then, I think, he rather abandoned that position and said that he could not dispute that the principal sum could be recovered but he contended that no interest was recoverable. I do not think that the contract was invalid. I think that having come to the conclusion that the real effect of the contract was an undertaking to repay the principal and interest at the rate of something like 100 per cent. within three months, what we have then to see is what the Court would do in such a case. We find that in the Regulation there are certain provisions varying according to the period for which interest is to be calculated, which direct the Court as to the rate at which the interest is to be allowed. I think the Court ought to enforce the contract in accordance with those provisions of the Regulation. Therefore, the period for which interest was to be calculated, having regard to the real meaning of the contract, was from the date of the loan to the month of *Magh* in the same year, which the learned Vakil told me was about $3\frac{1}{2}$ months. In my judgment inasmuch as that is less than a year, applying the Regulation section 5, paragraph (6), the rate of interest for that period would be 25 per cent. Therefore, the plaintiff is entitled to recover the principal and 25 per cent. interest from the date of the loan down to the date of repayment mentioned in the contract.

In addition to that, the plaintiff is entitled to damages, inasmuch as the defendant did not pay that which he was legally bound to pay under the contract; and the question then arises, what will be the rate of interest which the defendant should be charged in respect of the period after the date of repayment mentioned in the contract. We have had certain cases mentioned to us in some of which 6 per cent. interest was allowed, in some of which 12 per cent. was allowed, and in some of which 25 per cent. was allowed. Having regard to all the circumstances of this case, I am of opinion that 12 per cent. would

be a reasonable rate of interest to be allowed from the date of repayment mentioned in the contract down to the date on which the suit was instituted: and, then from the date of the institution of the suit at the rate of 6 per cent. per annum until realisation.

Inasmuch as the plaintiff succeeded to some extent but has not succeeded to the full extent for which he contended, I think the fairest thing as regards costs in this appeal is to make each party pay their own costs of this hearing.

This judgment disposes of both the appeals (Nos. 52 and 55), and we direct that each party do pay their own costs of this hearing in Appeal No. 55 also.

CHATTERJEA, J.—I agree.

*Suit partly decreed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1666 OF 1914.

September 21, 1916.

*Present*:—Mr. Justice Spencer and Mr. Justice Krishnan.

KOVVURI THIRUPATHI RAJU—PLAINTIFF—APPELLANT

*versus*

KOVVURI VENKATARAJU, MINOR BY HIS MOTHER AND GUARDIAN SANYASAMMA AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 44, 144—Joint Hindu family—Alienation by manager of minor co-parcener's property, describing himself as minor's guardian—Suit for possession after majority, nature of—Guardian and ward—Limitation.*

Article 44, Schedule I, of the Limitation Act applies to cases in which a person acts as a guardian of a minor in respect of property in which he has individual rights of ownership.

A suit by a member of a joint Hindu family for possession of property alienated by the manager during the plaintiff's minority describing himself as the guardian of the minor, is not a suit to set aside a sale by a guardian to which Article 44 of the Limitation Act applies, but is one for possession of immoveable property within the meaning of Article 144.

*Radhu Ram* v. *Mohan Singh*, 29 Ind. Cas. 199; 84 P. L. R. 1915; 96 P. W. R. 1915, followed.

*Sivavadevelu Pillay* v. *Ponnammal*, 15 Ind. Cas. 365; 22 M. L. J. 404; 11 M. L. T. 198; (1912) M. W. N. 383, distinguished.

Second appeal against the decree of the District Court, Vizagapatam, in Appeal Suit No. 186 of 1913, preferred against that of the District Munsif's Court, Chodavaram, in Original Suit No. 918 of 1911.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General), for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—We are of opinion that Article 44 of the Limitation Act 1877 cannot properly be applied to this case.

No doubt in the sale-deed the plaintiff's brother is described as the guardian of the minor as well as his senior brother, but the family was admittedly an undivided one, and it is a well-established principle of law that in an undivided family no guardian can be appointed for a minor co-parcener who has no separate property [see *Gharibullah* v. *Khalak Singh* (1) and *Bindaji* v. *Mathuratai* (2).]

The case reported as *Sivavadevelu Pillay* v. *Ponnammal* (3) was one in which the minor's guardian was his mother and no question of co-parcenary property was raised. The transaction evidenced by the sale-deed, Exhibit I, was essentially one of sale by the managing member of a joint Hindu family. Article 44 may apply to cases in which a person acts as a guardian of a minor in respect of property in which he has individual rights of ownership.

The view that we take coincides with the view taken in a similar case, *Radhu Ram* v. *Mohan Singh* (4), and we adopt the reasoning of the learned Judges who decided that case. Under Article 144 of the Limitation Act we think that the plaintiff had 12 years' time to sue for possession. We, therefore, allow the appeal and remand the case to the lower Appellate Court for decision according to law of the other issues arising in the case. Costs in this Court and in the lower Appellate Court will abide and follow the result.

*Appeal allowed; Case remanded.*

V.R.P.

(1) 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.).

(2) 30 B. 152; 7 Bom. L. R. 809.

(3) 15 Ind. Cas. 365; 22 M. L. J. 404; 11 M. L. T. 198; (1912) M. W. N. 383.

(4) 29 Ind. Cas. 199; 84 P. L. R. 1915; 96 P. W. R. 1915.

SATIS CHANDRA BASU *v.* NITTYA GOPAL HALDAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1691 OF 1913.

April 19, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

SATIS CHANDRA BASU AND OTHERS—DEFENDANTS NOS. 1, 2, 3 AND 5—APPELLANTS

*versus*

NITTYA GOPAL HALDAR AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), Sch. III, Art. 3, applicability of—Dispossession by landlord as such, whether necessary—Limitation.*

In order that the special rule of limitation as comprised in Article 3 of Schedule III of the Bengal Tenancy Act may apply, it is not necessary that the dispossession must be by the landlord as such. [p. 420, col. 1.]

A suit by a *ryot* to recover possession of a holding, from which he was dispossessed by the defendants with whom it was settled by the landlords after they had purchased it in execution of a decree, is governed by Article 3, Schedule III, of the Bengal Tenancy Act. [p. 420, col 1.]

Appeal against the decree of the Additional District Judge, 24-Pergannahs, dated the 15th March 1913, affirming that of the Munsif, Diamond Harbour, dated the 13th December 1911.

Babu *Ramchandra Mojumdar* (with him Babu *Panchanan Ghose* for Babu *Chandra Sekhar Banerji*), for the Appellants.—The only question for which your Lordships' decision is invited in this case is the point of limitation, whether in the present case Article 3 of Schedule III of the Bengal Tenancy Act applies or whether the ordinary rule of twelve years applies. I submit that the special limitation of two years is clearly applicable here and as such the suit is not maintainable. The lower Appellate Court has erred in law in thinking that Article 3 of Schedule III of the Bengal Tenancy Act is no bar to the present suit. The appellants, in order to invoke the aid of Article 3, Schedule III, are not required to show that dispossession was by the landlords *as such*. Refers to the judgment of Fletcher and Teunon, JJ., in *Fani Bhusan Sarkar* v. *Pulin Chandra Mandal* (1), where Fletcher, J., held that nothing warrants the addition of such words as 'by the landlords as such' after the wording in the 3rd column of Article 3 of Schedule III of the Bengal Tenancy Act. Refers to *Rudra Narain Maity Natabar Jana* (2).

Babu *Sashi Sikhar Bose* (with him Babu *Biraj Mohan Mozumdar*), for the Respondents.—In your Lordships' judgment in *Fani Bhusan Sarkar* v. *Pulin Chandra Mandal* (1), it is said that there was an ouster by the landlord and so the special law of limitation of two years applied. In *Rudra Narain Maity* v. *Natabar Jana* (2) the tenant was ousted by a purchaser at the instance of the landlord. So the 2 years' limitation applied. In *Basanta Kumari* v. *Nanda Ram* (3) ouster was not by the landlord. The judgment in *Kamal Dhari Thakur* v. *Rameshwar Singh* (4) considers all the other cases on the point. In the present case Article 3 of Schedule III of the Bengal Tenancy Act cannot be applied and so the appeal cannot succeed.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 1, 2, 3 and 5 from a decision of the learned Additional District Judge of the 24-Pergannahs, dated the 15th March 1913, affirming a decision of the Munsif at Diamond Harbour. The only question raised in this appeal is the question of limitation and that is whether Article 3 of Schedule III of the Bengal Tenancy Act applies to this case or whether the ordinary rate of twelve years applies. The father of the defendants Nos. 1 and 2 was the landlord of the plaintiffs and the *pro forma* defendants. He obtained in the first instance, in the year 1899, an *ex parte* decree for rent. That was set aside and the case was tried on the merits and a new decree was passed. In execution of that decree the property was put up to sale and purchased by the landlord and possession was delivered in the year 1904. Then the landlord settled some of the lands with the present tenants, the defendants Nos. 3, 4 and 5. The plaintiffs brought their suit for possession of a 13-anna share of the property, alleging that the dispossession took place in 1909. The only question that has been argued in this appeal

(1) 5 Ind. Cas. 838.

(2) 21 Ind. Cas. 431; 18 C. W. N. 353; 18 C. L. J. 89; 41 C. 52.

(3) 20 Ind. Cas. 350; 17 C. W. N. 1149; 18 C. L. J. 86.

(4) 19 Ind. Cas. 545; 17 C. W. N. 817.

is whether the special rule of limitation applies to a case of this nature or whether, as some of the cases say, the dispossession, in order that the special rule of limitation comprised in Article 3 of Schedule III may apply, must be by the landlord *as such*. The decisions are not all one way. There are conflicting decisions on this point. The latest decision is one of my own which is in favour of the appellants and, in the view that the matter is one on which different Courts have come to different conclusions, I think my own decision in which Mr. Justice Teunon concurred is, with all due respect, as much likely to be right as the others. The words "as such" do not appear in the Article and it is admitted that the special rule of limitation, which was passed apparently for the reason that disputes between landlord and tenant as to ouster should be settled and determined within the shorter period fixed by the Legislature rather than the longer period of twelve years, is considerably cut into by the addition of words in the Article such as the words "when the landlord dispossesses as such." There are no such words in the Article and I do not see why the Article should be limited or the generality of the language used therein cut down because it may be a hard case on the tenant. These holdings are of small value as a rule and it is essential that disputes of this nature should be decided within the shorter period mentioned in the Article. I see no reason to dissent from the judgment that I delivered in *Fani Bhusan Sarkar* v. *Pulin Chandra Mandal* (1). That being so, I do not agree in the view of the learned Additional District Judge. The learned Munsif came to this finding. That assuming that the special rule of limitation contained in Article 3 of Schedule III of the Bengal Tenancy Act applied, he was of opinion that the evidence did not show that the dispossession took place in 1312 as alleged by the defendants and, therefore, the plaintiffs' suit, in any event, was brought within time. The learned Additional District Judge made no finding in this respect. The case must, therefore, go back to the lower Appellate Court for the purpose of making a finding as to whether the suit was brought within time, having regard to the fact that, in our opinion, the special rule of limitation does apply, and then to pass a decree according to law. Costs will abide the result.

NEWBOULD, J.—I agree.

*Case remanded.*

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## ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 129 OF 1916.

October 24, 1916.

*Present*:—Mr. Justice Walsh and Mr. Justice Stuart.

CHAMPA LAL—APPLICANT

*versus*

MANGAL CHAND ANOTHER—OPPOSITE PARTIES.

*Adverse possession, whether question of law—Burden of proof—Limitation Act (IX of 1908), Sch. I, Art.* 142 *—Possession, suit for—Limitation.*

A question of adverse possession may be a question of law where the facts are not in dispute and where the conclusion depends upon inferences to be drawn from admitted facts. [p. 420, col. 2.]

A plaintiff in a suit for possession has to show title and where it is alleged that he is out of possession, he must show affirmatively that he has been in possession within twelve years of the suit. [p. 420, col. 2.]

Miscellaneous reference made by the Additional District Judge, Ajmer-Merwara, dated the 1st February 1916.

Mr. *E. A. Howard*, for the Petitioner.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.—The first point we have to decide is whether in this case before us there is a question of law. It was decided as such on appeal in Ajmer and was referred to us as such. It is well settled that a question of adverse possession, where the facts are not in dispute and where, therefore, it depends upon inferences to be darwn from admitted facts, may be a conclusion of law. We think that is the condition of things before us. *Secondly*, it has been urged by Mr. Panna Lal with great force that the onus is on the plaintiff. We agree. A plaintiff has to show title and where it is alleged that he is out of possession, he must show affirmatively that he has been in possession within twelve years of the suit. But possession may be ambiguous. Nothing shows that better than the case to which my brother called attention, decided by the Privy Council and reported as *Corea* v. *Appuhamy* (1). In that case there

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 536.

was no dispute about the facts. The only question in the first Court was whether the person in possession had taken possession as heir or as a squatter. The Privy Council held on the facts that he had come into possession in the only capacity he could lawfully come into possession as one of several co-owners, and they held as a matter of law that nothing having happened to change his position, his possession never became adverse. Applying that principle to the facts of this case, so far as they are known, it seems to us that the right conclusion is that Mangal at any rate from and after 1903 was in possession either as tenant or as agent or as licensee of his uncle Jai Lal, and that his possession was, therefore, permissive. At any rate the factsare such as to throw the onus upon the present defendant to satisfy the Court that the possession was adverse. The authorities which Mr. Panna Lal has referred to only deal with the question of onus, which may be shifted by evidence. Such evidence may lead either to a contrary conclusion or leave the facts ambiguous. Neither party here was in a position to prove how Mangal originally came into possession of this upper storey, but it is perfectly clear that when he was in possession he was a member of a joint family and, therefore, as a matter of law he could not be in adverse possession at that time. A partition took place in 1894 when his father had his share partitioned and the property in question remained the joint property of the other two brothers. So that neither Mangal nor his father had any interset in it. Nonetheless he was allowed to remain in possession. In 1895 another partition took place and the property in question was then partitioned and given to Jai Lal. Nonetheless Mangal remained still in possession. We think this fact alone, namely, the quick succession of parties and the continuance of possession in Mangal is in itself significant and rather raises the inference that he was allowed to continue after the partition, as he had been before the partition, in possession without interference by the other members of the family, but two things happened in 1903 which in the absence of any explanation to the contrary to our mind raise a very strong presumption. A certain person Kistur Chand, who was called as a witness, took a mortgage of this very property from Jai Lal in 1903 as he said. He knew the relationship of the parties and as we read his evidence he went out of his way, knowing that Mangal was in possession and that Jai Lal was purporting to deal with the property, to take what he called a rent-note from Jai Lal because he said he was Mangal's uncle. It seems to us not improbable that Mangal knew all about this transaction and of course if he did, it was an arrangement to which he was a party and which is wholly inconsistent with his present contention; but whether he did or not know precisely of this particular transaction it is to our minds sufficient, if unexplained, to show that at that time Mangal was in possession for and on behalf of his uncle Jai Lal who was looking after the property. The other point is that Jai Lal did not live there but lived far away while Mangal had always done so, and nothing is more natural in a joint family of this kind than that the uncle should allow the nephew to continue as he had done while the property was still joint. It is not suggested that since 1903 Mangal has done anything at all to show what is called adverse possession. We hold taking all these circumstances together that they are sufficient to justify the conclusion that Mangal was in possession, first, as a memeber of the joint family and after partition, for and on behalf of Jai Lal and not independently of him. The first Court set out the law perfectly correctly, but it overlooked the fact that the expression adopted in the judgment from the authority which was being quoted, namely, "the character of an agent", applied to the facts of this particular case. The Additional District Judge held that there was nothing on the record to show that the possession was permissive. That is where we differ from him, we think there is just enough and it is to be observed that the presumption as against Chatar Bhuj who sold this property, that the possession was always premissive, is in his case the only possible presumption consistent with his being an honest man. We do not think it well to answer the question in the precise terms of the reference, as it is submitted somewhat

in the abstract. We do not hold that when the parties are cousins the presumption of permission always arises, but we hold that on the facts of this particular case, there being nothing to show that respondent No. 1 ever exerted his possession adversely, the possession as a matter of inference justified by the evidence was with the permission first of the joint family and subsequently with the permission of Jai Lal. The question is, therefore, answered in favour of the purchaser. We think, therefore, that the appeal to the Court, from which the reference was made, should be allowed with costs, which under section 20 of Regulation No. 1 of 1877 will include the costs of this reference. We think the costs certified are reasonable.

*Appeal allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 291 OF 1914.

August 18, 1916.

*Present*:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Jusice Cuming.

ABU HAMID ZAHIR ALA—PLAINTIFF—APPELLANT

*versus*

GOLAM SARWAR—DEFENDANT—RESPONDENT.

*Arbitration—Arbitrators, absence of some, from meetings, effect of—Award, validity of.*

Inasmuch as the parties to a submission to arbiration have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made. The operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award; even where less than the whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. [p. 423, col. 2; p. 424, col. 1.]

*Nand Ram* v. *Fakir Chand*, 7 A. 523; A. W. N. (1885) 139; 4 Ind. Dec. (N. S.) 539; *Dalling* v. *Matchett*, (1740) Wiles. 215; 125 E. R. 1138; *Pering and Keymer, In the matter of*, (1835), 3 Ad. & E. 245; 111 E. R. 406; 42 R. R. 376, relied upon.

*Kazee Syud Naser Ali* v. *Musammat Tinoo Dossia*, 6 W. R. 95, distinguished.

Appeal against the decision of the Subordinate Judge of 24-Pergannahs, dated the 23rd May 1914.

Babus *Mahendra Nath Ray* and *Satis Chunder Mukherjee*, for the Appellant.

Babu *Kishindra Nath Sarkar*, for the Respondent.

JUDGMENT.—We are invited in this appeal to consider the propriety of an order of dismissal of an application under paragraph 17 of the Second Schedule to the Civil Procedure Code, 1908, for the enforcement of a private award. The relevant portion of the agreement of reference was in these terms:—

"Considering it desirable to decide the matters in dispute by arbitrators and so appointing the above-mentioned gentlemen as arbitrators, we execute this deed of reference and agree that the award, which all the arbitrators unanimously or the majority of the arbitrators will make, will be accepted as a decree of a superior Court and will have force and be valid at all places. In case of difference of opinion among the arbitrators, the majority of them will make and be competent to make their award unanimously. To that no objection by any of us will be entertained nor shall we be competent to make any." Under this instrument, five gentlemen were appointed arbitrators, three of whom alone signed the award. The application with which we are now concerned was made for the enforcement of this award. The defendant objected that there was no valid award in law because two of the arbitrators had not attended all the sittings and one at least did not take part in the final deliberations. The plaintiff contended that inasmuch as three arbitrators who had made the award had attended all the meetings, and as a majority of the arbitrators was competent to make a valid award, the award was legal and enforceable. The Subordinate Judge has overruled these contentions on the ground that all the arbitrators should be present at all the meetings and particularly at the last when the final act of arbitration is done, though as a result of this united deliberation there may be an award by a majority only of them. In our opinion, the view taken by the Subordinate Judge is correct.

It is now firmly se tled, as ruled in *Nand Ram* v. *Fakir Chand* (1), that when a case has been referred to arbitration, the presence of all the

(1) 7 A. 523; A. W. N. (1885) 139; 4 Ind. Dec. (N. S.) 539.

arbitrators at all the meetings and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. There the case had been referred by the Court to the arbitration of three persons and the parties had agreed to be bound as to the matters in dispute by the decision of the majority. One of the arbitrators subsequently refused to act and withdrew from the arbitration. Oldfield and Mahmood, JJ., held that the award of the majority was not binding. A similar view was taken in *Sreenath Ghose* v. *Raj Chunder Paul* (2). Our attention, however, has been drawn to the earlier decision in *Kazee Syud Naser Ali* v. *Musammat Tinoo Dossia* (3) as an authority for the contrary position. We are of opinion that this case is clearly distingishable, and is an authority only for the proposition that an award of arbitrators cannot be set aside on the ground that it is erroneous for that only two out of three arbitrators signed the award when the parties agreed to abide by the decision of the majority. There is nothing to indicate that the arbitrator who did not sign the award had not taken part in the deliberations. The principle which underlies the view we take is best stated in the words of Russell, which have now became classical, quoted as they were with approval in *In re Beck and Jackson* (4) and *Khelut Chunder Ghose* v. *Tarachurn Koondoo* (5): "As the arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges, so that by conference they shall mutually assist each other in arriving at a just decision." The same point of view had been emphasised in *Dalling* v. *Matchett* (6), where the Court of Common Pleas observed as follows:—"It has often been said that if that one had been present," that is, the arbitrator who did not attend, "he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always received this answer that every one has a right to argue and debate as well as to give his vote and it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion." The matter was put substantially in the same way in *Pering and Keymer, In the matter of* (7). Lord Denman observed: "Any two, under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after discussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him." Coleridge, J., added: "The parties have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted." This view accords with that adopted in *Peterson* v. *Ayre* (8); *White* v. *Sharp* (9); *Templeman, In re* (10); *Burton* v. *Knight* (11); *Morgan* v. *Bolt* (12) and *Doberor* v. *Morgan* (13).

We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award; even where less than the

(2) 8 W. R. 171.
(3) 6 W. R. 95.
(4) (1857) 1 C. B. (N. S.) 695; 140 E. R. 286; 107 R. R. 861.
(5) 6 W. R. 269 at p. 272.
(6) (1740) Wiles 215; 125 E. R. 1138.
(7) (1835) 3 Ad. & E. 245; 111 E. R. 406; 42 R. R. 376.
(8) (1854) 14 C. B. 665; 2 C. L. R. 722; 23 L. J. C. P. 129; 2 W. R. 373; 139 E. R. 273; 23 L. T. (o. s.) 67; 98 R. R. 805.
(9) (1844) 1 Car & K. 348; 12 M. & W. 712; 1 D. & L. 1039; 13 L. J. Ex. 215; 8 Jur. 344; 152 E R. 1385.
(10) (1842) 9 D. P. C. 962; 6 Jur. 324.
(11) (1705) 1 Eq. Ca. Abr. 50; 21 E. R. 893.
(12) (1863) 7 L. T. 671; 11 W. R. 235.
(13) (1903) 34 Can. Sup. Ct. 125.

whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. The inference follows that in the present case there is no valid award.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold *mohurs*.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 588 OF 1916.

April 14, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAMJI LAL—DECREE-HOLDER—APPELLANT

*versus*

KARAN SINGH AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Instalment decree—Default—Application for final decree, nature of—Limitation Act (IX of 1908), Sch. I, Art. 181.*

Under the Civil Procedure Code, 1908, an application for a final decree is not an application in execution. [p. 425, col. 1.]

In a suit on a mortgage a compromise was effected by which the defendant was required to pay the money by certain instalments and in default of payment of any one instalment the property was to be sold for the full amount of the claim. On default being made, the decree-holder applied under Order XXXIV, rule 5, of the Civil Procedure Code, for a final decree. The application was dismissed on the ground that the decree was barred by time:

*Held*, that Article 181 of Schedule I of the Limitation Act applied to the case and that time began to run from the date when default was made. [p. 425, col. 1.]

Second appeal against the decision of the Subordinate Judge, Meerut, dated the 6th January 1916.

FACTS of the case appear from the judgment.

Mr. *Radha Kanta Malaviya*, for the Appellant.—A compromise was effected in a mortgage suit. The mortgagor agreed to pay the amount of the mortgage by instalments. It was also agreed that if any default was made in the payment of instalments the decree-holder shall be entitled to get the property sold. Certain instalments have been paid. The first default was made on the 2nd of February 1915. The decree-holder then applied for a final decree. The Courts below dismissed the application as barred by time. The application is not an application in execution, but is for obtaining a final decree and the applicant is entitled to obtain a final decree if he comes within time of the first default. The case is governed by Article 181 of Schedule I of the Limitation Act.

Mr. *Lakshmi Narayan*, for the Respondents.—The payment of the instalments having not been certified as provided by Order XXI, rule 2, of the Civil Procedure Code, 1908, the Court could not recognize the payments. The application is clearly three years after the date of the decree and as such is barred by time. The case of *Chhattar Singh* v. *Amir Singh* (1) clearly covers the case.

Mr. *Radha Kanta Malaviya* was not called upon.

JUDGMENT.—This appeal arises out of a suit which was originally instituted upon foot of a mortgage. The suit resulted in a compromise decree, which provided that the defendants should pay Rs. 600 by certain instalments therein mentioned and that in default of any one of the instalments the property should be sold for the full amount of the claim and costs. It is alleged (and we may assume for the purposes of this appeal) that the judgment-debtors paid several of the instalments. According to the decree-holder default was first of all made on the 2nd of February 1915. Such default having been made, the present application was preferred for a final decree under Order XXXIV, rule 5. The Court below has dismissed the application as being barred by time. The Court relying on a decision of this Court [affirmed by the decision reported as *Chhattar Singh* v. *Amir Singh* (1)], has dismissed the application as barred by time. The case referred to was a case of a simple money decree and the application was for execution. Order XXI, rule 2, clause 3, provides that any payment or adjustment which has not been certified in the prescribed manner shall not be recognised by any Court executing the decree. The application in the present case was not an application for execution of the decree. Under the present Code an application for a final decree is not

(1) 32 Ind. Cas. 590; 14 A. L. J. 132; 38 A. 204.

an application in execution. The case cited, therefore, has no application. The Court below seems to have applied Article 182 of the Schedule to the Limitation Act. The proper Article in our opinion is Article 181 and limitation should run from the time when default was made. It will be for the Court below to ascertain when default was made, if at all. We must allow the appeal, set aside the decisions of both the Courts below and remand the case to the Court of First Instance through the Lower Appellate Court, with directions to re-admit the application under its original number in the file and proceed to hear and determine the same according to law. Costs will be costs in the cause. Costs in this Court will include fees on the higher scale.

*Appeal allowed; Case remanded.*

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 595 OF 1915.

January 23, 1917.

*Present*:—Mr. Batten, A. J. C.

SALAMSINGH AND OTHERS—DEFENDANTS —APPELLANTS

*versus*

HIRA—PLAINTIFF—RESPONDENT.

*Limitation Act* (*IX of* 1908), *ss.* 12, 5—*Time requisite for obtaining copies—Application on day of delivery of judgment—Exclusion of day twice over, whether permissible*—Bona fide *mistake.*

Where copies of a decree and judgment are applied for on the same day on which judgment is pronounced, the appellant is entitled to exclude that day from the period of limitation only once, as the day on which judgment is pronounced.

The period of limitation, with reference to the provision as regards time for obtaining copies, means the period of limitation beginning to run from the day after the delivery of judgment, and, therefore, no portion of time previous to this period can be deducted as time requisite for obtaining copies.

If a man chooses to adopt his own methods of calculation and files his appeal on the last possible day according to that method, he has only himself to thank if his method of calculation is erroneous.

**Appeal against the decree of the District Judge, Nimar, dated the 8th July 1915, confirming that of the Additional Judge to the Court of the Subordinate Judge, Khandwa, dated the 12th March 1915.**

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *C. B. Parakh*, for the Respondent.

JUDGMENT.—This appeal is only in time if the appellant can, in computing the period of limitation, exclude from the period the same day twice. Judgment was delivered on the 8th July and copies of judgment and decree were applied for on the same day. Copies were delivered on the 21st July. The fourteen days from the 8th to the 21st inclusive being deducted from the time taken by the appellant before he lodged his appeal, the appeal is time barred. The appellant wishes to deduct the 8th July twice over with reference to the provisions of section 12 of the Limitation Act. It would be manifestly absurd to deduct the same day twice, but I prefer to state the matter in a more logical manner. Section 12 (2) provides that the period of limitation shall not begin to run until the day after judgment is pronounced. The period of limitation, with reference to the provision as regards time for obtaining copy, means the period of limitation beginning to run from the day after the delivery of judgment. So much of this period as is taken up in obtaining copy may be deducted, but no portion of time previous to this period can be deducted. The period of limitation referred to in the section is the actual period beginning on a certain date, not an abstract number of days. One day cannot last more than one day, and be the equivalent of two. The learned Advocate for the appellant urges that the appellant made a *bona fide* mistake. If a man chooses to adopt his own methods of calculation and files his appeal on the last possible day according to that method, he has only himself to thank if his method of calculation is erroneous. He should not run things so fine. The appeal is dismissed with costs as time-barred.

*Appeal dismissed.*

## PATNA HIGH COURT.

MISCELLANEOUS APPEALS NOS. 253 AND 269 OF 1916.

April 17, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

*Munshi* ABDUR RAZZAK—DEFENDANT—APPELLANT

*versus*

*Rai Bahadur* BAIJNATH GOENKA—PLAINTIFF—RESPONDENT.

*Landlord and tenant—Purchaser at revenue sale—Sale set aside—Purchaser, right of, to recover rent.*

A purchaser of an *ijmali* share of an estate at a revenue sale, which is subsequently set aside at the instance of the original proprietors, is nevertheless entitled to realise rents from the tenants until the recovery of actual possession by the decree-holders.

Miscellaneous appeals from a decision of the District Judge, Monghyr, dated the 30th May 1916, reversing that of the Munsif, Jamui, dated the 23rd June 1915.

Syed *Muhammad Tahir*, for the Appellant.

Mr. *Naresh Chandra Sinha*, for the Respondent.

### JUDGMENT.

CHAPMAN, J.—These appeals arise out of suits for rent. The tenants' defence was that the plaintiff had no title. The plaintiff had purchased an *ijmali* share of an estate at a revenue sale in September 1901. The original proprietors brought a suit to set aside the sale at which the plaintiff had purchased. The suit succeeded in the first Court but was dismissed by the High Court in appeal. It finally succeeded on appeal to the Privy Council but although the original proprietors succeeded in their suit the finding is that they did not succeed in actually obtaining possession of this particular property. In these circumstances the learned District Judge held that until recovery of actual possession by the decree-holders, the plaintiff should continue to realise rents from the tenants. I am of opinion that this is the correct view to take.

It is contended in appeal before us, first, that the Privy Council having set aside the sale, the plaintiff ought not to be allowed to recover any rent. This contention does not appear to be valid. So long as the plaintiff remains in possession he should be entitled to continue to recover the rent, otherwise, as the learned District Judge points out, neither the plaintiff nor the



persons who have failed to recover possession can realise the rents.

Then it is contended that the learned District Judge should not have held that the plaintiff was still in possession. The finding is based upon an order of the Subordinate Judge in a suit subsequently instituted. This evidence appears to have been admitted in appeal without objection It was relevant evidence and in fact it was conclusive of the question whether the plaintiff was or was not in possession I am not disposed to interfere with the admission of this evidence in first appeal. The result is that these appeals are dismissed with costs.

JWALA PRASAD, J.—I concur.

*Appeals dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 477 OF 1915.

June 22, 1916.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

FULSUMMANNESSA BIBEE—DECREE-HOLDER—APPELLANT

*versus*

HALAMADDI MOLLA AND OTHERS—RESPONDENTS—JUDGMENT-DEBTORS.

*Civil Procedure Code (Act V of 1908), ss. 104 (2), 47, O. XXI, r. 90—Appeal, second, whether lies from appellate order setting aside sale—Fraud, antecedent to sale proclamation, allegation of.*

An order in first appeal setting aside an execution sale on the ground of fraudulent suppression of the sale proclamation and consequent inadequacy of price does not become open to second appeal, merely because the judgment-debtor impeached the sale not only on the ground of fraud in the publication of sale but also on the ground of fraud antecedent to the publication, and the Court of First Appeal held that the latter was not established. [p. 427, cols. 1 & 2.]

*Quære*.—Whether the decision of a question of fraud antecedent to the publication and conduct of an execution sale brings the case within the scope of section 47, Civil Procedure Code?

Appeal against the decision of the Subordinate Judge, Khulna, dated the 26th

August 1915, reversing that of the Munsif, Bagerhat, dated the 24th February, 1915.

Babu *Harendra Krishna Mukherjee*, for the Appellant.

JUDGMENT.—We are of opinion that this appeal is barred under sub-section 2 of section 104, Code of Civil Procedure. The appellant was the decree-holder in the Court below, and at his instance the property of the judgment-debtors was sold in execution on the 17th July 1912. On the 25th April 1914, the judgment-debtors applied to have the sale set aside, on the ground that it was vitiated by material irregularity and fraud in publication. But they also alleged fraud of a more comprehensive character, *viz.*, that the decree-holder had taken out execution, though his decree had been satisfied in full out of Court. The Trial Court dismissed the application. On appeal the Subordinate Judge held that the allegation that the decree had been satisfied in full was not established. He came to the conclusion, however, that the sale proclamation had been fraudulently suppressed, and that the property had been purchased by the decree-holder at a price much lower than its proper value. On these findings, the Subordinate Judge has set aside the sale under rules 90 and 92 of Order XXI of the Code. On the present appeal it is contended that the case falls beyond the scope of rule 90 of Order XXI and comes within the scope of section 47, in so far as the judgment-debtors impeached the sale on the ground of fraud antecedent to its publication and that, in this view, the order of the Subordinate Judge is a decree within the meaning of section 2 of the Code of Civil Procedure and is appealable as such. It is not necessary to determine, whether the decision of a question of fraud antecedent to the publication and conduct of sale, brings the case within the scope of section 47; for it is plain that in so far as fraud was imputed in connection with the publication of the sale, the case is covered completely by rule 90. The order of the Subordinate Judge, in so far as the case was within the scope of rule 90, was thus an order under that rule, and that rule alone. We cannot hold that by reason of an allegation of fraud of a more comprehensive scope, the character of the decision of the question within the scope of rule 90 was altered. The order of the Court of Frst Instance was thus open to appeal under Order XLIII, rule 1 (*j*), and the order passed in appeal was final under section 104(2) Consequently, the present appeal is incompetent in so far as the case is within the scope of rule 90. As the validity of the order cannot be assailed in second appeal, when regarded as an order based on the ground of fraud in the publication of the sale, it is immaterial to consider whether fraud of a wider scope imputed to the decree-holder has or has not been established: *cf. Jadab Chandra* v. *Joy Gopal* (1). The result is that this appeal is dismissed.

*Appeal dismissed.*

(1) 20 Ind. Cas. 191; 19 C. L. J. 81.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 139 OF 1916.

April 11, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

*Musammat* KAMER-UN-NISSA BIBI—DEFENDANT—APPELLANT

*versus*

*Musammat* SUGHRA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom, meaning of—Pre-emption—Single proprietor, acquiring entire village, effect of—Custom, whether continues to exist.*

Custom means a practice prevailing amongst a certain community and if that community has been reduced to a single individual, it is impossible that the practice can any longer exist. [p. 428, col. 2.]

Therefore, where once an entire village has come into the ownership of a single individual, that individual is entitled to dispose of his property to any one he pleases without its being subject to any right of pre-emption, unless the sale is made expressly subject to such right. [p. 428, col. 2.]

*Powell* v. *Powell*, First Appeal No. 302 of 1910, decided on the 22nd of March 1912, followed.

Second appeal against the decision of the District Judge, Ghazipur, dated the 14th September 1915

FACTS.—The appellant *Musammat* Kamer-un-nissa Bibi purchased on 16th May 1913 a 4 annas share in village Dhelwa from defendants 2nd party, who are respondents in this appeal. There were two other deeds of transfer between the parties but the questions of law involved in all those cases were the

same. *Musammat* Sughra Bibi, a co sharer in the village, brought three suits to pre-empt the properties transferred; but this report relates to the first sale-deed only, *viz.*, the one dated 16th May 1913. The plaintiff came into Court on the basis of custom as detailed in the *wajib-ul-araiz* of 1840 and 1881 and in the alternative on contract, if the entry in the *wajib-ul-arz* of 1881 be interpreted as a contract. Finally he fell back on the Muhammadan Law. The Court of First Instance dismissed the suit on the ground that there existed no custom of pre-emption in the village as in the year 1881. There was only one person as proprietor and thus the custom, if any, came to an end. It also held that there was no contract and that the demands required by Muhammadan Law had not been made. The plaintiff appealed to the District Judge, who allowed the appeal and held that the custom of pre-emption had been proved and the fact that in 1881 there was only one proprietor did not show that the right of pre-emption came to an end, but it only put an end to the exercise of that right. The defendant 1st party, thereupon, appealed to the High Court.

Sir *Sundar Lal* (with him Messrs. *Abdul Raoof*, *Mukhtar Ahmad and Kamlakant Verma*), for the Appellant, submitted that for the custom of pre-emption to exist there must be at least two persons; therefore, as soon as a single person became proprietor of the village, the custom, if any, ceased to exist. The view of the learned District Judge to the contrary was incorrect.

He referred to *Powell* v. *Powell*, First Appeal No. 302 of 1910, decided on the 22nd of March 1912.

Dr. *S. M. Sulaiman* (for Mr. *Iqbal Ahmad*), for the Respondent, submitted that during the time there was a single proprietor in the village, the custom of pre-emption was in abeyance; it did not disappear. The custom had now become enforceable as there were now more proprietors than one.

Dr. *Sundar Lal* was not called upon to reply.

JUDGMENT.—This appeal is connected with Second Appeals No. 140 and No 141 of 1916. They were all disposed of by one judgment. All three appeals arise out of pre-emption suits. The plaintiff in each case came into Court seeking to pre-empt certain property and relying both upon alleged village custom and Muhammadan Law. The Court of First Instance in each case dismissed the suit. The Lower Appellate Court reversed the decree of the Court of First Instance. That Court has held that there is an existing custom of pre-emption under which the plaintiff is entitled to get possession of the property upon payment of the price found to have been paid by the defendant vendee. The Court below, having decided that the custom of pre-emption existed, felt it unnecessary to consider whether the formalities required by Muhammadan Law had been complied with. We may assume for the purposes of the present appeal that some time prior to the year 1881 there was a custom of pre-emption prevailing which was recorded in the *wajib-ul-arz* of 1840. We find, however, that some time prior to 1881 (and in the year 1881) the *mahal* was the property of a single proprietor. It seems to us quite impossible that there could be a custom of pre-emption in existence when the property belonged to a single individual. The Lower Appellate Court seems to have thought that it was merely the right to exercise the power that was in abeyance. We do not think that this view can be accepted. "Custom" means a practice prevailing amongst a certain community. If that community has been reduced to a single individual, it is impossible that the practice can any longer exist. It seems to us equally clear that once the property had come into the ownership of a single individual, that individual was entitled to dispose of his property to any one he pleased without its being subject to any right of pre-emption (unless the sale was made expressly subject to such right). We have already decided this same question in another case. See First Appeal No. 302 of 1910, decided on the 22nd of March 1912, *Powell* v. *Powell*. In our opinion the Court below was wrong in holding that a custom of pre emption existed at the time of the sale in question. No doubt a custom might grow up again in the course of time, but there is no evidence to justify any such finding in the present case and this is not the finding of the Court below. Nor can it be said that a contract between the co-sharers has been proved. In 1881 (when the latest record of pre-emption was made) the property was, as already stated, in the hands of a single proprietor. The fact that there is such a record appearing in the *wajib-ul-arz* of a *mahal* in

the hands of a single proprietor is another instance that the entry in the *wajib-ul-arz* is not always trustworthy. Before finally deciding the appeal we must refer the second issue to the Court below, namely, whether the formalities required by the Muhammadan Law were performed by the plaintiff pre-emptor. This issue will be deemed to be taken in all three cases and the Court will decide the issue upon the evidence already on the record. The case will be put up on return of the finding before any Bench of two Judges.

*Appeal allowed; Case remanded.*

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MADRAS HIGH COURT.

**FULL BENCH.**

APPEAL AGAINST ORDER No. 279 OF 1915.

January 16, 1917.

*Present*:—Sir John Wallis, KT., Chief Justice,
Mr. Justice Abdur Rahim and
Mr. Justice Srinivasa Aiyangar.

T. RANGAYYA REDDY – DEFENDANT No. 2—APPELLANT

*versus*

V. R. SUBRAMANYA AIYAR AND OTHERS —PLAINTIFFS AND DEFENDANTS NOS. 1, 3 AND 5 —RESPONDENTS.

*Vendor and purchaser—Contract for sale of land by Hindu co-parcener – Suit for specific performance, partition and possession against all co-parceners, maintainability of—Misjoinder of parties—Specific Relief Act (I of 1877), ss. 19, 27—Civil Procedure Code (Act V of 1908), O. I, rr. 3, 5, O. II, rr. 3, 4, O. VI, rr. 16, 17, O. VII, r. 11—Amendment of plaint—Transfer of Property Act (IV of 1882), ss. 54, 55—Alienee of specified properties of joint family, position of.*

*By Full Bench* (per *Wallis, C. J., and Srinivasa Aiyangar, J., Abdur Rahim, J.*, dissenting).—The relief of partition and possession cannot be claimed by the vendee in one suit as well as execution of a sale-deed as against persons not parties to the contract of sale. [p. 441, col. 2.]

*Tasker* v. *Small*, (1837) 3 My. & Cr. 63; 6 Sim. 625; 5 L. J. Ch. 321; 40 E. R. 848; 45 R. R. 212; *De Hoghton* v *Money*, (1867) 2 Ch. 164; 15 L. T. 403; 15 W. R. 214; *Wood* v. *White*, (1839) 4 My. & Cr. 460; 2 Keen. 654; 7 L. J. Ch. (N. S.) 203; 8 L. J. Ch. (N. S.) 209; 3 Jur. 117; 41 E. R. 178; 48 R. R. 152; *Chadwick* v. *Maden*, (1851) 9 Hare 188; 21 L. J. Ch. 876; 68 E. R. 469; 89 R. R. 391; *West Midland Railway Company* v. *Nixon*, (1863) 1 H. & M. 176; 71 E. R. 77; 136 R. R. 79, followed.

*Bishop of Winchester* v. *Mid-Hants Railway Co*, (1868) 5 Eq. 17; 37; L. J. Ch. 64; 17 L. T. 161; 16 W. R. 72, distinguished.

Per *Wallis, C. J.*—All that the illustration to clause (*c*) of section 27 of the Specific Relief Act shows is, that if one of several joint tenants contracts, as he is entitled to do, to sell his share and dies before performing his contract, specific performance of that contract may be enforced against the other joint-tenants. The section and the illustration have no bearing on the question whether persons who are strangers to the contract and against whom it cannot be specifically enforced can be properly joined as defendants and partition claimed against them as co-parceners of the vendor. [p. 437, col. 1.]

In a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share against them. [p. 436, col. 1.]

The joinder of strangers, not parties to the contract, in such a suit would amount to misjoinder. [p. 437, col. 1.]

Per *Srinivasa Aiyangar, J.*—The right of the buyer in enforcing a contract for the sale of immoveable property is a right *in personam* against the vendor and arises out of the contract for sale, and is different from the title or the right of property which the purchaser obtains on the execution of the conveyance which enables him to sue in ejectment all persons in possession, including his own vendor. The fact that a buyer, when suing for specific performance of a contract of sale, does not seek recovery of possession would not prevent him from seeking that relief on his title which gives him another cause of action. It is doubtful whether the obligation under the contract of sale to give possession is one which is capable of being specifically enforced, and whether the proper relief is not damages for breach of the contract to give possession till execution of the conveyance, after which date the purchaser would be entitled to mesne profits from the person in possession, whether such person is the vendor or a stranger without title. [p. 440, col. 2; p. 441, col. 1.]

*Quære.*—Whether a suit for possession based on the obligation under a contract of sale can be brought against a subsequent purchaser with notice of the contract who has obtained possession as such purchaser.

If there is an existing cause of action for partition on the date of the institution of a suit for specific performance, the question whether the two causes of action, one for specific performance and the other for partition and possession, can be joined in one suit, would depend not only on the provisions of Order I, rules 3 and 5, Civil Procedure Code, which primarily regulate the joinder of parties, but also of Order II, rules 3 and 4, which provide for joinder of causes of action. [p. 442, col. 1.]

Per *Abdur Rahim, J.*—A purchaser from a co-parcener can enforce specific performance of his contract against the other co-parceners and in a suit for the said relief, the joinder of a prayer for possession or partition is permissible under section 27 of the Specific Relief Act and Order I, rule 3, Civil Procedure Code. [p. 437, col. 2; p. 439, col. 2.]

Under rule 3 of Order I it is sufficient if the right to relief exists in respect of or *arises out* of the same transaction or series of transactions, subject only to the condition that there be any common question of law

RANGAYYA REDDY v. SUBRAMANYA AIYAR.

or fact to be decided. It does not matter whether there are more than one and technically different causes of action, or the liabilities of the several defendants are different, nor is it necessary that every defendant should be interested in all the reliefs claimed in the suit. [p. 438, col. 1.]

The right to possession arises out of the contract of sale so as to be covered by the words of Order I, rule 3, Civil Procedure Code. The fact that by virtue of section 54 of the Transfer of Property Act, no interest in immoveable property is acquired by the contract does not affect the question. It is sufficient for the plaintiff to say that by the contract he obtained the right to acquire the property with the aid of the Court, the execution of a registered conveyance and delivery of possession being the means by which the right is to be enforced. [p. 439, col. 1.]

Nor does it make any difference that the right to possession is contingent on the plaintiff establishing his right to the execution of a proper conveyance by the defendant. [p. 439, col. 1.]

*By the Division Bench* (per *Oldfield and Sadasiva Aiyar, JJ.*)—Though an alienee of specific portions of joint family property does not, as of right, acquire any interest in it, his conveyance enables him to demand a partition of the family property and entitles him either to the specified property, if that can equitably be assigned to his vendor's share, or to its equivalent from such other property as that share may include. [p. 432, col. 2.]

The suit should not, in any event, be dismissed for joinder of prayers for possession and partition along with the relief for execution of a conveyance. The plaint should be allowed to be amended by deleting the prayers for possession and partition, and if not so amended, the Court should dismiss the suit so far as regards the objectionable prayers and dispose of it in so far as it relates to specific performance. [p. 432, col. 2; p. 433, col. 1; p. 434, col. 2; p. 435, col. 1.]

Appeal against the order of the District Court of North Arcot, in Appeal Suit No. 388 of 1914, preferred against the decree of the Court of the Subordinate Judge of North Arcot, in Original Suit No. 73 of 1913.

This civil miscellaneous appeal and the memorandum of cross-objections put in by the 1st and 2nd respondents coming on for hearing on the 9th and 11th August 1916, and having stood over for consideration till the 29th August 1916, the Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

## ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—Plaintiffs claim in this suit, first, specific performance of a contract by 1st defendant to sell and secondly, as consequential relief, possession of the property sold by means of a partition, to which 1st to 5th defendants, the members of the joint family it belonged to at the date of the contract, will be necessary parties. The main question argued is whether this constitutes misjoinder. The Subordinate Judge held that it did gave plaintiffs an opportunity to withdraw their consequential claim and, as they did not do so, dismissed the suit. The District Judge in the order under appeal directed separate trials of the two claims under Order II, rule 6, and then struck out the prayer for partition without, as I understand him, making it plain that it was reserved for separate disposal.

The matter is further complicated by the fact that the contract is alleged as being for the sale, not of 1st defendant's unascertained share or any particular part of it, but of his share in certain specified lands, which, of course, may or may not fall to him, when the partition takes place. It will be simplest to deal, *first*, with the question raised in its more general form, whether claims for specific performance against a vendor and possession by means of partition against him and his co-parceners can be made in one suit. If the answer is in the affirmative, it will be necessary, *secondly*, to decide whether such a suit is sustainable, when it is brought in respect of the sale of and for possession of specified properties, and whether any amendment of the plaint can make it so.

*Firstly*, as regards misjoinder, we have, no doubt, been shown no decision, in which such a suit as this was permitted expressly. But this and other High Courts have held, as for instance in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) and *Madan Mohan Singh* v. *Gaja Prosad Singh* (2), that a suit against a vendor for both specific performance and possession is sustainable; and it is well established (Mayne's Hindu Law, 8th edition, page 488) that a suit will lie against a vendor and his co-parceners for partition and possession by the purchaser of an unascertained share of family property or a portion of one. It is then difficult to understand why all these reliefs should not be asked for in one suit. For, the purchaser's right

(1) 32 Ind. Cas. 237; (1916) 1 M. W. N. 77.
(2) 11 Ind. Cas. 228; 14 C. L. J. 159.

to sue for possession as well as specific performance once recognised, if the objection is only that the right to sue the vendor for possession involves none to sue others who claim jointly with him, the contrary is entailed by the second principle just referred to. And again with reference to the wording of Order I, rule 3, and such cases as *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya* (3), *Aiyathurai Ravuthan* v. *Santhu Meera Ravuthan* (4) and *Kowuri Basivireddy* v. *Tallapaparagada Nagamma* (5), I should be inclined to hold that there is no misjoinder in the present case, the claim to relief against all the defendants arising in respect of the same transaction, plaintiffs' purchase, and the common question between them and each of the defendants being of the share, to which they through 1st defendant would be entitled on a fair partition.

Defendants' objection to this conclusion is based mainly on the character of the transaction, on which the suit is founded, as a contract, specific performance of which is asked for, and the particular rule alleged by them to be applicable to such suits, that strangers to the contract cannot be parties to them; and this general principle is, no doubt, laid down at page 94, Fry on Specific Performance, 5th edition, and in numerous cases, the most apposite being *Tasker* v. *Small* (6) and *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) already referred to. But defendants' argument takes no account of the circumstances, in which the principle was applied in these cases or the exceptions to it allowed in others. In each of the cases cited the stranger in question held, as defendants do here, under a title, which originated prior to the contract of sale. But he was a mortgagee and, as was pointed out in *Tasker* v. *Small* (6), he would not be bound to surrender the property on that contract being enforced or until he was redeemed, which might never happen, and he had no concern with the adjudication between the plaintiff and the mortgagor on the question, which would be entitled to redeem him. So also in *Narasinga Row* v. *Rangasami Thevan* (7) referred to by my learned brother, the third persons in question were sued as tenants, who could be ousted from possession only when their tenancy expired, and who had no direct interest in the decision of the suit for specific performance. In the case before us the plaintiffs' claim to possession against the stranger defendants is not contingent on anything except the enforceability of the contract of sale. For, when that is declared, the former's right to possession will arise immediately, not the less because it can be made effective only by the legal method, a partition to which 1 to 5 defendants are parties and which 1st defendant could at any time have demanded.

Reference postponed to the plaint allegations regarding the partition, which has actually been made, the foregoing entails that 2nd to 5th defendants' title, though prior to the contract and known to plaintiffs, might have been displaced by 1st defendant; and then reference to section 27 (*c*) of the Specific Relief Act affords an answer to 2nd to 5th defendants' objection. That this clause applies to contracts for the sale of the unascertained share of a joint tenant appears from the second illustration to it. The illustration is no doubt the case of a vendor, who might have displaced his joint tenant's title but for his death, not, as here, of one who has evaded his duty to displace it. That may be because the two English cases referred to at page 1031, Dart on Vendors and Purchasers, 7th edition, Volume II, as authority for the doctrine, deal only with its application to a surviving joint tenant. But it is stated by the learned author, as it is in the Act, without qualification; and it must, therefore, be applied to the case before us.

It is not the less applicable, because the plaint contains an admission that a suit for a partition, brought by 1st defendant against 2nd to 5th defendants, was in progress when the contract to sell was made. For, if that suit was contested honestly, 2nd to 5th

(3) 29 M. 29.
(4) 31 M. 252; 18 M. L. J. 238.
(5) 8 Ind. Cas. 1087; 35 M. 39; (1910) M. W. N. 827; 9 M. L. T. 467.
(6) (1837) 3 My. & Cr. 63; 6 Sim. 625; 5 L. J. Ch. 321; 40 E. R. 848; 45 R. R. 212.

(7) 35 Ind. Cas. 871; (1916) 2 M. W. N. 191; 4 L. W. 397.

defendants can claim at most that plaintiffs' right under their contract is restricted to receiving whatever they are entitled to from the property awarded to 1st defendant under the decree, which has been passed. Plaintiffs, however, allege (it must be assumed for the present purpose, truly) that the suit was not contested honestly and that the compromise decree, in which it ended and which awarded to 1st defendant a large proportion of his share in cash and a small proportion in land, was intended to defraud them and to defeat their rights under their contract, of which 2nd and 5th defendants had known throughout. They, therefore, contend in accordance with *Fateh Chand* v. *Narsingh Das* (8) that the partition under that decree should not prejudice them and that a fresh partition should be made. These allegations afford additional ground for the application of section 27 (*c*), since they justify reference in support of it to *Mokund Lall* v. *Chotay Lall* (9) which was apparently, though not statedly, decided under it. There the stranger defendant was held to be a proper party, because he had combined with the vendor to defeat the purchaser's rights, and it cannot be a valid ground of distinction that there the device employed was possession under a *benami* title, whilst here it is the use of fraud affecting the fairness of the partition, by which the purchaser's rights are to be worked out. I, therefore, hold that in the circumstances stated there is no objection to a suit for specific performance, partition and possession against all these defendants.

The second question above stated calls for decision, because plaintiffs' contract was for the sale only of 1st defendant's share in certain specified items of property, not directly or in the alternative of his share, as it might be ascertained; and it may be mentioned that one part of the fraud imputed to defendants in connection with the partition above referred to is that they excluded all those items from 1st defendants's share. Their present contention, however, is that, as laid down in *Duvvur Subba Reddy* v. *Kakuturu Venkatarami Reddi* (10), "On the view that a co-parcener cannot alienate any specific property, no specific performance can be decreed" of a contract to alienate such property. This *dictum* was, however, *obiter*; and with all respect, I can accept it only on the assumption that the learned Judge concerned was referring to a decree, not only for specific performance proper by execution of a conveyance, but also for possession, the two cases cited by him dealing with claims only to the latter. It is true that an alienee of specified property does not as of right acquire any interest in it. But it is well settled, and it was held by the same learned Judge in *Nanjaya Mudali* v. *Shanmuga Mudali* (11) that his conveyance enables him to demand a partition of the family property and entitles him either to the specified property, if that can equitably be assigned to his vendor's share, or to its equivalent from such other property as that share may include. The rights conferred by such a document, though not necessarily those expressed in it, are not unsubstantial: and there is no reason why the law should refuse to enforce the contract to transfer them by compelling the execution of a sale-deed in accordance with it. The plaint before us no doubt is defective in so far as it asks for possession under the sale-deed to be executed only of the specified properties. But Mr. Govindaraghava Iyer on behalf of plaintiffs has undertaken to make any necessary amendment, and his clients would probably have amended in the lower Courts, if they had been asked to do so. The proper form of prayer is that given in the statement of facts in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (12) and the plaint, amended in accordance with it, would, in my opinion, be open to no objection.

I would, therefore, set aside the decrees of the lower Courts and remand the suit to the Subordinate Court with directions to restore it and

1. To give plaintiffs a reasonable opportunity to amend as directed above.

2. If such amendment is made, to dispose of the suit according to law.

(8) 16 Ind. Cas. 988; 22 C. L. J. 383.
(9) 10 C. 1061; 5 Ind. Dec. (N. S.) 709.
(10) 26 Ind. Cas. 983; 16 M. L. T. 370; 38 M. 1187.
(11) 22 Ind. Cas. 555; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576; 38 M. 684.
(12) 25 M. 690.

3. If it is not made, to dismiss the suit so far as it relates to partition and possession and dispose of it so far as it relates to specific performance. In accordance with the foregoing I would dismiss the appeal against order and allow the memorandum of objections.

As, however, my learned brother differs, we refer to a Full Bench the questions

1. Whether 2nd to 5th defendants are proper parties to the suit?

2. Whether the relief of partition and possession can be claimed by plaintiffs in one suit as well as execution of a sale-deed?

SADASIVA AIYAR, J.—The facts have been set out in the judgment of my learned brother, which I had the advantage of studying before writing my own.

I am unable to distinguish on principle the case of *Tasker* v. *Small* (6) from the present case in respect of the question whether in a suit for specific performance a claim for possession against persons other than the vendor could be joined. That case, *Tasker* v. *Small* (6), was recognised as good law in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1). The case of *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) was followed in the recent judgment (dated 27th July 1916) in *Narasinga Row* v. *Rangasami Thevan* (7) decided by this Bench. I shall quote two sentences from our judgment in the last case: "The remaining argument is that the 3rd and the 4th defendants should not have been made parties, because the contract, to which they were strangers, between the plaintiff and the 1st and 2nd defendants was for the sale of the land and did not include the giving of possession of it by the last mentioned." "In the absence of an agreement to give possession, there is nothing against our applying the principle enunciated in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) and holding that the 3rd and 4th defendants are not proper parties to the suit."

As regards the argument based on Order I, rule 3 of the Code of Civil Procedure, I do not think that the act or transaction which is the plaintiffs' cause of action entitling them to claim the relief of specific performance against the 1st defendant gives them also the right to the relief of partition and separate possession of one-third share from the defendants Nos. 2 to 5. The transaction which would entitle them to such relief against the defendants Nos. 2 to 5 *had yet to come into existence*, namely, the execution by the 1st defendant (or on behalf of the 1st defendant by the Court) of a proper conveyance of the 1st defendant's one-third share. I entirely agree with the principles of law enunciated by Tyabji, J., in the case reported as *Krishnammal* v. *Manandiar Sundararaja Aiyar* (13). Though, where only the vendor and persons claiming by title subsequent to the plaintiff's contract or persons whose title may be displaced by the vendor are joined as parties, the relief for the specific performance of a contract of sale can be supplemented by a prayer for possession, (such joinder being allowed for the sake of convenience and to prevent useless multiplicity of suits), I do not think that the plaintiffs could be allowed to join in the same suit a *future cause of action* for partition against third persons (which cause of action could not vest in the plaintiffs till they get a conveyance from their vendor) along with the existing cause of action against the contractor (promisor) to obtain the specific performance of the contract, namely, the execution of the conveyance. The "right to relief" and "the same act or transaction or series of acts and transactions" mentioned in Order I, rule 3, must "exist" on the date of suit for the privilege granted by that section to be taken advantage of, whereas the right to relief of partition and possession had in this case to come into existence, even if all the plaint allegations were true. As Tyabji, J., puts it in *Krishnammal* v. *Manandiar Sundararaja Aiyar* (13), "The effect of section 55 (1) (*f*) of the Transfer of Property Act, when read with section 54 of the same Act and with the Registration Act, is that in the absence of an express agreement to transfer possession, independently of the registered conveyance, the purchaser (or to be accurate, the person agreeing to purchase) has no right to the possession of the property until the conveyance is completed." It follows *a fortiori* that he has no right to sue strangers to the contract for partition and possession

(13) 22 Ind. Cas. 912; 38 M. 698; 15 M. L. T. 103; (1914) M. W. N. 200; 1 L. W. 147.

till he gets his conveyance. Such a suit for partition and possession against strangers would clearly be premature.

As regards the contention based on section 27, clause (*c*) of the Specific Relief Act, I think the phrase used in that section, namely, "might have been displaced by the defendant", means "might have been displaced by the defendant according to his unilateral will and pleasure." This, I think, is clear from the second illustration to that clause. In the present case, the 1st defendant could not by his own will and pleasure, without reference to the consent of the defendants Nos. 2 to 5 or without obtaining a decree of Court (the Court having the power in a partition suit to allot properties according to its sense of justice and equity), have displaced the title of the defendants Nos 2 to 5 to their undivided joint ownership and possession in the plaint three items. Further section 27, clause (*c*), relates only to the right to the *specific performance of the contract* against a third person claiming title and not to the question of the right *to bring a suit for recovery of possession* against the persons not parties to the contract. The second illustration to section 27, clause (*c*), (where it is said that *C* may *enforce the contract against B*) only means, in my opinion, that *B* might be directed to convey *A*'s half share to *C*. If *C* also claims partition and possession of that half in the same suit and if *B* is in possession of the whole, the relief of partition and possession may also be granted (according to the practice of the Courts) in order to prevent multiplicity of suits *as the possession of no third party has to be disturbed.* It may be said that in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) and *Narasinga Row* v. *Rangasami Thevan* (7), section 27, clause (*c*) of the Specific Relief Act, was not referred to. But for the reasons set out by me above as to the scope of that clause, I do not consider it legitimate to distinguish those cases on that ground. I, therefore, agree with the learned Subordinate Judge that the plaintiffs ought to have amended the plaint by withdrawing the claim for partition and possession against the defendants Nos. 2 to 5 and by striking off the words in the plaint claiming partition and possession. They might, if so advised, have asked for the relief of possession as against the properties which fell to the 1st defendant's share in the partition decree already made as between the defendants but they must, in that case, abandon the contention that the decree in the partition suit was collusive and fraudulent.

The next question is whether on the plaintiffs' omission to amend as directed, the suit ought to have been dismissed wholly as the Subordinate Judge did. Order VII, rule 11, of the new Civil Procedure Code does not contain the clause (*d*) of section 54 of the old Civil Procedure Code, which provided that if the plaint is not amended within the time fixed by the Court, it should be rejected. I think that under those circumstances the Court itself (see Order VI, rules 16 and 17) ought to have exercised the power to strike out and amend all matters in the plaint which tend "to prejudice, embarrass or delay the fair trial of the suit" and "in such manner and on such terms as may be just." In the present case, not only is the plaintiffs' claim against the defendants Nos. 2 to 5 premature, but they make allegations as to fraud, collusion, notice, the effect of the decree in another suit Original Suit No. 8 of 1907 to which they were not parties and other matters (see paragraphs 3, 6, 7 and 8 of the plaint), which have nothing to do with their personal right against the 1st defendant, to get a conveyance from the 1st defendant of the undivided one-third share which belonged to the 1st defendant on the date of the contract of sale The trial of those matters along with the matters which directly and legitimately arise out of the contract of sale (which contract does not contain any stipulation as to the giving of possession) would clearly lead to embarrassment and delay. The Subordinate Judge ought, however, not to have dismissed the suit wholly for the reasons already given by me.

On the question whether the plaintiffs as purchasers of the undivided share of the 1st defendant *in some only of the family properties* are entitled to sue for specific performance, I agree with my learned brother for the reasons stated by him and I respectfully dissent from the view pro-

pounded in *Duvvur Subba Reddy* v. *Kakuturu Venkatarami Reddi* (10) on that point.

In the result, I would, in modification of the lower Appellate Court's order, remand the suit to the Subordinate Judge with directions to have the plaint amended by striking out the names of the defendants Nos. 2 to 5 and the prayers for partition and possession and by making any further consequential alterations (the amendments to be made either through the plaintiffs or by the Court itself) and to proceed with the trial of the suit as so amended, costs hitherto abiding.

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This civil miscellaneous appeal and the memorandum of cross-objections put in by the 1st and 2nd respondents came on for hearing before the Full Bench on the 29th and 30th November 1916.

Mr. *N. S. Rangasami Aiyangar*, for Mr. *T. Narasimha Aiyangar*, for the Appellant.—The primary principle is that in a suit on a contract only parties to the contract are necessary parties and not others. My first point is that none but the parties to a contract in a suit to enforce specific performance of a contract to sell land are necessary parties. A prayer for possession and partition is in some cases added in a suit to enforce specific performance and thus parties in possession are necessary parties to such a suit. It would be absurd to extend that rule to cases of this kind. In the present case, the parties added are other members of a joint Hindu family to which the vendor belonged. Until he establishes his right to a conveyance he has no right at all against the party in possession.

A cause of action for enforcing specific performance is different from a cause of action for possession. The right to a relief for possession arises only on the execution of a conveyance. The two causes of action are distinct and different. The English cases of *Tasker* v. *Small* (6), Fry on Specific Performance, *De Hoghton* v. *Money* (14), *Chadwick* v. *Maden* (15), *West Midland Railway Company* v. *Nixon* (16) and *Howard* v. *Miller* (17) clearly support my view.

A right under a contract of sale is quite distinct from a right to possession which arises immediately on the execution of a conveyance.

Messrs. *L. A. Govindaraghava Aiyar* and *K. N. Kumaraswami Aiyar*, for the Respondents.—The new Code of Civil Procedure has altered the law on the point. Under the present Code of Civil Procedure such joinder of parties is not illegal. The use of the words "where if separate suits were brought against such persons, any common question of law or fact would arise", in rule 3 of Order I, has entirely altered the law on the point. Under the old Code the words were "in respect of the same matter" and these were replaced by the words "by the same act or series or acts or transactions." This alteration is taken from rule 1 of Order XVI of the Rules of the Supreme Court. In England also the rule as to joinder of causes of action was amended, but the rule as to joinder of parties remained the same.

Even in England exceptions to the rule that none but parties to the contract are necessary parties to a suit for enforcing specific performance, are recognised, for instance, *Bishop of Winchester* v. *Mid-Hants Railway Company* (18).

In a suit for enforcing specific performance of a contract to sell lands, when the vendor refuses to convey it cannot be said that a right to sue for possession does not arise at the same time and this is covered by rule 3.

*Lakshmi Venkayyamma* v. *Venkatanarasimha* (19), *Madan Mohan Singh* v. *Gaja Prosad Singh* (2) are in point.

Section 27 of the Specific Relief Act

(14) (1867) 2 Ch.164; 15 L. T. 403; 15 W. R. 214.

(15) (1851) 9 Hare 188; 21 L. J. Ch. 876; 68 E. R. 469; 89 R. R. 391.

(16) (1863) 1 H. & M. 176; 71 E. R. 77; 136 R. R. 79.

(17) (1915) A. C. 315 at p. 318; 84 L. J. P. C. 49.

(18) (1868) 5 Eq. 17; 37 L. J. Ch. 64; 17 L. T. 161; 16 W. R. 72.

(19) 34 Ind Cas. 921; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 39 M. 509; 24 C. L. J. 279.

is not inapplicable to a case of this kind. That section is not merely confined to other persons joining in the execution of a sale-deed.

Mr. *N. S. Rangasami Aiyangar* in reply.—The provisions of the Code of Civil Procedure as to joinder of parties do not apply to cases of enforcing specific performance of a contract to sell.

## OPINIONS.

WALLIS, C. J.—As regards the second question my answer is that, in a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share as against them. It may, I think, be taken as the settled and salutary practice of this and other Courts in India, where parties properly sued for specific performance of a contract for sale of land are in possession of the land, to allow a prayer for possession to be added to the prayer for specific performance, thereby obviating the necessity for filing a fresh suit for possession to which there could be no defence. *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1). It is, however, in my opinion quite a different thing to allow a stranger to make the members of a joint Hindu family defendants in a suit for a partition, until he has established his right to sue for partition by obtaining a transfer from one of the members of the family.

The other members of the family were no parties to the alleged contract and, therefore, were not proper parties to the suit in so far as it is a suit for specific performance, and it would, in my opinion, be a distinct hardship to them to force them to defend a suit for partition which would not lie if the plaintiff failed to prove his contract. Partition suits often involve a great variety of complicated questions and it would not be satisfactory to deal with such a suit as a mere appendage to a suit for specific performance of a contract by a co-sharer to sell his share. The rule in *Tasker* v. *Small* (6) is not merely technical but well founded in principle. In *De Hoghton* v. *Money* (14) Turner, L. J., observed: "Here again his case is met by *Tasker* v. *Small* (6), in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed." Other cases in which the same rule was applied are *Wood* v. *White* (20), *Chadwick* v. *Maden* (15) and *West Midland Railway Co.* v. *Nixon* (16). We have not been referred to any authority to show that these authorities are no longer applicable under the existing rules of procedure, or in support of the proposition that it is permissible to bring suits against persons against whom there is no cause of action at the date of suit. On the other hand the judgment of Lord Parker in *Howard* v. *Miller* (17) seems to be in accordance with the view I have taken.

As regards *Bishop of Winchester* v. *Mid-Hants Railway Company* (18), which was cited before us, that was a suit by an unpaid vendor to obtain specific performance by payment and to enforce his vendor's lien by obtaining possession of the property and by sale, if necessary, and for a Receiver, and it was held that the London and South Western Railway who were in possession as lessees from the defendants were properly joined, as their possession would be affected by the decree sought for. In that case, the plaintiff claimed as on the date of suit to be entitled to recover possession both against his vendees and their lessees by reason of his vendor's lien. They were necessary parties to the suit only in so far as it included a claim to enforce the lien, a necessity which is clearly explained by Lord Romilly in *Attorney-General* v. *Sittingbourne and Sheerness Railway Company* (21).

(20) (1839) 4 My. & Cr. 460; 2 Keen 664; 7 L. J. Ch. (N. S.) 203; 8 L. J. Ch. (N. S.) 209; 3 Jur. 117; 41 E. R. 178; 48 R. R. 152.

(21) (1866) 1 Eq. 636; 35 L. J. Ch. 318; 14 L. T. 92; 14 W. R. 414.

RANGAYYA REDDY *v.* SUBRAMANYA AIYAR.

As to section 27 of the Specific Relief Act, that section merely provides against what persons' contracts may be specifically enforced. They include not only (*a*) the parties to the contract and (*b*) parties claiming under them by title subsequent other than transferees for value and without notice, but also (*c*) "any person claiming under a title which though prior to the contract and known to the plaintiff might have been displaced by the defendant. As an illustration of specific performance being enforced in this way against a person claiming under a title prior to the contract, we are given the case of two joint tenants each of whom owns an undivided moiety which he may alienate during his lifetime but which in default of alienation devolves on the survivor. All that the illustration shows is that, if one of the joint tenants contracts, as he is entitled to do, to sell his share and dies before performing his contract, specific performance of that contract may be enforced against the other joint tenant. The section and the illustration, in my opinion, have no bearing on the question before us, which is whether persons who are strangers to the contract and against whom it cannot be specifically enforced can be properly joined as defendants and partition claimed against them as co-parceners of the vendor.

As regards the first question, I agree with the opinion of Srinivasa Aiyangar, J., which I have had the advantage of reading.

ABDUR RAHIM, J.—The questions referred depend, in my opinion, for their answer on the provisions of Order I of the Civil Procedure Code, and section 27 of the Specific Relief Act. Rule 3 of Order I, Civil Procedure Code, which is directly applicable is in these words: "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits was brought against such persons any common question of law or fact would arise."

Rule 1 relates to the joinder of plaintiffs and is in identically the same words as rule 3 with 'plaintiffs' substituted for 'defendants' and with the necessary alterations to suit the case of plaintiffs. Comparing them with the corresponding provisions of the Code of 1882, it is clear that the Legislature by replacing the words 'in respect of the same matter' of the old Code with the words "in respect of or arising out of the same act or transaction or series of acts or transactions", followed by the qualifying proviso—"where if separate suits were brought against such persons any common question of law or fact would arise"—has materially widened the scope of the rules relating to joinder of parties. This is evident both from the more comprehensive nature of the language of the new rules and the history of the legislation on the subject.

The new words are taken from rule 1, Order XVI, of the Rules of the Supreme Court of 1896 where they were introduced because of the decision of the House of Lords in *Smurthwaite* v. *Hannay* (22) holding, in reversal of the judgments of Esher, M. R., and Kay, L. J., in the Court of Appeal, that the rule related only to joinder of parties in respect of the same cause of action and not to joinder of causes of action. This was exactly section 26 of the Indian Code of 1882, which contained the very words "in respect of the same cause of action." The amended rule 1 of the Supreme Court Rules of 1896 was evidently intended to carry out the view expressed by Lord Esher, M. R., that if in a case like *Smurthwaite* v. *Hannay* (22), where "the different causes of action and claims all arise out of the same transaction" more than one plaintiff was not allowed to join, it would be lamentable waste of time and money. In fact the English Rule Committee and following them, the Indian Legislature, went further in permitting such joinder, not merely with respect to right to relief arising out of the same transaction but a series of transactions.

In England while rule 1 was amended, rule 4 which dealt with the question of joinder of defendants was allowed to remain as it was before 1896. Nevertheless the Court of Appeal in *Compania Sansinena* v. *Houlder* (23), holding that the alteration of rule 1

(22) (1894) A. C. 494; 63 L. J. Q. B. 737; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.

(23) (1910) 2 K. B. 354; 79 L. J. K. B. 1094; 103 L. T. 333.

made it clear that Order XVI did not deal solely with joinder of parties and that rule 4 must be interpreted in the light of rule 1, laid down that the power to join several defendants in the same action extended to cases where the subject-matter of complaint as against the several defendants is substantially the same although the causes of action against them respectively are, technically, different in form, and the several liabilities alleged against them respectively are to some extent based on different grounds. The Indian Legislature, however, provided against all difficulties of interpretation by enacting rule 3 in the same words as rule 1. By section 28 of the old Code the right to relief was required to be 'in respect of the same matter,' under rule 3 it is sufficient if such right exists 'in respect of or *arises out of* 'the same transaction or series of transactions' subject only to the condition that there be any common question of law or fact to be decided. It does not matter whether there are more than one and technically different causes of action [*Compania Sansinena* v. *Houlder* (23)] or the liabilities of the several defendants are different, rule 4 (*b*); nor is it necessary that every defendant should be interested in all the reliefs claimed in the suit (rule 5).

But it is argued that these rules do not affect the question whether to a suit for specific performance strangers to a contract may be joined as defendants and it is contended that it is governed by the rule laid down by Lord Cottenham in *Tasker* v. *Small* (6).

It is perfectly clear, however, that even in England where the general rule still is that the parties to the contract are the necessary and sufficient parties to the action as held in *Tasker* v. *Small* (6), there are many real or apparent exceptions to this rule which is after all a rule of convenience and good sense (See Fry's Specific Performance, section 176 and section 192). Some of the exceptions were recognised under the former practice of the Court of Chancery itself, while the Rules of the Supreme Court have largely enlarged the powers of the Court in joining any party whose presence may be necessary (see Halsbury's Laws of England, Volume 27, notes to section 141, page 79, and Fry, section 192). It has thus been held in England that persons claiming adversely might be made defendants, a person who by virtue of an antecedent contract with the vendor claimed an interest in the purchase-money was a proper party to a suit for specific performance, in the case of purchases from a voluntary settlor when the contract was sought to be enforced by a purchaser not only the vendor but the trustees of the settlement and the persons beneficially interested under it were properly made defendants, and in some cases where a portion of the relief claimed might affect the person in actual possession of the property that person may properly be made a party to an action for specific performance of the contract (see the summary of cases in Fry, sections 175, 180, 181, 185, 187, 188, 189, 192, and 210, and 27 Halsbury's Laws of England, section 141 and notes thereto). *Bishop of Winchester* v. *Mid-Hants Railway Company* (18), was a case of the last class where Stuart, V. C., held: "Ordinarily a person not being a party to the contract ought not to be brought before the Court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree."

That in a suit to enforce specific performance of a contract for the sale of immoveable property possession can also be asked for and obtained as against the vendor is well established by the rulings of this Court as well as of the other Indian High Courts. See *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1), where the learned Chief Justice and Seshagiri Aiyar, J., say: "It is the practice in this and other Courts to allow a claim for possession to be included in a claim for specific performance of a contract for the sale of immoveable property and we are not prepared to question it." And it was not argued before us that as against the vendor himself partition could not be obtained in such a suit although delivery of possession might be, at any rate any such distinction would be altogether untenable. That a buyer of a Hindu co-parcener's share cannot ask for joint possession but only for partition cannot surely make his position any worse.

The real ground on which objection to the joinder in this case of defendants Nos. 2 to 5, who are the co-parceners of the 1st

defendant who contracted to sell his share in certain items of the family property to the plaintiff, is based is that the right to partition does not arise until after the conveyance has been executed under the decree of the Court. This objection, it may be pointed out, primarily raises the question as to what reliefs can be obtained along with specific performance and relates to the joinder of defendants only inferentially. I do not see why we must say that the right to ask both for specific performance and for possession did not arise at the time when the vendor refused to carry out the bargain and give the vendee possession of the property.

I may observe, however, that it does not follow that because in a suit for specific performance the plaintiff does not ask for delivery of possession, Order II, rule 2, of the Code of Civil Procedure would be a bar to a future suit for possession. For ordinarily the vendor is either not interested in denying or cannot deny the plaintiff's right to obtain delivery of possession of the property if the latter has a right to enforce the contract and the question, therefore, of the purchaser's right to possession is seldom raised at a time when the very contract of sale or the plaintiff's right to enforce it is still in dispute.

That by virtue of section 54, Transfer of Property Act, no interest in immoveable property is created by the contract of sale itself does not at all affect the question. It is sufficient for the plaintiff to say that by the contract he obtained the right to acquire the property with the aid of the Court, the execution of a registered instrument and delivery of possession being the means by which the right is to be enforced. The decision of the Privy Council in *Lakshmi Venkayyamma* v. *Venkatanarasimha* (19) is based on this principle. I think it would be unreasonable to hold that the right to possession *does not arise out of* the contract so as to be covered by the words of rule 3 [see *Madan Mohan Singh* v. *Gaja Prosad Singh* (2)].

Nor can it make any difference that the right to one relief, that is, possession, is contingent on the plaintiff establishing his right to another relief, namely, execution of a proper conveyance by the defendant. There are many other examples of such suits: *e. g.*, suits for establishing right to and to recover immoveable property and for mesne profits, for setting aside alienation on ground of fraud or undue influence and other cases of that description.

I am also of opinion that section 27, clause (*c*), of the Specific Relief Act applies as illustrated by the two examples appended to it, especially the second case which is as follows: "*A* and *B* are joint tenants of land, his undivided moiety of which either may be alien in his lifetime, but which, subject to that right, devolves on the survivor. *A* contracts to sell his moiety to *C*, and dies. *C* may enforce specific performance of the contract against *B*." This illustration, which is undoubtedly covered by the terms of the section, is substantially the present case and shows that a purchaser from a co-parcener can enforce specific performance of his contract against the other co-parceners. That being so, the only question is whether the joinder of prayer for possession or partition is permissible, and I have already tried to show that it is.

As for the suggestion that the joinder of parties other than the vendor as contemplated by section 27 is for the purpose of compelling them to join in the conveyance, it is not necessary to express any opinion upon it on this reference. All that I wish to say on that point, as it is raised in Sadasiva Aiyar, J.'s judgment, is that in some cases it may be necessary to order persons other than the vendor to join in the execution of the deed of sale. And that, I may observe, was the kind of question that was really mooted in *Tasker* v. *Small* (6) and the other English decisions of that category. In *Howard* v. *Miller* (17) also, all that was decided was that no decree for specific performance could be given against a person who was not a party to the agreement. Anyhow, I fail to see that because defendants Nos. 2 to 5 might or might not be asked to join in the conveyance, it follows in any way that partition might not be obtained as against them in the same suit.

It is obvious that to require the purchaser first to enforce specific performance of the contract of sale and after he has obtained a decree to that effect, to institute a separate suit for partition, would be a wholly unnecessary multiplication of suits resulting in a mere waste of time and money. In some cases where, for instance, a co-parcener or tenant,

in-common who had been excluded from his share sold to a *bona fide* purchaser shortly before the lapse of the period of limitation, the purchaser might lose the whole bargain through no fault of his own As, in my opinion, the terms of Order I of the Code of Civil Procedure and section 27 of the Specific Relief Act, negative such a narrow construction and there is nothing in reason or principle to warrant it, I would answer both the questions in the affirmative There is no decision exactly in point, but in so far as the cases in *Bugata Appala* v. *Chengalvala Jogiraju* (1) and *Narasinga Row* v. *Rangasami Thevan* (7) may be regarded as laying down any general rule that in a suit for specific performance, a person in possession other than the vendor cannot be joined as a defendant, I should hold with the greatest deference to the learned Judges concerned in those decisions, that such a general proposition is not sustainable. It is mainly based on the observations of Lord Cottenham in *Tasker* v. *Small* (6), without sufficient regard being had to the subsequent relaxations of the old rule in later decisions of the English Courts and the changes effected in the rules of the Supreme Court of England.

If the Court thinks that the claims against several defendants should be separately tried in any cases covered by rules 3, 4 and 5 of Order I on grounds of convenience, it has ample power to order separate trials and it is the obvious intention of the Legislature, as is to be collected from the provisions of Order I, that subject to this power, all claims arising out of the same transaction or series of transactions shall be tried together if they are so connected as to give rise to any common question of fact or law.

It may be pointed out that in this particular case the further allegations that the 1st defendant fraudulently compromised the previous suit for partition instituted by his co-parceners (defendants Nos. 2 to 5) in order to deprive the plaintiffs of the fruits of their purchase and that the defendants Nos. 2 to 5 have been acting in collusion with him with knowledge of the contract of sale, make defendants Nos. 2 to 5 necessary parties to the action.

For these reasons, I agree with the conclusion of Oldfield, J.

SRINIVASA AIYANGAR, J.—As I agree generally with the judgment of Sadasiva Aiyar, J., I do not propose to discuss the question at length. The answer to the questions referred to us appears to me to depend upon well settled principles. To a suit for specific performance of a contract the parties to the contract or their representatives are necessary parties, others bound to perform it are proper parties, and no others can be made parties, *Howard* v. *Miller* (17). Section 27 of the Specific Relief Act specifies the persons against whom contracts can be specifically enforced. As a part of this rule all persons who may be affected by the enforcement of the rights of the plaintiff arising out of the contract may properly be made parties; as for example in *Bishop of Winchester* v. *Mid-Hants Railway Co.* (18), which was a vendor's suit for specific performance, where the plaintiff sought relief by way of declaration of lien for unpaid purchase-money and enforcement of that lien by the appointment of a Receiver and injunction, the purchaser's lessees were held proper parties. It is also settled that in a suit by the buyer for specific performance of a contract of sale of immoveable property, the plaintiff is entitled not merely to call for a conveyance from the vendor, but also seek possession of the property from the vendor, by compelling him to perform all his obligations under the contract of sale, namely, to give the buyer such possession of the property as its nature admits. Ordinarily and in the absence of a contract to the contrary, the buyer would be entitled to possession at the time fixed for completion of the sale and if he accepts the title and offers to pay the purchase money, he would be entitled both to call for a conveyance and to possession of the property from the vendor; and in a suit for specific performance the buyer may be entitled to damages in addition to specific performance for the failure of the vendor to give possession at the time agreed [see illustration of the third paragraph in section 19 of the Specific Relief Act. *Royal Bristol Permanent Building Society* v. *Bomash* (24)]. This right of the buyer,

(24) (1887) 35 Ch. D. 390; 56 L. J. Ch. 840; 57 L. T. 179.

I apprehend, is a right *in personam* against the vendor and arises out of the contract for sale and is different from the title or the right of property which the purchaser obtains on the execution of the conveyance, which enables him to sue in ejectment all persons in possession including his own vendor. If this is the correct view, the fact that a buyer when suing for specific performance of a contract of sale does not seek recovery of possession would not prevent him from seeking that relief on his title which gives him another cause of action. My only doubt is whether the obligation under the contract of sale to give possession is one which is capable of being specifically enforced, and whether the proper relief is not damages for breach of the contract to give possession till execution of the conveyance, after which date the purchaser would be entitled to mesne profits from the person in possession, whether such person is the vendor or a stranger without title. Whether a suit for possession based on the obligation under the contract of sale can be brought against a subsequent purchaser with notice of the contract who has obtained possession as such purchaser need not be considered now. In *Fateh Chand* v. *Narasingh Das* (8) it was held and in *Goffur* v. *Bhikaji* (25) it was assumed that it can be.

In the present suit the contract of sale was to sell the 1st defendant's share in certain items of immoveable property, which formed part of the co-parcenary property belonging in common to himself and the other defendants in the case. It is now settled so far as this Court is concerned that this contract, even if completed by a conveyance, would not entitle the plaintiff to joint possession with the other co-parceners—that in fact he is not entitled to any sort of possession—but that his purchase, if completed, would enable him to bring a suit for partition in which, if the Court making a division considers it fair having due regard to the rights of other co-parceners to allot the property sold to the vendor, the vendee standing in his shoes may obtain that property. It is obvious that the 1st defendant, the vendor, was under no obligation to place the plaintiff in joint possession of any family property and no other person, even if bound to perform the obligation of the contract, can be under that obligation.

It was said that in the case of a contract to sell his share of the joint family property by a member of the co-parcenary, there is a contractual obligation on his part to divide himself off from the other members and place the vendee in possession of the property which may be allotted in a fair partition. Without an express stipulation in the contract, I am unable to imply any such obligation from the provisions of the Transfer of Property Act or any other law governing the relation of vendor and vendee. Even in the case of tenants-in-common, where one tenant-in-common sells his share in specific items there appears to be no such obligation (see Freeman on Co-Tenancy, section 199, at page 329).

The right to sue for partition does not arise till after the legal title is transferred and when the suit was instituted in the present case there was no right to sue for partition at all. This conclusion, apart from any question of joinder of parties or causes of action, which can only arise if there is a right to relief against one or more at the time of the institution of the suit, is enough to answer the second question in the negative [see *De Hoghton* v. *Money* (14), especially the observations at page 170 of the report].

The first question stands on a different footing; and an answer to that would depend on, whether defendants Nos. 2 to 5 are subsequent transferees of the property agreed to be sold to the plaintiff. The compromise in the previous litigation, which is challenged in the present suit as a fraud on the rights of the plaintiff under his contract of sale, does not in terms purport to be a transfer of the 1st defendant's share of the property agreed to be sold to the plaintiff; he as a member of a Mitakshara joint Hindu family had no definite share in any particular item of the family property. In fact what defendants Nos. 2 to 5 say is that they have only converted their partial interest in the whole of the family properties into a full interest in some of them, and that no agreement by the 1st defendant can affect

(25) 26 B. 159; 3 Bom. L. R. 596.

their prior rights in the family property. They in no way dispute the contract of the 1st defendant with the plaintiff. It is not said that the value of the property allotted to the 1st defendant is less than the value of his share.

But a partition involves the release of the interest of the other co-parceners in the properties allotted to one of them and though by virtue of their prior title defendants Nos. 2 to 5 may be entitled to a release from the 1st defendant of his interest in the properties, the subject of the present suit, if these properties were allotted to them in a fair partition without being affected by the contract of sale which can only operate subject to their rights, yet if the partition is proved to be a fraudulent design to defeat the rights of the plaintiff under his contract of sale, by the 1st defendant giving up the chance of the suit properties or a share in them being allotted to him in a fair division, I think that defendants Nos. 2 to 5 in such a case may fairly be treated as subsequent transferees with notice. In *Fateh Chand* v. *Narsingh Das* (8), which is perhaps the nearest to the present case, under the form of a compromise one of the defendants got a transfer for money of whatever interest the other defendant had in the property agreed to be sold. It was held that he was a subsequent transferee. The difference between that case and this is obvious; but that, I think, makes no difference in principle. The answer to the 1st question must, therefore, be in the affirmative.

In the view I have taken, there is only one cause of action, namely, that for specific performance in this case, the other cause of action, *viz.*, for partition not having accrued on the date of the suit. If there was an existing cause of action for partition on the date of the suit, the question whether the two causes of action, one for specific performance and the other for partition and possession, can be joined in one suit, would depend not only on the provisions of Order 1, rules 3 and 5, which primarily regulate the joinder of parties but also of Order II, rules 3 and 4, which provide for joinder of causes of action.

*Reference answered in the negative.*

Y.R.P.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2603 OF 1915.

April 2, 1915.

*Present*:—Mr. Justice Fletcher and Mr. Justice Smither.

BYMKESH CHAKRABARTTY—PLAINTIFF—APPELLANT

*versus*

JAGADISWAR ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Evidence Act (1 of 1872), s. 13—Tenant, status of—Decree in favour of stranger, admissibility of.*

A decree (whether obtained by the plaintiff's predecessor or a stranger), in which it was found that the defendants-tenants had a holding in a certain estate on a certain rental, is admissible under section 13 of the Indian Evidence Act for the purpose of showing that the defendants held a holding in that estate on that rental. [p. 433, cols. 1 & 2.]

Appeal against the decree of the Sub-Judge, Jessore, dated the 12th August 1915, affirming that of the Munsif, Jessore, dated the 14th December 1914.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"This appeal arises out of a suit for rent from 1313 to 1316. For the first three years the plaintiff has claimed ½rd of the alleged entire *jama* and for 1316 he has claimed the entire rent, on the allegation that on partition of the present estate the entire *mauza* to which the *jama* in suit appertains fell to the plaintiff's share.

The defendants *inter alia* denied the relationship of landlord and tenant and contended that they held no lands of Mudafat, Ambika Dasi stated in the plaint.

The learned Munsif dismissed the suit and the plaintiff appealed but the defendants did not appear in this Court though they were served with notices.

The only question for trial is whether the relationship of landlord and tenant has been established between the parties?

FINDING.—To prove the claim the plaintiff tendered a rent-decree alleged to have been obtained by one co-sharer Jogendra Nath Rai and a cheque book and he examined two witnesses. The learned Munsif held that the co sharer's decree was not admissible in evidence.

In my opinion it could be admissible in evidence, provided the plaintiff could prove

that the decree-holder was his co-sharer. There is no evidence to show that the said decree-holder was ever co-sharer of the plaintiff. There being no evidence to connect the link, the plaintiff cannot avail of the decree.

* * * From the evidence in the case I find that the claim could not be proved and the suit was rightly dismissed. Ordered that the appeal be dismissed *ex parte*."

Babus *Surendra Madhab Mallik* and *Satis Chandra Bose*, for the Appellant.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff from a decision of the learned Subordinate Judge of Jessore, dated the 12th August 1915, affirming a decision of the Munsif of the same place. The plaintiff brought the suit to recover rent for the years 1313 to 1316 B. S. He sued as a 5-annas 4-pies co-sharer and he alleged that the defendants had a holding of which the rent was Rs. 17. The estate in which the plaintiff was a co-sharer bore *tauzi* No. 250 of the Jessore Collectorate. The plaintiff is a person who has purchased this share in the month of September 1906. In support of his claim the plaintiff gave in evidence a decree obtained by another co-sharer also of a 5-annas 4-pies share in which it was found that the defendants had a holding in the estate of which the *Tauzi* number was 250 of the Jessore Collectorate, and that the rent of that holding was Rs. 17 per annum. It is quite clear that to prove these facts the decree in the other suit was a relevant document. There cannot be any doubt about it whether the decree was by a predecessor of the plaintiff or by a stranger, under the provisions of the Indian Evidence Act that decree is admissible and, no doubt, it is an important document. The learned Judge in the primary Court thought that the decree was not admissible at all. The learned Judge in the lower Appellate Court held that the decree could only be given in evidence if the plaintiff could prove that the person who had obtained it was his co-sharer. What I understand the learned Judge meant is that the plaintiff had got to prove that Jogendra, *i.e.*, the person who had obtained the decree and the present plaintiff were co-sharers in the estate at one and the same time and that otherwise the document would not be admissible in evidence. That, I do not agree, was the proper view at all. This document was obviously admissible under section 13 of the Indian Evidence Act for the purpose of showing that the defendants held a holding in this estate *Tauzi* No. 250 and that the rent of tha tholding was Rs. 17. The case must, therefore, go back to the lower Appellate Court to have the appeal re-heard after due attention being given to the decree obtained by Jogendra. Costs of this appeal and of the lower Appellate Court will abide the result of the re-hearing by the learned Subordinate Judge.

SMITHER, J.—I agree that the decree is admissible in evidence and the case must, therefore, go back.

*Case sent back.*

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1559 OF 1915.

May 31, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique

*Malik* AKBAR ALI KHAN—PLAINTIFF—APPELLANT

*versus*

SHAH MUHAMMAD—DEFENDANT—RESPONDENT.

*License—Licensee denying licensor's title—Forfeiture.*

A licensee in possession does not, like a tenant, by denying the title of the grantor of the license, forfeit the license and become liable to immediate ejectment. [p. 444, col. 2.]

*Dharam Kunwar* v. *Fakira*, A. W. N. (1901) 157, followed.

Second appeal against the decision of the District Judge, Shahjahanpur, dated the 4th September 1915.

ORDER OF REFERENCE.

TUDBALL, J.—The question which arises in the present case for decision is one which is covered by a decision of this Court. It clashes somewhat also with a more recent decision in very similar circumstances which is to be found reported as *Anand Sarup* v. *Chawra* (1). Under the circumstances I think it admissible to refer the case to a Bench of two Judges for decision. I order accordingly.

Dr. *S. M. Sulaiman*, for the Appellant.

Mr. *M. L. Sandal*, for the Respondent.

(1) 34 Ind. Cas. 952; 14 A. L. J. 115.

ANNODA CHARAN NAYA v. DASARATH HALDAR.

JUDGMENT.—This case was decided in both the Courts below on the admission that the defendant was in possession of the land as a licensee and the plaintiff was a licensor. This was not in accordance with the actual pleadings of the parties. In the plaint the plaintiff alleged a tenancy. The defendant alleged, on the other hand, a license, but apparently, as we see from the judgment of the Court of first instance, it was subsequently admitted that the defendant was in possession of the land as a licensee. Clearly that was the position which the plaintiff appellant took up in the lower Appellate Court also and it is the position which is taken up in the one ground in the memorandum of appeal filed in this Court. The Courts below have decided the case in view of the decision of a Bench of this Court in *Dharam Kunwar* v. *Fakira* (2). The plea taken before us is that the defendant having denied the plaintiff's title altogether, his license is liable to be revoked and he should have been ejected. It was in the previous suit between the parties that the defendant denied the plaintiff's title, and in that the question of title was decided in the plaintiff's favour. In the present suit the defendant has admitted the plaintiff's title. The ruling in question is the only ruling to which our attention has been called. It is admittedly against the appellant's contention. It was therein laid down that a licensee in possession does not, like a tenant, by denying the title of the grantor of the license, forfeit the license, and become liable to immediate ejectment. The two Judges who decided that case remarked as follows: "No authority, either from the Indian or English reports, has been cited to us in support of the contention that in such a case a licensee is in the same position as a tenant who denies his lessor's title, and we see no reason why we should extend the rule of forfeiture and make it applicable to a licensee. The grantor of the license has ordinarily power by revocation to put an end to the license and that may be the reason why the same rule has not been made applicable to a licensee denying the title of the grantor of the license as to a tenant denying his landlord's title. It is to be noticed also, as regards Indian legislation, that although the Transfer of Property Act provides for forfeiture of his tenancy by a tenant denying his landlord's title, no such provision has been made regarding a licensee in the chapter of the Easements Act which deals with licenses." It may seem anomalous that a tenant who denies his landlord's title, is liable to forfeiture of his lease, whereas a licensee may deny a licensor's title without any such liability to forfeiture, but it is correct that there is no such provision in the Easements Act such as has been made in the Transfer of Property Act, section 111. In this state of the law we think that it would be proper to accept the ruling in the case mentioned, inasmuch as no good reason has been shown why we should differ from it. We, therefore, follow that ruling and in that view the appeal must fail. We, therefore, dismiss it with costs.

*Appeal dismissed.*

(2) A. W. N. (1901) 157.

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1212 OF 1917.

May 7, 1915.

*Present*:—Mr. Justice Fletcher and Mr. Justice Smither.

ANNODA CHARAN NAYA AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

DASARATH HALDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Covenant by tenant not to transfer his interest, enforceability of.*

Where there is no condition of forfeiture in a lease, a covenant by the tenant not to transfer his interest cannot restrain the latter from transferring the same, unless proper conditions are put in for enforcing the rights of the landlord on a breach of the covenant. [p. 445, col. 1.]

Appeal against the decree of the District Judge, 24-Perganas, dated the 9th April 1915, affirming that of the Subordinate Judge, Alipur, dated the 13th February 1914.

Babus *Bepin Behary Ghose II*, *Dhirenda Lal Khastgir* and *Surendra Nath Ghosal*, for the Appellant.

Babus *Dwarka Nath Chackerbutty* and *Khirode Narain Bhuia*, for the Respondents.

FLETCHER, J.—This an appeal from a decision of the learned District Judge of the 24-Perganas, dated the 9th April 1915, affirming the decision of the Subordinate Judge at

Alipur. The plaintiffs were three in number. They brought a suit to recover possession of certain land. The plaintiffs Nos. 2 and 3 were the original tenants of the property, the 1st defendant being the landlord. Certain rents having fallen due by the plaintiffs Nos. 2 and 3 to the landlord, the defendant No. 1, a suit for rent was instituted and an *ex parte* decree was obtained on the 10th July 1900. The property was then attached and brought to sale and purchased by the defendant No. 1. The sale was confirmed on the 15th August 1900. On the 2nd June 1902, the plaintiffs Nos. 2 and 3 sold their interest to the plaintiff No. 1 and immediately executed a *kabuliyat* in favour of the plaintiff No. 1. On the 18th May 1905 the defendants Nos. 2 and 3 took a lease of the property from the defendant No. 1. On the 26th May 1905 the plaintiffs Nos. 2 and 3 applied to set aside the decree and the sale in execution. On the 18th July 1906, the decree was set aside and the sale fell with it. The first point that has been urged before us, as it was urged in the lower Appellate Court, is that the plaintiffs Nos. 1, 2 and 3 have no title to the land as the plaintiff No. 1 claims through the plaintiffs Nos. 2 and 3 who, on the terms of the lease, had no right to transfer the land. This case depends purely on the terms of the lease, because Mr. Ghose on behalf of the appellants has quite frankly admitted that apart from the terms of the lease the plaintiffs Nos. 2 and 3 would have a right to transfer their interest in the land. That being so, there is not very much to say, because if the plaintiff No. 1 has not got a valid transfer the property has vested in the plaintiffs Nos. 2 and 3 and *vice versa*. The question of this conveyance may not be so easy, but it seems to me clear that the transfer at any rate had been recognised for some purposes by the landlord before a quarter of the purchase-money had been paid to him. In fact from the very nature of the conveyance, there could not be a quarter of the purchase-money paid to the landlord until there was a transfer and sale to the purchaser because the purchaser was not likely to part with a quarter or the whole of the purchase-money before he had got a proper document executed to him for the transfer of the land. That seems to me to be one answer. The other answer is that in a case of this sort where there is no condition of forfeiture in the lease, a covenant like this cannot restrain the transfer of an interest unless proper conditions are put in for enforcing the rights of the landlord on a breach of the contract. I think the conclusion arrived at by the learned Judge of the lower Appellate Court that this property has vested in the plaintiffs is clearly right.

The other point of limitation is clearly covered by the decision which Mr. Ghose has been good enough to refer to, namely, the decision reported as *Budhu Kumar* v. *Hafiz Hussain* (1). The appeal is, accordingly, dismissed with costs.

SMITHER, J.—I agree.

*Appeal dismissed.*

(1) 20 Ind. Cas. 821, 18 C. L. J. 274.

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 193 OF 1916.

May 29, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

MUHAMMAD SHIS—PETITIONER—APPELLANT

*versus*

MAHABIR PRASAD AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 15—Application—Omission to disclose dismissal of previous application, effect of.*

The mere omission to disclose in an application for adjudication that a previous application by the same applicant has been dismissed is not a sufficient reason within the meaning of section 15 of the Provincial Insolvency Act for dismissing the application.

First appeal from the order of the District Judge, Saharanpur, dated the 29th June 1916.

Messrs. *S. M. Y. Hasan* and *Uma Shankar Bajpai*, for the Appellant.

Mr. *Nihal Chand*, for the Respondents.

JUDGMENT.—The order of the Court below is obviously wrong. The petition has been dismissed simply because the applicant did not therein disclose the fact that he had once before applied to be declared an insolvent and that that application had been dismissed. This is not a sufficient reason within the meaning of section 15 of the Act. The act of filing an application by a debtor under the Act is in itself an act of insolvency. We, therefore, allow the application, set

aside the order of the Court below, and direct that Court to restore the petition to its original number on the file and to proceed to hear and determine it according to law. We make no order as to costs.

*Application allowed.*

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PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 383 OF 1916.

May 4, 1917.

*Present*:—Mr. Justice Leslie Jones.

JAGAT RAM—DEFENDANT—APPELLANT

*versus*

DHARAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mortgage by way of conditional sale—Proprietary rights of mortgagee, when called into existence—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900). Sch.—Alienation—Suit to recover land alienated—Limitation, commencement of.*

In a suit to recover possession of ancestral land alienated by a male proprietor during his lifetime, limitation runs primarily from the date on which the alienation is attested. [p. 447, col. 1.]

The proprietary title of a mortgagee is called into existence only when the right of redemption is extinguished. [p. 447, col. 1.]

Plaintiffs sued for possession of certain lands alleging that an alienation thereof by their father was without consideration and necessity. It appears that the original alienation was a mortgage executed in November 1897, which recited that if the property was not redeemed within two years it should be deemed to be sold. The mortgage not having been redeemed, the mortgagee instituted a suit for possession on the 9th March 1901. This suit was compromised on the understanding that if the mortgagor failed to redeem within a further period allowed to him the mortgagee was to get possession. The mortgagee accordingly took possession on the 19th August 1901, mutation of the proprietary right being effected on the 29th June 1903. On the 31st of March 1915, the mortgagor's sons instituted the present suit for possession:

*Held*, that the alienation by sale which the plaintiffs sought to attack not having been mutated till the 29th June 1903, time began to run from that date and the plaintiffs' suit was, therefore, not barred. [p. 447, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Sialkot, dated the 8th January 1916, reversing that of the Subordinate Judge, Sialkot, dated the 15th July 1915, dismissing the claim and remanding the case for decision on the merits.

Bakhshi *Tek Chand*, for the Appellant.

Bhagat *Govind Das*, for the Respondents.

JUDGMENT.—The facts of this case may be stated as follows :—

In November 1897, Devi Singh, a Rajput, mortgaged certain land to Jagat Ram, a Mahajan. The deed contained a condition that the property mortgaged would be deemed to be sold if not redeemed within two years.

On the 28th July 1898, Jagat Ram obtained mutation as of an ordinary mortgage. The mutation proceedings contained no mention of the clause of conditional sale.

On the 12th January 1900 the mortgagee instituted proceedings under Regulation XVII of 1806 and on the 9th March 1901, as the mortgage had not been redeemed, he instituted a suit for possession. The alienor raised certain objections regarding the validity of the notice, but at the next hearing the parties arrived at a compromise under which the alienor was allowed a short further period within which to redeem and failing redemption within that period the alienee was to get possession.

The alienor again failed to redeem and Jagat Ram took possession on the 19th August 1901, mutation of the proprietary right being effected on the 29th June 1903.

Devi Singh died not long afterwards. On the 31st March 1915, his four sons instituted the present suit for possession alleging that the alienation by their father was without consideration or necessity. The Subordinate Judge dismissed the suit of the three elder plaintiffs on the ground that the defendant had obtained possession in 1901, but he held that the suit of the youngest son Kirpa was within time because he was still under twenty-one years of age on the day when the suit was instituted.

It would have been very much more convenient if the Subordinate Judge had decided the whole suit before dismissing that of the three elder plaintiffs. The reason which he gave for holding their suit to be barred by time was incorrect and they appealed to the District Judge, who accepted the appeal and remanded the suit stating that he left all questions other

than that of limitation to be decided by the Court of first instance.

The defendant has now preferred a second appeal to this Court. The District Judge pointed out quite correctly that in a suit of this kind to recover possession of ancestral land alienated by a male proprietor during his lifetime limitation runs primarily from the date on which the alienation was attested. He appears to have been of the opinion that the plaintiffs could not attack the mortgage for the reason that mutation of the mortgage was effected more than twelve years before the suit was instituted, but that they could at least attack the sale as the mutation of proprietary rights was effected within twelve years of bringing the suit. He also remarked that the suit was not barred, regarded as a suit for redemption.

I may remark here that I do not understand why this suit should be regarded as one for redemption. The plaintiffs did not pay the Court-fee necessary for such a suit. They did not admit the amount of the mortgage-debt but merely stated that if the sale was set aside, they would be willing to pay any such sum as was found to have been incurred for a necessary purpose.

The main question is, however, whether the plaintiffs are in time to attack the sale. Counsel for the defendant-appellant urges that the alienation was complete when the deed of mortgage was executed and that the rights of the mortgagee ripened into those of absolute owners without any further action on the part of the alienor. The fact remains, however, that the alienation by sale which the plaintiffs now seek to attack was not mutated until 1903 and that mutation of proprietary rights was obviously necessary. The proprietary title of a mortgagee [see *Atar Singh* v. *Ralla Ram* (1)] is called into existence only when the right of redemption is extinguished, and it is created by the proceedings which took place under Regulation XVII of 1806. In my opinion, therefore, the District Judge was right in holding that so far as the sale is concerned time runs from the 29th June 1903.

It appears to me that it is doubtful whether he was equally correct in holding that the plaintiff could not attack the mortgage apart from the condition of sale, as it is difficult to imagine any case in which the intention not to preserve a mortgage can be more strongly indicated. The plaintiffs, however, appear to have accepted that particular finding as they have not appealed to this Court.

Accordingly the result of the findings of the District Judge appears to be this that, if the plaintiffs can succeed in setting aside the sale, they will be entitled to take possession on payment of the amount of the mortgage-debt. The appeal fails and is dismissed. Costs will be costs in the suit.

*Appeal dismissed.*

(1) 103 P. R. 1901; 120 P. L. R. 1901.

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ALLAHABAD HIGH COURT.

CIVIL REVISION No. 203 OF 1916.

May 29, 1917.

*Present*:—Mr. Justice Ryves.

MESSRS. FORD & MACDONALD, LTD.—PLAINTIFFS—APPLICANTS

*versus*

A. D. MEYER—DEFENDANT—OPPOSITE PARTY.

*Limitation Act (IX of 1908), s. 14—Suit filed in wrong Court—Good faith—Limitation, saving of.*

A suit which ought to have been filed in the Court of Small Causes was filed in the Court of a Munsif and the *munsarim* of that Court certified that the plaint was one within the jurisdiction of the Court of the Munsif. A few days afterwards the Munsif transferred the case to another Court which decreed the suit *ex parte*. On an application by the defendant the *ex parte* decree was set aside and on trial of the suit the Munsif returned the plaint to be filed in the proper Court, as the Munsif's Court had no jurisdiction to try it. The plaint was filed in the Small Cause Court next day and the plaintiff was met with a plea of limitation:

*Held*, that inasmuch as the plaintiff had acted throughout in good faith he was entitled to the benefit of section 14 of the Limitation Act. [p. 448, col. 1.]

Civil revision from the decision of the Court of Small Causes, Agra, dated the 6th July 1916.

Mr. *U. P. Singh*, for the Applicant.

Mr. *S. K. Dar*, for the Opposite Party.

JUDGMENT.—The suit out of which this application arises was filed in the Court of the Munsif of Agra on the 20th June 1914. The suit is one for the recovery of Rs. 350 odd from the defendant, price of bricks supplied. The *munsarim* of the Court certified that

the plaint was one within the jurisdiction of the Court of the Munsif of Agra. A few days later, the Munsif of Agra transferred the case to the Court of the Munsif of Fatehabad. That Court proceeded to try the case and gave the plaintiffs an *ex parte* decree on the 12th August 1914. On the 17th of September 1915, the plaintiffs took out execution, whereupon the defendant applied to have an *ex parte* decree set aside and to have the suit re-heard. This application was granted on the 20th of September 1915 and the suit was re-tried. On the 23rd February 1916, the Munsif of Fatehabad came to the conclusion that the plaint had been filed in the wrong Court and directed the plaint to be returned to the plaintiffs for presentation to the proper Court. The next day the plaint was filed in the Court of Small Causes at Agra. The defence to the suit in that Court was one of limi ation, and it is quite clear that the suit is barred by limitation unless the plaintiffs can call in aid the provisions of section 14 of the Indian Limitation Act, excluding the time the suit was pending in the Courts of the Munsifs of Agra and Fatehabad. The learned Judge of the Court of Small Causes holds that section 14 cannot apply to this case because, as he says, "nothing was done with due care and attention." He says that "the Small Cause Court existed in Agra for a long time, and no one specially Pleaders and clerks are ignorant of this. The mistake was not accidental but was due to inattention and gross negligence." It seems to me there is nothing whatever on which to found this finding. I have not the slightest doubt that the plaintiffs thought honestly that the suit was properly filed in the Court of the Munsif of Agra. That Court itself acted on this supposition, and so did the Court of the Munsif of Fatehabad. Apparently when the defendant applied to have the suit restored on the 17th of September 1914 he took no such plea that the suit had been filed in a wrong Court, because if he had, the Court would have had no jurisdiction to go on with it. It seems to me, therefore, clear that the plaintiffs acted throughout in good faith and, therefore, they are entitled to the benefit of section 14 of the Indian Limitation Act. The plaint is so worded that it might lead to an honestly mistaken view of law that the suit was one for an account. I, therefore, allow this application, set aside the decree of the Court of Small Causes at Agra and remand the suit to that Court with directions to re-admit it on to its file of pending cases and proceed to dispose of it on the merits. Under the circumstances, however, I think the plaintiffs ought to pay the costs of the defendant throughout.

*Application allowed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 800 OF 1914.

May 22, 19 7.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

NANAK CHAND—PLAINTIFF—APPELLANT

*versus*

NUR UD-D.N AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. IX, r. 5—Defendant not served—Suit consigned to record room—Second suit on same cause of action, maintainability of.*

In a suit on a bond it appeared that the plaintiff had, on the 19th February 1909, brought a suit for recovery on the same bond against the same defendants, but as one of the defendants could not then be served, the Court had, on the 10th March 1909, consigned the suit to the record room, making a reference to Order IX, rule 5, Civil Procedure Code:

*Held*, that it was impossible for the Court to dismiss the first suit under Order IX, rule 5, Civil Procedure Code, that it was still pending and that, therefore, a second suit on the same cause of action was not maintainable. [p 449, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 7th March 1914, affirming that of the Additional District Judge, Lahore, dated the 10th June 1913, dismissing the claim.

Lala *Tirath Ram*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—On the 19th February 1909 the plaintiff instituted a suit for recovery on a bond against two defendants. One of the defendants could not be served at the time, and on the 10th March 1909 the Court consigned the suit to the record room making a reference to the provisions of Order IX, rule 5, Civil Procedure Code.

In 1912 the plaintiff instituted a second and fresh suit on the same cause of action against the same defendants. The Additional District Judge dismissed the second suit,

holding that the first suit was still pending. The plaintiff appealed but the Additional Divisional Judge upheld the finding of the first Court. The plaintiff has now preferred a second appeal to this Court.

In our opinion the decision of the lower Court is quite right. It was impossible for the Court to dismiss the first suit under Order IX, rule 5. The meaning of the Subordinate Judge was, no doubt, loosely expressed, but all that he can have intended was to keep the case pending until the provisions of Order IX, rule 5, could be employed. The first suit was never actually dismissed.

Nor are we able to agree with the Counsel for the appellant that even if the first suit is still pending, the second should be kept pending also until the first suit is decided. If the first suit is decreed the second must necessarily be dismissed, and if the first suit is dismissed the same result will follow.

We have been informed by Counsel for the appellant that after the decision of the Additional Divisional Judge his client made an application to the Court of first instance to proceed with the first suit and that this application was rejected. He should now make a fresh application and the Court should proceed to dispose of the original suit.

The present appeal is, however, dismissed with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1804 OF 1915.

March 16, 1917.

*Present*:— Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

A. KUTTAN—DEFENDANT NO. 1—APPELLANT

*versus*

P. KALLIANI AMMA AND OTHERS—PLAINTIFFS NOS. 1 TO 3 AND DEFENDANT NO. 2—RESPONDENTS.

*Malabar law—Decree, personal, against* karnavan *—Execution, application for, against* tarwad*—Burden of proof.*

Where a decree is against the *karnavan* of a *tarwad* personally and execution is prayed for against the *tarwad*, it is for the decree-holder to show that, as a matter of fact, the decree was obtained against the *tarwad* for money borrowed for *tarwad* necessity.

Second appeal against the decree of the Court of the Subordinate Judge, Calicut, in Appeal Suit No. 950 of 1914, preferred against that of the District Munsif, Palghat, in Original Suit No. 95 of 1914.

Mr. *P. S. Narayanaswami Aiyar*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.— The first defendant obtained a decree against the second defendant who is a *karnavan* of the *tarwad* directing him either to execute a *kanom* or to pay damages. The *kanom* was not executed and the 1st defendant in execution of the decree for damages sold the property and bought it. The Subordinate Judge has held that the decree is not binding on the plaintiff's *tarwad*. He says that there is reason to believe that the 1st defendant and the 2nd defendant acted in collusion but no such case was made. However that may may be, he points out that the decree was a personal decree against the 2nd defendant and not a decree against the *tarwad*. That being so, it was for the 1st defendant to show that the decree was obtained, as a matter of fact, against the *tarwad* for money borrowed for *tarwad* necessity. This view of his law is borne out by the Full Bench decision of this Court in *Vasudevan* v. *Sankaran* (1). There is no evidence to show that either the 2nd defendant was sued in his capacity as *karnavan* or that as a matter of fact the agreement to execute the *kanom* was for *tarwad* purposes.

The second appeal is dismissed with costs.

*Appeal dismissed.*

V. R. P.

(1) 20 M. 129; 7 M. L J. 102; 7 Ind. Dec. (N. S.) 90.

JANENDRA MOHUN *v.* GOPAL CHANDRA HAR.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 2321 OF 1915.

April 18, 1917.

*Present*:—Mr. Justice Chitty and Mr. Justice Beachcroft.

JANENDRA MOHUN CHOUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

GOPAL CHANDRA HAR—DEFENDANT—RESPONDENT.

*Evidence Act (I of 1872), s. 90—Ancient document not signed or sealed—Presumption under s. 90, applicability of.*

Section 90 of the Evidence Act does not apply to an ancient document which is neither signed nor sealed nor purports to be in the handwriting of any particular person. [p. 450 col. 2.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 12th June 1915, modifying that of the Assistant Settlement Officer of that District, dated the 26th October 1914.

Babus *Jogesh Chandra Roy* and *Mukunda Nath Roy*, for the Appellants.

Babu *Kshitish Chunder Neogi* (with him Babu *Naresh Chandra Sen Gupta*), for the Respondent.

JUDGMENT.

BEACHCROFT, J.— The plaintiff is the appellant before us. He applied under section 105 of the Bengal Tenancy Act for settlement of rent payable by the defendant. The defendant claimed that he was a *raiyat* holding at fixed rates. The First Court found that the tenant was not a *raiyat* holding at fixed rates and it assessed rent at the rate of Rs. 2-8 0 on the whole of the tenant's holding, it also gave an enhancement on account of the rise in prices. Both sides appealed to the Special Judge. The plaintiff appealed against the decision as to the rate of rent and the defendant appealed against the decision as to status. The learned Judge held that the presumption of section 50 (2) of the Bengal Tenancy Act should apply in this case, and applying that presumption he held that the defendant was a *raiyat* at fixed rates. Some old papers appear to have been filed in the case dating back to 1264, 1275 and 1276. The papers of 1275 and 1276 show that the tenant was holding at the same rate at which he was holding at the time of the institution of the suit. The paper of 1264, however, shows a different rate. This paper, it appears, was neither signed, nor sealed, nor is there any evidence to show that it was written by any particular person, and in that state of facts the learned Judge held that section 90 of the Evidence Act did not apply.

The first argument addressed before us is that the learned Judge is wrong in so deciding and that the Judge ought to have presumed that the document was written by the person whose duty it was to write such documents. In my opinion, this argument cannot be sustained. Section 90 of the Evidence Act provides that the Court may presume that the signature and every other part of a document, which purports to be in the handwriting of any particular person, is in that person's handwriting. As already stated, the document has not been signed, nor does the document purport to be in the handwriting of any particular person. We are asked to go beyond the presumption specified in section 90 of the Act. The first point, therefore, cannot succeed.

The next point taken is that the tenancy was created subsequently to the Permanent Settlement and that, therefore, the presumption raised in section 50 (2) of the Bengal Tenancy Act does not apply. As regards that, it is a sufficient answer to say that the learned Judge refused to accept the evidence which bore on the question of the creation of the *jote* subsequently to the date of the Permanent Settlement; and, that being his finding, the provisions of section 50 (2) of the Bengal Tenancy Act apply. The result then is that the learned Judge's decision as regards the status of the defendant must be upheld.

It is then argued that the learned Judge has not dealt with the appeal of the plaintiff as regards the rate of rent to be assessed. The learned Judge points out that there has been some increase in the area from the date of the earliest papers, which he accepts and he assesses rent in respect of the excess area. He does not, in so many words, accept the rate which is settled by the Assistant Settlement Officer, *viz.*, Rs. 2-8-0 per *kur*, but as he does not interfere with the rent so settled, it is obvious that he intended to uphold the rent thus settled.

Then it is further urged that the Judge ought to have entered into a discussion of

the evidence in regard to rent because the landlord claimed some higher rate than Rs. 2-8-0. As regards that all I need say is that it does not appear that that question was argued before the learned Special Judge.

In my opinion, this appeal fails and must, therefore, be dismissed with costs, two gold *mohurs*.

CHITTY, J.—I agree.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 71 OF 1916.
April 12, 1917.
*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.
MADAN GOPAL AND ANOTHER—PLAINTIFFS APPELLANTS
*versus*
SATI PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Alienation by father—Sons, right of, to set aside sale—Antecedent debt, consideration paid, whether constitutes.*

The amount of consideration paid in cash to a Hindu father at the time of the sale by him of joint property, which is not required for the necessity of the family, is not an antecedent debt for which the sons are liable on the sale being set aside. [p. 452, col. 1.]

The money paid to a Hindu father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale has been set aside and the right of the vendee to get back the sale consideration from the father has accrued. [p. 452, col. 1.]

Second appeal against the decision of the Subordinate Judge, Mainpuri, dated the 19th May 1915.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiffs for setting aside a sale-deed executed by their father, defendant No. 2, on the 14th of May 1913 in favour of the first defendant and for possession of the property comprised in the sale. The ground upon which they brought the suit was that the sale was not for an antecedent debt or for family necessity. They also alleged that the defendant No. 2, the father of the plaintiffs, had been duped by the guardian of the first defendant and had been induced to execute the sale-deed without receiving any part of the consideration for the sale. The Court of First Instance dismissed the claim on the ground that it had not been proved that the sale had been made for immoral or illegal purposes. This judgment of the Court of First Instance was set aside by the lower Appellate Court. That Court held that there was no legal necessity for selling joint family property and that part of the consideration, *viz.*, Rs. 262-7-0 which had been withheld by the vendee for payment of two prior mortgage-debts had not been paid. As to the remainder of the consideration the learned Subordinate Judge was of opinion that it had not been proved that the vendor, the father of the plaintiffs, had not received it and he held that the plaintiffs could only recover the property comprised in the sale on condition of paying to the vendee Rs. 537-9-0, the balance of the consideration. The plaintiffs have preferred this appeal and it is contended on their behalf that the Court below was wrong in attaching to its decree a condition that the plaintiffs should pay to the vendee the balance of the consideration which purported to have been paid in cash to their father. In our opinion this point is concluded by authority in this Court. It has been held in a number of cases that a sale for an antecedent debt or for the payment of an antecedent debt is binding on the sons and that if the consideration for a sale made by the father was not for any of the purposes mentioned above the sons were entitled to recover the property. It is urged, however, that the amount of consideration paid in cash to the father must be deemed to be the father's debt and the sons cannot recover the property sold by the father unless they refund to the vendee the amount so paid. This view is no doubt supported by the decision of the Calcutta High Court in *Koer Hasmat Rai* v. *Sunder Das* (1). That case was dissented from by a Bench of this Court in *Ram Dayal* v. *Suraj Mal* (2). In *Manbahal Rai* v. *Gopal Misra* (3), to which one of us was a party, it was stated in the judgment that the consideration paid in cash to the father could not be

(1) 11 C. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1023.
(2) 23 Ind. Cas. 891.
(3) A. W. N. (1901) 57.

regarded as an antecedent debt or as a debt of the father and the same view was repeated in the case of *Chandradeo Singh* v. *Mata Prasad* (4). In the case of *Ram Dayal* v. *Suraj Mal* (2), it was clearly ruled that the sons were not liable to refund to the purchaser the portion of the consideration which had been paid in cash to the father at the time of the sale but which was not required for the necessity of the family. The reason why we feel ourselves unable to agree with the decision of the Calcutta High Court to which we have already referred is that money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale has been set aside and the right of the vendee to get back the sale consideration from the father has accrued. The amount so paid may at some subsequent time become a debt of the father but until this event arises it cannot be deemed to be a debt for which the sons at the time when they get the sale set aside can be held liable. There are other cases decided by this Court in which the same view was practically held, but we deem it unnecessary to refer to them in detail. The result is that we allow the appeal, vary the decree of the Court below by striking out from it the provision that the plaintiffs should refund to the purchaser Rs. 537-9-0 as a condition precedent to their obtaining possession. The plaintiffs' claim is, therefore, decreed in full. The appellants will get their costs in all Courts including in this Court fees on the higher scale. The objections preferred under Order XLI, rule 22, of the Code of Civil Procedure fail, and are dismissed with costs. We may note that a preliminary objection was taken by the respondents to the effect that the appeal was beyond time. We overruled the objection as the appeal had been admitted under section 5 of the Limitation Act.

*Appeal allowed*

(4) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 141 OF 1916.

July 31, 1916.

*Present*:—Mr Stuart, J. C.

*Musammat* MUHAMDI BEGAM—DEFENDANT No. 1—APPELLANT

*versus*

DURGA PRASAD AND ANOTHER—PLAINTIFFS, NAZIR AHMAD—DEFENDANT No. 2—RESPONDENTS.

*Principal and agent—Pro-note executed by general agent—Liability of principal—Evidence—Judgment in criminal trial, value of.*

A lady executed a general power of attorney in favour of a relation, which gave him authority to borrow money on her behalf, but only for necessity. The said relation borrowed money on a promissory note, in which he described himself as a relation and agent of the lady, who was no party to its execution. The note described that the money was borrowed to meet the funeral expenses of one of her relatives and of her husband, who was the brother of the executant, and for personal expenses:

*Held*, that the lady was not liable on the note, inasmuch as it could not be inferred that the money was borrowed on her behalf, or if so borrowed was borrowed for necessity. [p. 453, col. 2; p. 454, col. 1.]

A judgment in a criminal trial is by itself evidence only of the conviction or acquittal which it records, and of no other matter. [p. 455, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 13th April 1916, modifying that of the Munsif, Sitapur, dated the 30th August 1915.

Mr. *Mohammad Wasim*, for the Appellant.

Syed *Nabi Ullah* and Babu *Kanhaiya Lal*, for Respondents Nos. 1 and 2.

JUDGMENT.—Syed Nazir Ahmad borrowed Rs. 600 on 15th February 1912 from Lalta Prasad and executed on that date a promissory note for Rs. 600 in favour of Lalta Prasad. Syed Nazir Ahmad was the brother of Bashir Ahmad deceased who was the husband of *Musammat* Muhamdi Begam. After the death of Bashir Ahmad, Nazir Ahmad acted as his sister-in-law's general agent. He subsequently married her. Their relations became strained in the year that the money was borrowed. *Musammat* Muhamdi Begam refused to live with Nazir Ahmad. He sued her for restitution of conjugal rights. She prosecuted him criminally for embezzlement. He was convicted and sentenced to imprisonment by a Criminal Court on 16th July 1912.

His conviction and sentence were affirmed on appeal. Nazir Ahmad has since divorced Muhamdi Begam. Lalta Prasad died after execution of the promissory note and was succeeded by Durga Prasad and Devi Dayal.

The two latter instituted a suit in the Court of the Munsif of Sitapur on 30th January 1915 on the basis of this promissory note against *Musammat* Muhamdi Begam and Nazir Ahmad. The learned Munsif granted them a decree against Nazir Ahmad alone and dimissed the suit as against *Musammat* Muhamdi Begam. Nazir Ahmad did not appeal to the District Judge. The plaintiffs appealed to the District Judge against the exemption of *Musammat* Muhamdi Begam. The learned District Judge allowed their appeal. *Musammat* Muhamdi Begam comes to this Court in second appeal.

The promissory note in question was admittedly not executed by *Musammat* Muhamdi Begam. It purports to borrow Rs. 600 to defray the expenses of the *fatiha* ceremonies of Bashir Ahmad, and the *fatiha* and *chaliswan* of *Musammat* Fatima Bibi, and for private expenses, and it is signed by Nazir Ahmad who describes himself as the brother-in-law and agent of *Musammat* Muhamdi Begam. If the promissory note stood alone, it would be impossible to pass a decree upon it against *Musammat* Muhamdi Begam. She never executed it, and there is nothing in its contents to show that she in any way benefited by it. The plaintiffs-respondents endeavoured to make her liable under its terms by evidence to the following effect. They asserted that she had directly authorized Lalta Prasad to advance the money explaining that it was for herself. The evidence on this point has been disbelieved by both Courts and their finding that it is unreliable is final. The plaintiffs next proved that *Musammat* Muhamdi Begam had executed a general power of attorney on 9th February 1912 in favour of Nazir Ahmad which gave him authority to borrow money on her behalf. I find that this power-of-attorney was executed by *Musammat* Muhamdi Begam, that she understood its contents, and that under its terms Nazir Ahmad was authorised to borrow money on her behalf, but only for necessity. This qualification is very important. If it was proved that the money was borrowed for the necessity of the lady, she would be bound under the terms of the general power of attorney. But there is nothing to prove from the document itself that it was borrowed for her necessity. As the document stands, the money might have well been borrowed by Nazir Ahmed in his personal capacity. A general agent of another person who borrows money and describes himself as general agent may be borrowing either for his principal or for himself. The circumstance that Nazir Ahmad described himself as the brother-in-law of the lady could not legally convey to the mind of any one that he was borrowing money on her behalf. The description is undoubtedly not an usual one. But I can draw no legal conclusion from it to the effect that merely by the use of this description the lender would understand that the money was being borrowed on behalf of the lady.

We next come to the question whether the description of the purposes of the loan in the promissory note would show that the money was being borrowed on behalf of the lady. A portion of the money was taken for the expenses of the *fatiha* ceremonies of the deceased Bashir Ahmad. It is undoubtedly a pious duty of a Muhammadan widow to perform to the best of her ability according to her means such ceremonies on account of her deceased husband. But it is also a pious duty of a male Muhammadan to perform such ceremonies on behalf of his deceased brother, and as Bashir Ahmad was not only the husband of the lady but also the brother of the executant, the circumstance that Nazir Ahmad borrowed a portion of the money for the ostensible purpose of defraying the expenses of these ceremonies would raise no legal inference that he borrowed that amount on behalf of *Musammat* Muhamdi Begam. The case of the expenses for the ceremonies on behalf of *Musammat* Fatima Bibi is slightly different. *Musammat* Fatima Bibi was a relative of *Musammat* Muhamdi Begam and not a relative of her husband and his brother. But that circumstance would not create a legal inference that the lender knew that the money

was being borrowed on behalf of *Musammat* Muhamdi Begam. He was in a position to know that Bashir Ahmad was the husband of *Musammat* Muhamdi Begam and the brother of Nazir Ahmad, for Nazir Ahmad had described himself as the brother-in-law of *Musammat* Muhamdi Begam who, the creditor knew, was the widow of Bashir Ahmad, (it is in evidence that Bashir Ahmad had had dealings with Lalta Prasad), but there is nothing on the record to show that Lalta Prasad had any knowledge as to who *Musammat* Fatima Bibi was, and the point remains, could money borrowed to defray the expenses of the ceremonies on behalf of that lady be considered as borrowed for legal necessity? I cannot answer that question in the affirmative. The last amount borrowed was ostensibly for private expenses. But the promissory note does not state whose the private expenses were and they would appear from the terms of the document to be the private expenses of the executant Nazir Ahmad.

A further point remains, however. The learned District Judge found that the contents of the judgments of the Criminal Courts showed that *Musammat* Muhamdi Begam had prosecuted Nazir Ahmad for the embezzlement of this very sum of Rs. 600 which he had obtained by execution of the promissory-note, and that it was on that charge that Nazir Ahmad was convicted. He, therefore, arrived at the conclusion that, if *Musammat* Muhamdi Begam claimed the money which was borrowed on that promissory note, and prosecuted Nazir Ahmad for embezzlement, she must be considered to have accepted liability under the terms of the note. It was for this reason mainly that he decided the case in favour of the plaintiffs-respondents. I have now to see on what evidence the learned District Judge arrived at this conclusion. The complaint of *Musammat* Muhamdi Begam on which these criminal proceedings were instituted was never proved. *Musammat* Muhamdi Begam was examined on commission. There is nothing in her evidence to show that she prosecuted Nazir Ahmad in respect of the embezzlement of this sum of Rs. 600. She says,".....I learnt of Lalta Prasad's debt from Sakhawat Ali in the course of the trial of Nazir Ahmad whom I had prosecuted for embezzlement. Sakhawat Ali told me that Nazir Ahmad has borrowed Rs. 600 from Lalta Prasad. Have you given him permission to do so? I said 'I know nothing of it'.....Nazir Ahmad embezzled the income of my village and took away my moveables for which I prosecuted him twice." Then she stated in cross-examination, "I had stated in Criminal Court that I knew not whether Nazir Ahmad had or had not brought any money from Lalta Prasad. I had also said that I neither asked him to borrow nor did he give anything to me. I did not prosecute Nazir Ahmad for this Rs. 600. I do not know if he was convicted for embezzling this sum. I had prosecuted him for embezzling the income of my estate and he was convicted."

It is thus clear that there is nothing in the lady's evidence to show that she prosecuted Nazir Ahmad in respect of the embezzlement of this sum. In the present suit the plaintiffs called as a witness a certain Ishri. His evidence was disbelieved by both Courts. They also called Abul Hasan to prove the *mukhtarnama* given by *Musammat* Muhamdi Begam to Nazir Ahmad. Durga Prasad one of the plaintiffs then gave evidence himself. That evidence has not been believed. They then called a certain Chhote Lal who gave no evidence of value and Paragi Singh who also gave no evidence of value. There is nothing in the evidence called by *Musammat* Muhamdi Begam to show the charge on which Nazir Ahmad was convicted except the lady's own statements. There is thus no evidence upon which the learned Dis rict Judge has based his finding that Nazir Ahmad was convicted on a charge of embezzlement of this sum of Rs. 600 except the copies of the judgments of the Deputy Magistrate who heard the case, the Sessions Judge who heard the appeal, and the Judicial Commissioner who heard the revision. These judgments, if they were admissible in evidence, would certainly go to show that Nazir Ahmad was convicted on a charge of embezzlement of this sum of Rs. 600, although I should not be disposed to draw from them the conclusion which the learned District Judge drew, that the circumstance of his prosecution on the charge discloses the acceptance by *Musammat*

Muhamdi Begam of liability under the promissory note. But apart from that fact, these judgments are not admissible in evidence to prove that the prosecution was on that charge. They cannot be so admitted under any provision of the Indian Evidence Act. The provisions of section 42 have no application. The judgments are conclusive evidence to show that Nazir Ahmad was convicted but they are not admissible in evidence to show even that *Musammat* Muhamdi Begam was the prosecutrix. It was for the plaintiffs-respondents to establish by evidence other than the contents of the judgments that *Musammat* Muhamdi Begam prosecuted Nazir Ahmad upon this charge. It was easy for them to adduce evidence upon such a point and they abstained from doing so.

I have considered whether in the circumstances of the case I should allow the plaintiffs-respondents the exceptional indulgence of permitting them to adduce further evidence to establish this point now. But I have after consideration decided not to do so. In the first place they ought to have known the legal requisites of success in such a matter. But apart from that fact even if the judgments were admissible in evidence I do not draw from them any conclusion to the effect that *Musammat* Muhamdi Begam accepted liability under the promissory note in the criminal proceedings or that anything which she did in those proceedings establishes her liability.

The case thus stands that the plaintiffs-respondents, even if they were allowed to utilize the contents of documents which are not admissible in evidence, have failed to establish the liability of the lady. They no doubt are in an unfortunate position, as the man who executed the promissory note is an exceedingly dishonest person, and there is reason to suppose that he will not be likely to satisfy the decree. But they have largely to thank themselves for their own difficulties in this matter. They clearly lent him the money without communicating with the lady or without satisfying themselves of his reliability or responsibility. They have been given a decree against him which they will have to execute as best they can. But *Musammat* Muhamdi Begam is on my finding in no way responsible for the satisfaction of the promissory note.

I, therefore, allow her appeal, dismiss the decree as against her, and direct that the plaintiffs-respondents pay their own costs and those of *Musammat* Muhamdi Begam in all Courts.

*Appeal allowed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1327 OF 1915.

February 20, 1917.

*Present*:—Mr. Justice Scott Smith.

KAJU MAL—DEFENDANT—APPELLANT

*versus*

PARMA NAND—PLAINTIFF, MARU, MINOR—DEFENDANT—RESPONDENTS.

*Registration Act (XVI of* 1908), *s.* 17 (1) (b)—*Letter reciting certain facts and delivery of possession, whether compulsorily registrable.*

A letter reciting certain facts and saying that the writer has given possession of certain property to a certain individual and has ceased to have anything to do with it, is not an instrument which of itself operates or purports to create or declare any right, title or interest in the property and does not, therefore, require registration. [p. 456, col. 1.]

Second appeal from the decree of the Senior Subordinate Judge, Kangra at Dharamsala, dated the 22nd February 1915, reversing that of the Munsif, third Class, Dehra, District Kangra, dated the 30th November 1914, dismissing the claim.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—The suit out of which the present appeal arises was brought by Parma Nand, plaintiff-respondent, for possession of a shop which he alleged had been sold to him by Ghaplia and of which Kaju Mal, defendant-appellant, was said to have taken wrongful possession. The plaintiff claimed under an unregistered deed of sale, dated the 23rd September 1912, whereas Kaju Mal based his title on an alleged oral sale of the 22nd April 1911, followed by possession. The First Court found that the sale in favour of the defendant was proved, that he had been in continuous possession since the date of the sale and that the sale to the plaintiff was a fictitious one. On these findings it dismissed the suit The lower Appellate Court on appeal held that, though the defendant

pleaded an oral sale, he really relied upon a document, dated the 22nd April 1911, as evidence of the sale, that consideration for the sale was over Rs. 100 and that as the instrument purported to convey rights in property of the value of more than Rs. 100 its registration was compulsory, and, as it had not been registered, it was not admissible in evidence. The Court, therefore, ruled that the document must be excluded from consideration and that the defendant must fall back on the oral evidence of the alleged sale which evidence it, however, pronounced to be unsatisfactory and not out-weighing the documentary and oral evidence relied upon by the plaintiff. It, therefore, accepted the appeal and decreed the plaintiff's claim. In second appeal by the defendant it is urged that the document in question did not require registration. It is also pointed out that the lower Appellate Court has not come to any finding as to whether the defendant was in possession of the property, and, if so, what the effect of that possession was. It is argued that defendant was in possession at the time of the sale to the plaintiff and that such possession was a notice to the latter and is *prima facie* evidence of the defendant's title. I have carefully considered the document of the 10th *Besakh Sambat* 1968, corresponding to 22nd April 1911, it is written in Hindi and is really a letter, as it purports to be from Ghaplia to Shah Kaju; it is only a sort of memorandum, and is quite an informal document; it recites certain facts and states that the writer has to-day given possession of the shop and has put Shah Gauri and Kaju in possession, that the writer has nothing to do with the shop in future and it has been sold. This document is not in my opinion an instrument which of itself purports or operates to create or declare any right, title or interest in the shop in question. It is merely a letter reciting certain facts. I hold that such a document does not require registration. I also note that this objection was not raised in the First Court and the document was received in evidence without apparently any objection being raised. Besides the document there is ample oral evidence of the sale of Kaju. I also see no reason to doubt that the vendee obtained possession; the subsequent sale to the plaintiff was by an unregistered deed and cannot have any priority over the sale to the defendant. Counsel for the appellant referred *inter alia* to *Imam Buksh* v. *Pokhar* (1), *Hassan* v. *Fazal* (2) and *Jodh Singh* v. *Sundar Singh* (3), as authority for the proposition that the defendant's title should be presumed from his peaceful possession of the property, and that in any case the onus was on the plaintiff to show that the defendant was not the owner of the property. It is unnecessary to discuss this argument because of my finding that the document of the 22nd April 1911 does not require registration and that the defendant appellant has fully proved his sale by the evidence produced by him.

I accept the appeal and setting aside the order of the lower Appellate Court, restore the decree of the First Court with costs throughout.

*Appeal accepted.*

(1) 26 P. R. 1882.
(2) 121 P. R. 1882.
(3) 122 P. R. 1882.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 139 OF 1916.

March 12, 1917.

*Present*:—Mr. Lindsay, J. C.

SAIFU KHAN—DEFENDANT No. 4—APPELLANT

*versus*

THE DEPUTY COMMISSIONER, FYZABAD, MANAGER, COURT OF WARDS, AJUDHIA ESTATE - PLAINTIFF,

PIR BAKHSH KHAN AND OTHERS—DEFENDANTS NOS. 1 TO 3 AND 5—RESPONDENTS.

*Oudh Rent Act (XXII of 1886), s. 154—Under-proprietor, decree against, for arrears of rent—Encumbrancer of under-proprietary property, position of—Suit on encumbrance, maintainability of—Plea not specifically raised—Court, power of.*

The mere fact that the encumbrancer of an under-proprietary property did not, in view of section 154 of the Oudh Rent Act, satisfy the decree for arrears of rent obtained by the superior proprietor against the under-proprietor, does not debar him from bringing a suit on the basis of his encumbrance. [p. 458, col. 2.]

A Court is justified in trying out a question arising in a case, although it has not and could have not been specifically raised in the pleadings owing to the peculiar circumstances of the case. [p. 459, col. 2.]

**Appeal from the decree of the District Judge, Fyzabad, dated the 28th January**

1916, reversing the order of the Subordinate Judge, Sultanpur, dated the 30th April 1915.

Mr. *Mohammad Wasim*, for the Appellant.

The Government Pleader, for Respondent No. 1.

JUDGMENT.—The appellant in this case one Saifu Khan was the 4th defendant in a suit, which was brought in the Court of the Subordinate Judge of Sultanpur by the Deputy Commissioner of Fyzabad in his capacity of Manager of the Court of Wards of Ajudhia Estate. The first three defendants in the case were Pir Bakhsh Khan, Fida Husain Khan and Chand Khan, and the suit was brought for the purpose of enforcing a surety bond by attachment and sale of a 1 anna 1 pie under-proprietary share situated in a village called Sewa. It appears that the first defendant Pir Bakhsh Khan in tha month of January 1906 took a lease of a certain village belonging to the Ajudhia Estate for the year 1313 to 1322 *Fasli*. He executed a *kabuliyat* in favour of the estate agreeing to pay a yearly rent of Rs. 2,275 and it was alleged in the second paragraph of the plaint that Pir Bakhsh got possession under the terms of this *kabuliyat*. In the third paragraph of the plaint it was stated "that with a view to ensure the realization of the lease money aforesaid the defendant No. 1 (that is the lessee), and his own brothers the defendants Nos. 2 and 3 executed a surety bond on the 18th of June 1906 by which they hypothecated a 1 anna 1 pie under proprietary share of the village Sewa to secure the payment of one year's rent amounting to Rs. 2,275." The other paragraphs of the plaint set out that the lessee Pir Bakhsh fell into arrears and that consequently the suit was brought in order to enforce the terms of this contract of indemnity. The position of the 4th defendant Saifu Khan with respect to this claim is as follows. It appears that the Raja of Hasanpur, who is the 5th defendant in the case, is the superior proprietor of this village of Sewa in which the under-proprietary share in suit is situated. The Raja obtained a decree for arrears of rent against a number of the under-proprietors in the village including the first three defendants and in execution of his decree he had caused the under-proprietary right in the village to be sold, property which included the share which is now in dispute. The Court of Wards had a decree against Pir Bakhsh for the arrears of rent which were owing from him; and claiming to be interested in the under-proprietary share which had been hypothecated under the deed of indemnity above mentioned the Deputy Commissioner, in the course of the execution proceedings taken by the Raja of Hasanpur, applied to have this property either exempted from sale, or failing that, to have it notified at the time of the sale that the property was subject to an encumbrance in favour of the Court of Wards. This application of the Court of Wards to the Revenue Court which was executing the Raja's decree was unsuccessful. The property was brought to sale and was purchased by the defendant appellant Saifu Khan. The present suit, therefore, has been brought for enforcement of the indemnity bond and the plaintiff Court of Wards claims to be entitled to bring this under-proprietary share to sale for the purpose of realizing the amount secured by the deed of indemnity. A number of pleas were put up by the defendant Saifu Khan. Shortly stated his defence was to the effect that he had purchased the property free from all encumbrances and that the Court of Wards had no right to call for a sale of this property in order to satisfy a claim based upon the deed of indemnity. With regard to this deed the only plea which Saifu Khan put forward in his written defence was that he had no knowledge whatever of it. Another defence was in the form of a suggestion or assertion that the plaintiff was in some way estopped from maintaining this suit. After the written pleadings had been put in Court statements were made from time to time by the Counsel employed by the parties. Issues were framed and issue No. 2 (*a*) reads as follows. "Is the security deed genuine and valid?" On the 16th April 1915 after these issues were framed it seems that the Pleader for Saifu Khan made an admission that the deed

which was being sued upon was a genuine deed and that he would not, therefore, require proof of its execution. When the Subordinate Judge came to decide the case he was of opinion that the deed was invalid to the extent of two-third of the share hypothecated inasmuch as no consideration for its execution was proved. In the course of his judgment the learned Subordinate Judge remarks that although the Pleader engaged by the defendant Saifu Khan had admitted the genuineness of the document he still contested its validity. The result was that the claim was dismissed. In appeal this decree of the Court of First Instance has been reversed by the learned District Judge of Fyzabad. In his opinion the Subordinate Judge was wrong in holding that the deed of indemnity was void for want of consideration. The Judge was of opinion that the defendant appellant Saifu Khan was bound to raise a definite plea attacking the validity of the document in suit. He held that no such definite plea had been put forward and that in reality there was no issue between the parties with regard to this matter. He refers in the course of his judgment to the provisions of Order VIII, rule 2, of the Code of Civil Procedure, and says that Saifu Khan was bound to expressly raise the plea of want of consideration in his written statement of defence. With regard to the other points which were debated before the learned Judge he held that there was no bar to the entertainment of the suit on the other grounds which were put forward by Saifu Khan in his statement of defence. There are nine grounds set out in the memorandum of appeal presented to this Court but only two points have been argued before me by Mr. Wasim, the learned Counsel for the appellant. The first five grounds of the memorandum of appeal relate to the question of the validity of this deed of indemnity. The argument with respect to this point is that the learned Judge was wrong in not investigating the question of want of consideration. The only other ground which has been pressed upon my attention by the learned Counsel is with reference to the plea taken in the ninth ground of the memorandum of appeal. It was argued that when the Raja of Hasanpur obtained his decree against the under-proprietors including Pir Bakhsh and his brothers the Court of Wards which had taken an encumbrance of the property belonging to these under-proprietors was under a liability to satisfy the decree obtained by the Raja the superior proprietor. In this connection reference was made to section 154 of the Oudh Rent Act. It is contended that as the Court of Wards did not satisfy the decree the present suit is not maintainable. I am unable to accept this argument. It may be the case that the Court of Wards as an encumbrancer of under-proprietary property was liable to the Raja. It does not appear, however, that the Raja made the Court of Wards any party to the suit in which he claimed arrears of rent from Pir Bakhsh and the others and in any case I fail to see how it can be said that the mere fact that the Court of Wards did not satisfy the Raja's decree is any bar to its making the present claim on the basis of this deed of indemnity. So far as this point is concerned the appellant has, in my opinion, no case. I have come to the conclusion, however, that I must send the case back for a decision upon the question of the consideration which passed between the persons who are parties to the bond of indemnity executed in the month of June 1906. I have already mentioned that the learned Judge has referred to Order VIII, rule 2, of the Code of Civil Procedure in his judgment. I might also refer to Order VI, rule 8, which lays down that where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged and not as a denial of the legality or sufficiency in law of such a contract. It was, however, to be remembered in the present instance that the defendant-appellant Saifu Khan was no party to this deed of indemnity and this being so it seems to me impossible to insist that he should have set up pleas based upon facts which could not possibly be within his knowledge. How, it may be asked, was Saifu Khan to raise a plea to the effect that no consideration moving from the Court of Wards had passed to the executants of this deed of indemnity. It is

quite clear, as I have already mentioned, that this document was executed behind Saifu Khan's back and without his knowledge and when he stated in the second paragraph of his written statement that he had no knowledge of the terms of the document or the circumstances in which it came to be executed he said all that could be expected from him in the circumstances. Referring to section 127 of the Contract Act we find that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. If this case is to be decided upon the strict law of pleadings it seems to me that the learned Judge should have insisted upon a strict observance of the law by the plaintiff himself. If we examine the plaint which was filed in this case we find no allegation made by the plaintiff that any consideration moved from the plaintiff to the first three defendants in connection with the execution of this contract of indemnity. Order VI, rule 3, of the Code of Civil Procedure, lays down that the forms in Appendix A when applicable, and where they are not applicable, forms of a like character, as nearly as may be, shall be, used for all pleadings. In Appendix A to the Code, form No. 12, we have a form of plaint which is to be followed in a suit brought against a surety for payment of rent; and in the second paragraph of this pattern plaint we find an allegation made by the plaintiff "that the defendant (that is the surety) agreed, *in consideration of the letting of the premises* to the lessee, to guarantee the punctual payment of rent." Similarly we find in form No. 18 in the same Appendix (a case of a suit on a bond for the fidelity of a clerk) an allegation that consideration passed from the plaintiff to the defendant. It seems to me clear, therefore, that in cases of the present kind it is the intention of the Legislature that the fact of consideration having been given should be alleged in the plaint. Another point may be noticed here. I have already stated that the *kabuliyat* which was executed by the first defendant Pir Bakhsh was signed by him on the 9th of January and was registered on the 15th of January 1906. I take it from the allegation contained in the second paragraph of the plaint that Pir Bakhsh obtained possession immediately after this deed had been registered. That may not of course be the real meaning of what is said in paragraph 2, but at any rate it is the apparent meaning. Then we find in paragraph 3 that the indemnity bond upon which the plaintiff relied was executed on the 18th of June 1906, that is to say about six months after the *kabuliyat* had been executed by the principal debtor and presumably six months or thereabouts after he had been admitted to possession. *Prima facie* therefore it would appear from these statements contained in the plaint that there was no consideration for this contract and the learned Counsel for the appellant has referred in this connection to illustration (*c*) attached to section 127 of the Contract Act. In these circumstances it may well be contended that it was not necessary for the appellant Saifu Khan to raise, even if he could, any definite plea that the bond in suit was void for want of consideration, that fact being apparent upon the statement of the case made by the plaintiff himself. I think there can be no doubt that the question of the validity of this document was one which ought to have been tried out in the Court of First Instance. The Subordinate Judge has, as I have mentioned, decided this question adversely to the plaintiff. At the same time he was guilty, I think, of error in not allowing the plaintiff an opportunity of producing evidence to show that notwithstanding what appeared in the plaint there was in fact good consideration for the bond. I cannot agree with the learned Judge of the Court below that the issue relating to want of consideration for the bond was not a matter which was to be inquired into in the Court of First Instance.

I remit the following issue for trial to the Court of the learned Judge:—

What consideration, if any, moved from the plaintiff to the defendants Nos. 1 to 3 in connection with the execution of the indemnity bond dated the 18th of June 1906?

The plaintiff will be given an opportunity of adducing any evidence he may choose to

bring bearing upon this issue and the defendant-appellant ought to have an opportunity of producing evidence by way of rebuttal. The learned Judge will return his finding on this issue within two months from the date of the receipt of this order of remand and fifteen days to run from the date of his finding will be allowed to the parties to file objections if they so desire.

This appeal has already been before me and by my order of the 16th of January last an issue was remitted for trial to the learned District Judge of Fyzabad. The question which the learned Judge was asked to determine was whether or not any consideration moved from the plaintiff to the defendants Nos. 1 to 3 in connection with the execution of the indemnity bond dated 18th June 1906. The finding of the learned Judge is that there was consideration for this bond of indemnity. He finds as a matter of fact that actual possession of the property in respect of which the lease had been executed was not delivered to the lessee Pir Bakhsh Khan until the indemnity bond in suit, namely the bond of 18th of June 1906, had been executed and accepted as adequate security. A petition of objection was lodged against the finding of the learned District Judge but Mr. Wasim has very candidly informed me that he is unable to challenge the finding. In view of that finding the appeal must be dismissed. The order, therefore, is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3215 OF 1915.

April 19, 1917.

*Present*:—Mr. Justice N. Chatterjea and Mr. Justice Smither.

JOGESH CHANDRA ROY—PLAINTIFF—APPELLANT

*versus*

RAM KEBAL NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Rent suit—Decision as to annual rent payable—Subsequent suit.*

Where in a suit for rent, the question as to what is the rent annually payable for the holding is directly raised and decided by the Court, the decision operates as *res judicata* in a subsequent, suit between the parties or their representatives, unless it is shown that the rent has been subsequently changed.

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 10th September 1915, affirming that of the Munsif at Satkania, dated the 18th February 1915.

Babus *D. L. Kastgir* and *Chandra Sekhar Sen*, for the Appellant.

Babus *Khitish Chandra Sen* and *Probodh Ch. Dutt*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent. The plaintiff stated that the rent was Rs. 6-11-0 per year, while the defendant said that it was Rs. 5-14-6.

It appears that there was a previous rent suit in which also the plaintiff claimed Rs. 6-11-0 as rent of the holding. The defence was the same. As in the present suit, an express issue was raised as to the amount of the *jama* payable by the defendant. In that suit, the Court, upon a consideration of the evidence, came to the conclusion that Rs. 5-14-6 was the rent payable for the holding per year.

The present suit is for the period immediately succeeding that for which the previous suit was brought. In this suit the plaintiff again claims rent at the rate of Rs. 6-11-0 per year. The Courts below have held that the decision in the previous suit operates as *res judicata*.

We think that the decision of the Court below is right. As we have said, the question as to what is the rent payable for the holding was directly raised and decided in the previous suit. The plaintiff says that he had no knowledge of the *kabuliyat* which he has now produced and from which he wants to show that Rs. 6-11-0 which he claims as rent, includes the price of a goat which the defendant's predecessor-in-title agreed to pay. Practically the plaintiff wants to produce additional evidence or urge an additional ground in support of his contention that Rs. 6-11-0 constitute the annual rent. The yearly rent was expressly determined in the previous suit to be Rs. 5-14-6 and it has not been shown nor even suggested that the rent has been subsequently changed.

The appeal accordingly fails and is dismissed with costs.

*Appeal dismissed.*

SUBA SINGH *v.* MAHABIR SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1400 OF 1916.
April 21, 1917.
*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
SUBA SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
*versus*
MAHABIR SINGH—PLAINTIFF—RESPONDENT.

*Pre-emption—Mortgage by conditional sale—Decree absolute—Possession—Cause of action—Limitation.*

A mortgage by way of conditional sale was executed on the 3rd of June 1909. A decree absolute was made with respect to the mortgage on the 13th of June 1914, and possession was given on the 26th of February 1915. A suit for pre-emption with respect to the property was instituted on the 5th of October 1915. The custom of pre-emption as proved by an entry in the *wajib-ul-arz* referred to transfers and not to any order of Court making a decree absolute or granting possession:

*Held*, that the suit was barred by time inasmuch as the plaintiff's right, if any, accrued at the time of the original transfer, *i.e.*, in 1909 and not at the time at which possession was given under the decree absolute, as there was no right to get possession as the result of the decree absolute or the order for possession of the Court. [p. 462, col. 1.]

Second appeal against the decision of the District Judge, Ghazipur, dated the 13th September, 1916.

FACTS appear from the judgment.

Dr. *Surendra Nath Sen*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The facts are that as far back as the 3rd of June 1909, there was a mortgage by way of conditional sale. The decree absolute was made on the 13th of June 1914. Possession was given on the 26th of February 1915. The present suit was instituted on the 5th of October 1915. The plaintiff alleged his cause of action to have arisen not at the date of the original transfer but on the date at which possession was given under the decree absolute. The custom as proved by the entry in the *wajib-ul-arz* refers to transfers (*intikal*) and provides that the first offer must be made as therein set forth. There is no reference in the entry to any right of pre-emption upon the order of the Court for making a decree absolute or granting possession. The question in the Court below was when did the plaintiff's cause of action, if any, arise. The Court of First Instance held that the cause of action, if any, arose on the 3rd of June 1909, the date of the transfer, and that the suit was barred by limitation. The lower Appellate Court thought otherwise. The defendant comes here in second appeal. It is contended that there was no right to get possession as the result of the decree absolute or the order for possession of the Court and that the plaintiff's right, if any, accrued at the time of the original transfer, that is, in 1909. It is contended on behalf of the respondent that this plea is not open because in the Court below the right of pre-emption was admitted. It seems to us that what was admitted in the Court below was that there was a right of pre-emption as recorded in the *wajib-ul-arz* and that this custom had reference to voluntary transfers by co-sharers and that if the plaintiff's rights were under this custom, his suit was clearly barred. In our opinion it cannot be contended for one moment that the defendant admitted in the Court below that there existed a right of pre-emption by reason of the fact that there had been an order absolute in a foreclosure suit and an order for possession following thereon. The last paragraph but one of the judgment of the lower Appellate Court clearly shows that the defendant's Pleader in that Court never intended to make any such admission. We think that the only custom which was proved in the present case was the custom recorded in the *wajib-ul-arz*. The plaintiff's right,

therefore, if any, arose in 1909, and the suit ought to have been brought within one year from that date. We allow the appeal set aside the decree of the lower Appellate Court and restore the decree of the Court of First Instance with costs in this Court and in the Court below. Costs in this Court will include fees on the higher scale.

*Appeal allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3213 OF 1915.

June 7, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

DWARIK BALA AND OTHERS—DEFENDANTS APPELLANTS

*versus*

NIDHI RAM BALA—PLAINTIFF AND SHUSARI DASYA AND ANOTHER—PROFARMA DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. II, rr. 6, 7—Possession or joint possession of particular plot, suit for recovery of, maintainability of—Frame of suit—Contradictory causes of action—Estoppel by pleading.*

The plaintiff brought a suit in the alternative, first of all, to recover a particular land on the footing that a legal partition had been made between the parties, and if the partition was not legal, then he asked to be put in joint possession with the defendants. The case went to trial without any application by the defendants under the provisions of the Civil Procedure Code to exclude one of the causes of action from the trial. The Trial Court awarded the plaintiff a decree for joint possession, which was affirmed in appeal without any objection having been made to the frame of the suit:

*Held*, that in second appeal the defendant could not urge that the whole of the proceedings culminating in the decree for joint possession should be put an end to on the ground that contradictory causes of action ought not to have been tried together. [p. 463, col. 1.]

Appeal against the decree of the Subordinate Judge, Jessore, dated the 9th August, 1915, affirming that of the Munsif, Jhenida, dated the 3rd August 1914.

FACTS of the case appear from the judgment.

Babu *Bireswar Bagchi*, for the Appellants.

—The defendants are the appellants. The plaintiff's case was that he had been in possession of a specific portion which fell to his share on partition and that he was dispossessed from his share by the defendants. His prayers were two, *viz.*, (1) for the recovery of his share from which he had been dispossessed, or in the alternative (2) a decree for joint possession. The Courts below disbelieved the plaintiff's story of partition and separate possession but gave him a decree for joint possession. My submission is that when his main case failed he should not have been given a decree for joint possession. In view of the findings of the Court below his remedy lay in a suit for partition. See unreported Letters Patent Appeal No. 125 of 1915.

[FLETCHER, J.—In the plaint the alternative prayer was made, and so the lower Courts could allow such a prayer.]

But the alternative prayers made in the plaint are contradictory and inconsistent, and when the plaintiff's main case for recovery of *khas* possession failed, the alternative prayer for joint possession should not have been allowed.

[FLETCHER, J.—Was this point taken in the lower Courts?]

I am not sure of that.

[FLETCHER, J.—In second appeal you cannot raise any point not taken in the lower Courts.]

It is a pure question of law, and your Lordships can allow it to be raised for the first time in second appeal. The two cases set up in the plaint are contradictory and inconsistent, and your Lordships have held in many cases that such contradictory cases should not be allowed to be set up. Even according to the finding of the lower Appellate Court the plaintiff is not entitled to a decree for joint possession.

Babu *Makunda Behari Mullick*, for the Respondents, not called upon in reply.

JUDGMENT.—This is an appeal by the defendants against a judgment of the learned Subordinate Judge of Jessore affirming a decision of the Munsif of Jhenida. The plaintiff brought a suit in the alternative, first of all to recover certain particular specified land on the footing that a legal partition had been made between the parties and, if the partition was not legal, then he asked to be put in joint possession with the defendants. This is not a case where the plaintiff sued to recover a particular land on the footing that there had been a parti-

tion and that case having failed the Court awarded a decree for joint possession. The plaintiff set out his case from the outset and the defendants had notice of the alternative case. They might have applied to the Court under the provisions of the Code to exclude one of the causes of action from the present trial. They, however, did not do so. The case went to trial and was argued in both the lower Courts without any objection, and now in the second appeal we are asked to put an end to the whole of the proceedings on the ground that contradictory causes of action ought not to be tried together. We think there is no force in this contention. Having regard to the fact that the case was tried in that way without any objection in the first Court on the settlement of issue the objection urged in this appeal was not raised and in the lower Appellate Court where the present appellants were also the appellants they raised no point excepting the two mentioned by the learned Judge in his judgment as matters for determination and these matters having been determined in the suit against them, the appellants cannot now in the second appeal raise a matter which has not been considered by the lower Courts. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

RULE *Nisi* No. 76 OF 1917.

May 11, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

BHABASINDHU HALDAR AND ANOTHER—PLAINTIFFS—PETITIONERS

*versus*

KESAB CHANDRA HALDAR AND OTHERS DEFENDANTS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 115—Review—Discretion of subordinate Court—Revision—High Court, power of.*

The High Court in revision under section 115, Civil Procedure Code, cannot interfere with the discretion of a subordinate Court as to whether it should or should not review its judgment.

**Rule against the order of the Munsif, Second Court, Diamond Harbour in Miscellaneous Case No. 254 of 1916.**

Babu *Sarada Charn Maity*, for the Petitioners.

JUDGMENT.—This is a Rule calling on the opposite party to show cause why the order of the learned Judge of the Court below declining to review his judgment should not be set aside. The Judge in the Court below had all the materials before him. He said that the judgment he delivered was all right and he saw no reason to interfere with it and, therefore, declined to grant a review. We cannot interfere with the discretion of a Judge as to whether he should or should not review his judgment. The argument that has been put forward that the application is made not against the order of the learned Judge on the review but against the original order cannot be assented to for one moment. As a matter of fact, the Judge in the original judgment said that the plaintiffs were in serious default. Notwithstanding that they were given time to rectify the default; but they did not do so. The Judge having considered these matters said that he declined to review his judgment. We see no reason to interfere with the judgment of the learned Judge. The Rule is, therefore, discharged. We make no order as to costs.

*Rule discharged.*

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 866 OF 1915.

December 8, 1916.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

PUNNU AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Musammat* KOUSA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Money advanced by one member—Presumption—Burden of proof.*

Where a member of a joint Hindu family advances money on a mortgage, the presumption is that the money is advanced from the joint funds and the burden of proving to the contrary lies on those who allege that he advanced the money out of his self-acquired funds. [p. 464, col. 1.]

**Second appeal against the decision of the District Judge, Mainpuri, dated the 30th of April, 1915.**

Mr. *M. L. Sandal*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This and the connected Appeal No. 1128 of 1915 arise under the following circumstances. Two mortgages were made in favour of one Govind, since deceased. The purchaser of the equity of redemption from the mortgagor paid into Court the amount due upon the two mortgages under section 83 of the Transfer of Property Act. The present suit has been brought by the plaintiffs alleging that they and Govind constituted a joint Hindu family and that accordingly the defendant No. 1, the daughter of Govind, had no interest therein. The Court of First Instance found that the family was joint but nevertheless dismissed the suit of the plaintiffs. The plaintiffs appealed contending that if the finding that the family was joint was accepted, then the suit ought to have been decreed. The defendant *Musammat* Kausa filed an objection to the finding that Govind and the plaintiffs were joint. The lower Appellate Court apparently accepting the finding of the Court of First Instance that the family was joint, held that it lay upon the plaintiffs to prove that the money advanced on the mortgages were out of joint family funds. He declined to record any finding on the question of jointness or separation. We think that if the family was found to be joint and if it was proved that there was joint family property belonging to the family, then the onus of showing that the money advanced on these mortgages was the self-acquired property of Govind would lie upon the defendant his daughter. Before finally deciding the appeal we think it necessary to refer issues to the Court below. We accordingly refer the following issues; —

(1) Were plaintiffs and Govind members of a joint Hindu family and did they own joint property?

(2) Was the money advanced on these mortgages the separate property of Govind?

In dealing this last mentioned issue the Court will bear in mind what we have said above as to the onus of proof. The Court will decide these issues on the evidence already on the record. Ten days will be allowed for filing objections.

*Case remanded.*

## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1905 AND 2061 OF 1913.

April 19, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

IN No. 1905

BHUPENDRA KUMAR CHAKRAVARTY

PLAINTIFF—APPELLANT

*versus*

PYARI MOHAN ROY AND OTHERS—DEFENDANTS—RESPONDENTS

AND

IN No. 2061

PYARI MOHAN ROY—DEFENDANT—APPELLANT

*versus*

BHUPENDRA KUMAR CHAKRAVARTY

PLAINTIFF—RESPONDENT.

*Contract Act (IX of 1872), s. 70, scope of—Transfer of Property Act (IV of 1882), s. 51—Trespasser in good faith, improving land—Owner, liability of, to pay costs of improvement.*

The defendant encroached upon the land of the plaintiff, believing in good faith that it belonged to him as forming part of his adjoining land, cleared it of jungle and rendered it fit for cultivation at his expense:

*Held*, that the defendant was not entitled to a charge upon the land decreed to the plaintiff for the expenses, as it was not established that the plaintiff or his predecessor was aware of the encroachment but as what was done by the defendant for the improvement of the land was done by him lawfully and was not intended to be done gratuitously and as the plaintiff enjoyed the benefit of it, the defendant was entitled, under section 70 of the Contract Act, to be compensated for the money spent by him and the plaintiff should get a decree to recover possession upon payment of the amount which was laid out by the defendant in improving the land of the plaintiff. [p. 466, col. 1.]

Section 70 of the Contract Act is not limited to cases where the person lawfully doing the thing for another person knows who the other person is. [p. 465, col. 1.]

Appeals against the decrees of the Additional District Judge, 24-Parganas, dated the 18th January 1913, modifying that of the Subordinate Judge, 3rd Court, of that District, dated 19th June 1907.

Babus *Basant Coomar Bose*, *Siva Prasanna Bhattacharjee* and *Lal Mohan Ghose*, for the Appellant in No. 1905 and Respondent in No. 2061.

Babus *Mohendranath Roy* and *Manmatha Nath Roy*, for the Respondent in No. 1905 and Appellant in No. 2061.

BHUPENDRA KUMAR *v.* PYARI MOHAN ROY.

JUDGMENT.
IN No. 1905 OF 1913.

FLETCHER, J.—This is an appeal by the plaintiff from a decision of the learned District Judge of the Twenty-four Parganahs modifying a decision of the Subordinate Judge at Alipur. The present suit was instituted as long ago as the 9th April 190[illegible], and is, therefore, slightly more than eleven years old to-day, and I think that the delay in the proceedings casts no credit either on the Courts or on the parties engaged in the litigation. The suit was a suit for possession brought by the plaintiff as the assignee of a lease granted by the defendant No. 3 in the month of June 1899, and the suit was principally brought against the contesting defendant who had obtained a lease from the same lessor in August 1899, his property adjoining the property let out to the plaintiff's predecessor-in-title. The case as decided by the learned Judge of the lower Appellate Court in the judgment now under appeal is this:—The learned Judge came to the conclusion that the defendant was acting in good faith when he encroached upon and cleared the lands of the plaintiff and that he had done so in the belief that the property was included in his share and that, so far as I gather from the reasons given by the learned Judge, was partly, if not, largely, due to the failure of the plaintiff or his predecessor to fulfil one of the terms of the lease which was granted to him, namely, that the boundaries should be demarcated between the plaintiff's predecessor and the defendant. But the learned Judge made a finding that the evidence did not establish that the plaintiff or his predecessor-in-interest were aware of the encroachment that had been made by the defendant. The learned Judge, however, seems to have considered that that point was immaterial and he declared a charge on the property in favour of the defendant and declared the plaintiff's right thereto subject to the charge so created. The plaintiff appealed against that decision.

The first point is whether the learned Judge was right in the view that he took, namely, that having come to the conclusion that knowledge of the plaintiff or his predecessor had not been established to the satisfaction of the Court, whether the mere fact that the defendant had encroached and spent money in good faith was sufficient to entitle him to a charge on the plaintiff's property. The case is not governed by section 51 of the Transfer of Property Act, but it comes within the general rule as laid down in the well-known case of *Ramsden* v. *Dyson* (1). That rule has been adopted and followed in India in more than one case. The fact that the learned Judge found that the plaintiff or his predecessor had no knowledge or that, at any rate, the evidence did not establish such knowledge is sufficient to take the present case out of that rule, and, therefore, the judgment appealed from cannot be supported on the ground on which the learned Judge rested his decision. But the case does not rest there. There are other provisions in the law in this country governing the obligations of persons enjoying the benefit of a non-gratuitous act. Section 70 of the Indian Contract Act is a statutory enactment with reference thereto. That section provides that where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered. It is argued on the part of the plaintiff that this section only applies when the person lawfully doing the thing for another person knows who the other person is. There is no warrant for such limitation being put on the section and the illustrations to the section negative the view that the person lawfully doing the thing for another person knew the name of the other person. It is quite clear that the two illustrations presuppose that the person doing the thing did not know the name. The first illustration of the tradesman having the goods at the wrong house is a clear case where the tradesman did not know the name of the person, or, at any rate, if he knew his name, he made a mistake as to the person bearing that name. There is no foundation for the argument put forward by the learned Vakil

(1) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

for the appellant as regards the meaning of this section. The question is whether the present case comes within the terms of that section. The section is very wide and, of course, there must be some limitation. But it cannot be suggested in the present case that the clearing of the jungle was not done lawfully. It is quite clear from the findings made by the learned Judge that the defendant did not intend to do so gratuitously. The evidence also shows without doubt that the plaintiff has enjoyed the benefit of the money laid out by the defendant in clearing the jungle and making the land fit for cultivation. I think the case clearly comes within the terms of section 70 of the Indian Contract Act. The difference between section 51 of the Transfer of Property Act and section 70 of the Indian Contract Act is that, in cases coming under section 51 of the Transfer of Property Act and under the rule laid down in *Ramsden* v. *Dyson* (1), the defendant gets a charge on the property, but, in cases under section 70 of the Indian Contract Act, the plaintiff is bound to make compensation to the defendant for the amount spent; and, therefore, the decree in this case, instead of declaring a charge in favour of the defendant, should declare that the plaintiff is entitled to recover possession upon payment of the amount that was found to be due to the defendant by the learned Judge of the lower Appellate Court. I think, on the findings made by the learned Judge the defendant is entitled to recover the money which he has laid out in improving and rendering fit for cultivation the land of the plaintiff. If the defendant be deprived of the amount spent by him on the land, it will be a great hardship on him. The argument that has been put forward on behalf of the plaintiff-appellant that this is, in fact, a case of the defendant having improved his own land has no foundation. The land was dense jungle and had no value unless and until the property was cleared and made fit for cultivation. It is not suggested that the property could have been cleared and made fit for cultivation at any lesser sum. If the defendant loses the benefit of the money spent by him for clearing this considerable piece of land, it would be a great hardship. Therefore, on the findings made by the learned Judge of the lower Appellate Court, I think the case comes within the terms of section 70 of the Indian Contract Act and the plaintiff is entitled to obtain the decree given in his favour by the lower Appellate Court, subject to the variation I have mentioned.

Two other points were raised in this appeal which were touched upon somewhat lightly. It is hardly a matter of surprise when we find that the points were not referred to in the judgment of the lower Appellate Court. The first point was that, in ascertaining the amount of compensation allowed to the defendant, the defendant ought to have been charged by way of mesne profits. The point was not referred to in the judgment of the learned Judge of the lower Appellate Court and presumably for the reason given in the Munsif' judgment, namely, that, if the defendant be charged by way of mesne profits, he ought to be allowed interest on the amount he laid out. It is sufficient to say that the point was not raised in the Court of Appeal below, and it is much too late to raise it now in this Court in second appeal. The second point was that the defendant ought to have been also charged with the value of the timber that was cut and removed from the land in order to make it clear. There is nothing in the judgment of the lower Appellate Court about this point at all. We do not know whether the timber was of any value or whether it was merely under growth which was wholly valueless and would fetch nothing and would rather require money to be spent to remove it from the land. The point was, however, not raised in the Court of Appeal below and it cannot be taken here now in second appeal.

In the result, the judgment appealed from must be affirmed and the present appeal dismissed with costs, subject to the variation that I have already mentioned.

NEWBOULD, J.—I agree.

IN No. 2061 OF 1913.

This appeal is not pressed and is accordingly dismissed with costs.

*Appeals dismissed.*

JNANENDRA MOHAN SEN *v.* HARI RAM RABHA.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1621 OF 1915.

April 20, 1917.

*Present*:—Justice Sir Charles Chitty, KT., and Mr. Justice Beachcroft.

JNANENDRA MOHAN SEN—PLAINTIFF—APPELLANT

*versus*

HARI RAM RABHA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal decided on new case not made out in pleadings, re-hearing of—Remand.*

Where an Appellate Court dismissed the plaintiff's suit affirming the decision of the primary Court on a case which was neither set up by the plaintiff nor by the defendant and was absolutely inconsistent with the defendant's case:

*Held*, that the judgment of the Appellate Court could not stand and that the case should be remanded to the Appellate Court for a re-hearing of the appeal. [p. 468, col. 2.]

Appeal against the decree of the Special Subordinate Judge, Dhubri, Assam Valley District, dated the 31st March 1915, affirming that of the Extra Assistant Commissioner and Munsif, Goalpara, dated the 19th December 1913.

FACTS.—The plaintiff was the appellant in this case. The suit was for recovery of possession after declaration of title to 8 *bighas* of land with mesne profits. The land in dispute was a part of a large plot of 54 *bighas lakheraj* lands, originally held by the *lakherajdars* from whom Rani Abhoyesswari Debi, *pro forma* defendant, purchased it in 1908 The Rani in her turn gave a settlement of the said 54 *bighas* to the plaintiff, from whom the defendant No. 1 took a sub-lease of the 8 *bighas* on condition to pay rent in kind. The defendant No. 1 used to pay rent in paddy, and on his failure to pay rent, the plaintiff brought a suit against him for rent. In that suit the defendant alleged that there was no relationship of landlord and tenant between him and the plaintiff. The trial Court dismissed the plaintiff's suit for rent, holding that the plaintiff had failed to establish the relationship of landlord and tenant between himself and the defendant. Thereupon the plaintiff brought the present suit to recover *khas* possession of the land from the defendant No. 1, the Rani being made *pro forma* defendant. In this case also the defendant pleaded that he was not a tenant of the plaintiff, but a tenant holding directly under the Rani.

The Court of first instance found that the settlement was in favour of the plaintiff, and that the defendant had failed to prove his tenancy under the Rani. But the Court, relying on the deposition of one of the defendant's witnesses, found that one Chakar had an occupancy right in the disputed land, and so long as Chakar did not abandon his holding, the plaintiff was not entitled to take possession of the land. The evidence relied upon was to the effect that Chakar who was holding the land in dispute, while leaving the country for some military service, asked the defendant No. 1 to remain in possession of the land till he returned, that Chakar employed defendant No. 1 as his agent, and that the defendant paid rent in his absence. The Court held, there was no surrender of the holding by Chakar.

Against this decision the plaintiff preferred an appeal and the lower Appellate Court held that the settlement was made by the *zemindar* in favour of the plaintiff, when Chakar was in possession of the land and had a claim to that land, and that the *zemindar* had no right to settle the land ignoring Chakar's right to the land, so long as no default was made in payment of rent.

Against this decision the plaintiff preferred this appeal.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Satya Charan Sinha*), for the Appellant.—In this case the lower Court altogether decided upon a new case, which was not made out either by the plaintiff or by the defendant. In the written statement, the defendant alleged that he was a tenant of the Rani and he produced witnesses to support his case. The Court, on the deposition of one of the defendant's witnesses, came to the conclusion that the defendant was the agent of Chakar, who held the land prior to the settlement made in favour of the plaintiff, and that the defendant No. 1 who was the agent of Chakar in his absence, had a right to the land by virtue of his agency, as Chakar's interest and right to the land could not in any way be prejudiced by the settlement made by the Rani in favour of the plaintiff. This is an altogether new case, which the plaintiff never alleged, nor the defendant in his written statement set up. The question was whether the defendant No. 1 was the direct tenant of the Rani or not,

The Court had no jurisdiction to decide a new case which the plaintiff never urged nor the defendant alleged.

[CHITTY, J.– The Court may pronounce judgment not on the case made out by the plaintiff or the defendant but on the evidence produced by the parties.]

The Court cannot decide a case which is not made out in the pleadings nor upon evidence which is not given for the finding of an issue raised. In the written statement the defendant No. 1 stated that his predecessors were holding the land from the Rani and no plea of Chakar's holding the land and his deriving the title to the land in dispute from Chakar was set up.

Moreover, the entire holding of 54 *bighas* was settled with the plaintiff by the Rani, and by that Chakar, who was holding 8 *bighas* of the land in question, becomes my tenant.

Refers to Order VIII, rule 2. The defendant cannot make a new case.

Babu *Gobinda Chander Dey Roy* (with him Babus *Abaninath Bhattacharya* and *Purno Chunder Roy*), for the Respondents.—These are questions of fact. Even if the finding is wrong, in second appeal the questions of fact are not to be interfered with.

JUDGMENT. - This appeal arises out of a title suit brought by the plaintiff against the defendant Hari Ram Rabha. Plaintiff sought to eject the defendant from about 8 *bighas* of land, on the ground that he was a trespasser and that the plaintiff was entitled to possession. It appears that the defendant No. 2 Rani Abhoyeswari Debi purchased certain *lakheraj* land in 1901. In 1902 plaintiff took settlement from the Rani of the whole 54 *bighas* of that land. In 1910 he brought a suit against the defendant for rent of the 8 *bighas* of which the defendant was in possession. In that suit defendant denied the relationship of landlord and tenant and the suit was dismissed on the ground that no such relationship existed. Plaintiff accordingly brought this suit in ejectment against the defendant. Defendant's case as put forward in his written statement was that he was a tenant of the Rani under a settlement from the *lakherajdars* who had sold to the Rani. Evidence was recorded and amongst other witnesses for the defendant one Chakar Mech was examined. It appears that this Chakar Mech had left the locality in 1304 when he joined the military police and he had not been there since.

The Court of first instance found that there was a settlement in favour of the plaintiff by the Rani, though the learned Munsif threw some doubt on that settlement on the ground that the officer in charge of the Rani's affairs who had the making of the settlement was the plaintiff's father. The Munsif also found that the defendant failed to prove his tenancy from the time of the *lakherajdars*, but he came to the conclusion that the disputed area was held by Chakar Mech as a recorded tenant under the *lakherajdar* and formed part of his holding. He was further of opinion that Chakar had acquired occupancy rights in his holding before he enlisted in the military police in 1304 and that he had made over the land to Hari Rabha to hold on his account, on a verbal understanding that on Chakar's retirement from the military police he would get it back. During his absence Hari Rabha was to pay rent to the *lakherajdar*. It has been found also by both the Courts that in one instance, at any rate, Hari Rabha paid rent for Chakar's holding to the Rani (Exhibit A). On appeal, the learned Subordinate Judge appears to have accepted the findings of fact arrived at by the first Court without much consideration of the evidence.

The error that is apparent in the Subordinate Judge's judgment is that he has dismissed the plaintiff's suit on a case which was not that of the plaintiff and was not that of the defendant. So far from its being the case of the defendant, it is absolutely inconsistent with it. The learned Judge has dismissed the suit on a view of Chakar's status which is inconsistent with defendant"s own plea, contrary to what Chakar himself claims and which the plaintiff has had no opportunity of contesting.

Under these circumstances we do not think that the present judgment of the learned Subordinate Judge can be supported. We are accordingly compelled to set aside his decree and remand the case to the Court of the Subordinate Judge for a rehearing of the appeal. Costs of this appeal will abide the result.

*Appeal allowed; Case remanded.*

SITAL SINGH *v.* SITLA BAKHSH SINGH.

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 125 OF 1913.

September 15, 1916.

*Present*:—Pandit Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

*Thakur* SITAL SINGH—PLAINTIFF—APPELLANT

*versus*

*Thakur* SITLA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Oudh Estates Act (I of 1869)*, *ss.* 8, 10, 14, 15, 22—*Crown Grants Act (XV of 1895)*, *ss.* 2, 3—*Primogeniture* sanad, *applicability of*—*"Successor," meaning of*—*Lineal primogeniture, rule as to succession by*—*Hindu Law*—*Will, interpretation of*—*Will executed by* talukdar *in favour of person who would not have succeeded under the Act, effect of*—*Absolute estate conferred by Will*—*Devise, lapse of, by death*—*Ulterior disposition becoming operative on death of first devisee during lifetime of testator*—*Transfers made by persons having no title, effect of.*

One *G.* was the owner of a *taluka* to whom a primogeniture *sanad* was granted. He was succeeded by his son who died leaving two sons, *D. B.* and *S. B.* On the death of *D. B.*, *S. B.* succeeded to the *taluka* and in 1895 executed a Will, to the effect that after his death his wife was to succeed to the entire *taluka* as full proprietor and that upon her death the *taluka* was to go to his mother *D. K.* as absolute owner and on her death intestate to his daughter *S. K.* and her heirs. Adoption was also permitted to the widow and failing her to the mother. The wife of *S. B.*, the last *talukdar*, died during the lifetime of her husband. On the death of *S B.* in 1899 his mother *D. K.* succeeded to the *taluka* under the terms of the Will of 1895. She made certain mortgages affecting the villages included in the *taluka* during her lifetime and died in 1906. After her death *S. B.*'s daughter *S. K.* came into possession of the *taluka*, alleging that her mother *D. K*, had executed a Will in her favour in 1902, and she also executed certain transfers regarding portions of the *taluka* property. In 1911 two collaterals of the husband of *D K.*, *viz.*, *S. B. S.* and *K. S.* instituted two suits for recovery of the entire *taluka* against the daughter *S. K.*, alleging that she took nothing under the Will of 1895 and was not, therefore, entitled to the estates. *S. B. S.* claimed the whole estate on the ground that he was the nearest male heir according to the rule of lineal primogeniture. *K. S.* claimed to be the nearest male relative and ignored the rule of lineal primogeniture. The daughter *S. K.* died during the pendency of the suit and the question was as to what interest *D. K.* took under the Will and which of the plaintiffs was entitled to succeed. *K. S.* died during the trial of the case and *S. S.* and *D. S.* were brought on the record as his legal representatives. Subsequently *D. S.* relinquished his rights in favour of *S. S.*, who thereafter remained as the sole plaintiff in the suit brought by *K. S*:

*Held*, (1) that the wife of *S. B.* took nothing as she died in her husband's lifetime, the devise in her favour having lapsed on her death; [p. 473, col. 1.]

(2) that on the death of the wife of *S. B.* the ulterior disposition in favour of *D. K*, his mother, became operative and she took an absolute interest in the *taluka* under the terms of the Will of 1895; [p. 474, col. 1; p. 476, col. 1.]

*Toolsi Dass Kurmokar* v. *Madan Gopal Dey*, 28 C. 499, followed.

*Musammat Salta* v. *Kashi Nath*, 9 O. C. 119; *Punchoo Money Dossee* v. *Troylucko Mohiney Dossee*, 10 C. 342; 8 Ind. Jur. 440; 5 Ind Dec. (N. S.) 229; *Moulvie Mohamed Shumsool Hooda* v. *Shewukram*, 2 I. A. 7; 22 W. R. 409; 14 B L. R. 226; 3 Sar. P. C. J. 405 (P. C.); *Radha Prasad Mullick* v. *Ranee Mani Dassee*, 35 C. 896; 12 C. W. N. 729; 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 604; 8 C. L. J. 48 (P. C.), distinguished from.

(3) that the Will of 1902 alleged to have been executed by *D. K.* in favour of the daughter *S. K.* was not established; [p. 481, col. 1.]

(4) that under section 15 of Act I of 1869 the effect of the Will of 1895 in favour of *D. K.*, who would not have succeeded to the estate except for that Will, was to take the *taluka* for the purpose of succession out of the Act and the successors of the husband of *D. K.* were to be found out by the ordinary provisions of the Hindu Law; [p. 481, cols. 1 & 2.]

(5) that the rule of succession laid down in the *sanad* granted to *G.* was not applicable to the case, because *D. K.* being a legatee under the Will of 1895 could not be considered as a "successor" under the terms of the *sanad*; [p. 481, col. 2.]

(6) that the provisions of the Crown Grants Act (XV of 1895) did not apply to the case; [p. 482, col. 1.]

(7) that the rule of succession by lineal primogeniture as laid down in the *sanad* being inapplicable, both the plaintiffs, being equal in degree in their relationship to the husband of *D. K.*, were entitled each to half of the *taluka*; [p. 483, col. 2.]

(8) that the transfers made by *D. K.* were binding on the reversioners, whereas those made by *S. K.* were inoperative and of no effect. [p. 485, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 15th August 1913.

Messrs. *John Jackson*, *Mumtaz Husain* and the Hon'ble Syed *Wazir Hasan*, for the Appellant.

Messrs. *Muhammad Nasim*, *Muhammad Wasim*, the Hon'ble Mirza *Sami Ullah Beg* and Babu *Panna Lal*, for the Respondents.

JUDGMENT.—The five appeals which are dealt with in this judgment arise out of two suits brought by rival claimants for the *taluka* of Mohammadpore in the Bara Banki District. It is not disputed before us that a primogeniture *sanad* was granted to *Thakur* Ganga Bakhsh Singh, who was also known as Ganga Singh, after the summary settlement in regard to that estate. He was accordingly entered

*The judgment in this case disposes of five cases together, *viz.*, First Civil Appeals Nos. 125, 126, 127, 128 and 129 of 1913.—*Ed.*

SITAL SINGH *v.* SITLA BAKHSH SINGH.

at No. 51 in list No. 1, and at No. 26 in list No. 3, of the lists prepared under section 8 of Act I of 1869.....lists of which the Court will take judicial notice, and which the Court will regard as conclusive evidence that the persons named therein are such *talukdars*, under section 10 of the Act. He was, therefore, by the operation of the Act a *talukdar*, the succession to whose estate was to be regulated by the rule of primogeniture. *Thakur* Ganga Bakhsh Singh was succeeded by his son Sheo Singh, who died leaving two sons, Dan Bahadur Singh and Sher Bahadur Singh. Dan Bahadur Singh succeeded to the *taluka*, and was himself succeeded by his brother Sher Bahadur Singh, who died on the 10th of June 1899, leaving him surviving his mother *Musammat* Dilraj Kuar and a daughter *Musammat* Sheoraj Kuar. His wife *Musammat* Harpal Kuar had died in his lifetime as had one of his daughters. After his death mutation was effected in favour of *Mucammat* Dilraj Kuar who executed certain mortgages, hypothecating property comprised in the *taluka*. *Musammat* Dilraj Kuar died on the 12th April 1906, and on her death mutation was effected in favour of *Musammat* Sheoraj Kuar, who was in possession of the *taluka* at the time the present suit was filed.

*Thakur* Sitla Bakhsh Singh instituted his suit on the 8th June 1911, on the allegations that *Musammat* Dilraj Kuar had come into proprietary possession of the *taluka* by right of inheritance as a Hindu widow without any power of alienation, and that after her death he, *Thakur* Sitla Bakhsh, was entitled to succeed according to the rule of lineal primogeniture laid down in the *sanad*. He alleged that *Musammat* Sheorj Kuar was a mere trespasser; and he joined as defendants with her three batches of transferees, some from *Musammat* Dilraj Kuar and some from *Musammat* Sheoraj Kuar.

On the 10th June 1911 Kirat Singh brought his suit on the allegation that Sher Bahadur Singh died without making a valid Will, that the eldest nearest male relative was entitled to succeed, that *Musammat* Dilraj Kuar did succeed to the estate for life, and that on her death *Musammat* Sheoraj Kuar took unlawful possession of the estate. He attached to his plaint a pedigree which, he claimed, showed him to be as the nearest reversioner of the aforesaid Sher Bahadur Singh. Subsequently each of the rival claimants added the other claimant as a defendant in his suit. Kirat Singh impleaded the transferees from *Musammat* Dilraj Kuar and *Musammat* Sheoraj Kuar, but he omitted to sue among the transferees *Musammat* Bishan Dei and *Musammat* Prag Dei who were impleaded by *Thakur* Sitla Bakhsh Singh.

As the case proceeded, it became apparent to both the parties that Sher Bahadur Singh had executed a Will on the 1st December 1895. On behalf of Sitla Bakhsh Singh, the execution of the Will was admitted, but his plaint was allowed to stand as before. Kirat Singh plaintiff died in the course of the proceedings and his two brothers, Sitla Singh and Debi Singh, were brought on the record in his place. By an application on their behalf their plaint was amended. The words "without making a valid Will" were struck out, and the allegation was added that Sher Bahadur Singh made a Will in favour of his wife and his mother, that his wife dying in his lifetime, his mother became the owner and possessor of the property on his decease, and that the plaintiff was, therefore, entitled to the property according to Hindu Law, as also in consequence of the legal effect of the above-mentioned Will, also according to the provisions of Act I of 1869, and the rule of lineal primogeniture. This amendment had the effect of considerably enlarging the scope of the suit, as it was first brought, and the ground upon which Kirat Singh had sued was relegated as a last possible alternative.

On behalf of *Musammat* Sheoraj Kuar, the main defendant to the suits, it was alleged that *Musammat* Dilraj Kuar had taken an absolute estate under her son's Will, and that she had herself executed a Will which conferred an absolute estate upon *Musammat* Sheoraj Kuar, who was, therefore, owner and in possession of the estate. The transferees from *Musammat* Dilraj Kuar pleaded that she had an absolute estate, and that, if she had only a life-estate, even then the

transfers in their favour were good as having been made for legal necessity. The transferees from *Musammat* Sheoraj Kuar supported her plea that she had an absolute estate under the Will of *Musammat* Dilraj Kuar. It was further argued on their behalf that even if *Musammat* Dilraj Kuar only enjoyed a life-estate under her son's Will, even then *Musammat* Sheoraj Kuar came in under that Will as a remainderman with an absolute estate. As an alternative, these transferees claimed at least the right to retain possession of certain lands as mortgagees from *Musammat* Dilraj Kuar.

The learned Subordinate Judge found in favour of the pedigree set up by *Thakur* Sitla Bakhsh Singh. He found that *Musammat* Dilraj Kuar took an absolute estate under her son's Will, and that as she was a person who would not have succeeded according to the provisions of Act I of 1869 to the estate, had the transferor died intestate without having made any transfer, section 15 of that Act applied. He went on to find, therefore, that the ordinary law must govern the succession, but that by reason of the Crown Grants Act that law must be found to be that set out in the *sanad*, that the rule of lineal primogeniture, therefore, applied and that *Thakur* Sitla Bakhsh Singh was entitled to succeed. He upheld some, but not all, the transfers made in favour of various defendants, and he dismissed the suit of Kirat Singh.

Sital Singh and his brother have appealed against the decree dismissing their suit. They have also appealed against the decree in favour of *Thakur* Sitla Bakhsh Singh; while the encumbrancers, who are three parties, have also filed three separate appeals as to the extent of their interest in the disputed property. In these last three appeals cross-objections have been filed by *Thakur* Sitla Bakhsh Singh, urging pleas similar to those on which his suit was based.

In the course of suit, *Musammat* Sheoraj Kuar died, leaving a husband Gajraj Singh. An application was made by *Thakur* Sitla Singh and *Thakur* Debi Singh, in the suit in which they were defendants, on the 23rd April 1912 that her husband Gajraj Singh should be brought on the record in her place. It was opposed by the other rival plaintiff who contended that if *Musammat* Sheoraj Kuar had a life-estate, that estate terminated with her, and if she was a trespasser since the death of her mother in 1906, her trespass ended with her death. The learned Subordinate Judge refused to implead Gajraj Singh as her legal representative. It appears that at the time when the suits were instituted, the Mohammadpur *Taluka* was temporarily under the management of the Deputy Commissioner of Bara Banki, having been attached by reason of arrears of revenue under the U. P. Land Revenue Act (III of 1901). On the death of *Musammat* Sheoraj Kuar, the *taluka* continued to be in the management of the Deputy Commissioner until the arrears of Government revenue were satisfied. Subsequently by an order of the Board of Revenue dated the 11th January 1915, to which Gajraj Singh was an unsuccessful party, possession was made over to *Thakur* Sitla Bakhsh Singh [*Sitla Bux Singh* v. *Gajraj Singh* (1)]. Meanwhile *Thakur* Sitla Bakhsh Singh had also obtained in his favour a decree from the Civil Court which is the subject of these appeals. The action of one of the rival plaintiffs in opposing the application to bring Gajraj Singh on the record as that of the other in failing to implead him in his case appears to have been somewhat ill-considered, but that was their lookout. We have in these cases to adjudicate on the rights of the parties, such as are actually before us. So far as the transferees from *Musammat* Sheoraj Kuar are concerned, they have no interest in raising such an objection; for their rights in the properties transferred to them can be determined, without the legal representative, if any, of *Musammat* Sheoraj Kuar being brought on the record. The other parties have not taken or pressed this objection at the hearing. As pointed out in *Orr* v. *Muthia Chetti* (2) and *Sarala Sundari Dasi* v. *Sarada Prosad Sur* (3) the possession of a receiver or of the

(1) 29 Ind. Cas. 651.
(2) 17 M. 501; 6 Ind. Dec. (N. S.) 347.
(3) 2 C. L. J. 602.

Government under such circumstances can only be regarded as *custodia legis* or possession held for the rightful owner. Gajraj Singh admittedly never got possession. If it be found that *Musammat* Sheoraj Kuar was an absolute owner, the plaintiffs would in any case have no right to sue. If, on the other hand, it be found that she held a life estate or was a trespasser, her life estate or trespass ended with her death. The non-joinder of Gajraj Singh is, therefore, of no practical importance in these cases.

Before proceeding, however, to consider the principal matters of contention between the parties to these appeals it will be well to set out clearly the facts which are admitted by the parties before us. It is admitted that *Thakur* Sitla Bakhsh Singh of one branch and Kirat Singh, Sital Singh and Debi Singh of another branch are equidistant and would be entitled to share half and half, if the ordinary law applies. It is conceded too that if the law of lineal primogeniture applies *Thakur* Sitla Bakhsh Singh will be entitled to succeed, to the exclusion of the rest. It is also admitted that Sher Bahadur Singh executed a Will on the 1st December 1895, though the effect of that Will is in dispute. It is admitted further that *Musammat* Dilraj Kuar is not a person who would have succeeded to the estate according to the provisions of Act I of 1869, if the testator had died intestate without making a transfer. The mother does appear among the persons to whom the estate may descend, under section 22 of the Act as amended by U. P. Act III of 1910 (the Oudh Estates Amendment Act); but it is admitted that the property in dispute vested before that Act came into force. It is admitted that if by Sher Bahadur Singh's Will *Musammat* Dilraj Kuar took an absolute estate, *Musammat* Sheoraj Kuar would not be entitled to succeed to her under that Will, and that her position would be that of a trespasser. It is admitted that, according to the ordinary law, which, apart from Act I of 1869, would apply to the family, daughters are excluded from inheritance. Finally, both the claimants to the estate accept such liability to transferees as the learned Subordinate Judge has decreed.

It will be convenient first to come to a definite finding as to the position of *Musammat* Sheoraj Kuar before we commence to discuss the existence of encumbrances and the rights, if any, of the various encumbrancers.

The Will of Sher Bahadur Singh dated the 1st December 1895 created a devise in favour of his wife *Musammat* Harpal Kuar, and laid upon her certain instructions. It further provided that on her death intestate the estate should descend to *Musammat* Dilraj Kuar and on her death intestate to *Musammat* Sheoraj Kuar and her heirs. Adoption was also permitted to both the widow, and failing her the mother. It is argued that as *Musammat* Harpal Kuar died in the lifetime of the testator, the Will became inoperative, that in any case the Will did not confer anything more than a succession of life-estates, and that *Musammat* Dilraj Kuar did not possess an absolute interest, which she could have conveyed to her transferees or to *Musammat* Sheoraj Kuar.

In his Will, the testator, after reciting that he had a wife, *Musammat* Harpal Kuar, two daughters, *Musammat* Sheoraj Kuar and *Musammat* Raghuraj Kuar, declared: "After me, my wife shall be the full proprietor and possessor of the entire *ilaqa* left by me, and the whole of my property moveable and immoveable, but it shall not be competent to her to execute any deed of any description in favour of her personal relations. I do by this written instrument authorise her to adopt either of my daughters, or if a son is born to either of them, the daughter's son, or any other boy of my family; and the adopted son aforesaid shall from the date of adoption acquire all those rights, subject to the terms of the deed of adoption (*hasb sharayat tabniyatnama*), as my own son, had any been in existence, would have acquired on my death." The Will then proceeded to provide for the maintenance of his mother, *Musammat* Dilraj Kuar, and set out that if a son was born to the testator after the execution of the Will, that son would be the owner of the

entire property in accordance with Act I of 1869.

It is obvious from the above provisions that what was given to *Musammat* Harpal Kuar was a contingent interest to vest in her after the death of the testator, in case no son was born to the testator meanwhile and remained alive at the time of his death. *Musammat* Harpal Kuar did not, however, survive the testator and the devise in her favour consequently lapsed on her death.

But the Will contained an ulterior devise in favour of *Musammat* Dilraj Kuar in the following terms: "On life no one can depend, hence I declare also this, that if my wife dies without performing the marriages of my daughters and without making a Will, then my mother, *Musammat* Dilraj Kuar, shall be the owner (*malik*) of the whole of the property left by the deceased (*matruka mutwaffia*), and to her the terms and conditions of clauses 1, 2, 3 and 4 of this Will shall be applicable. On her dying intestate, both of my daughters shall become owners (*malik*) of the estate and the property, moveable and immoveable, left by the deceased (*matruka mutwaffia*); and thereafter issue in due order (*alat-tartib*) shall get it."

There seems to us no doubt that in the above circumstances the Will must operate in favour of *Musammat* Dilraj Kuar. Section 92 of the Indian Succession Act (X of 1865), which has been extended to *talukdari* estates in Oudh by section 19 of Act I of 1869, provides that if the legatee does not survive the testator the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person. Illustration (*d*) to this section is at any rate to some extent applicable to the present case. "A sum of money is bequeathed to *A* for life, and after his death to *B*. *A* dies in the lifetime of the testator. *B* survives the testator. The bequest to *B* takes effect." There can be no doubt from the *resume* of the Will given above that the testator did not contemplate intestacy if his wife should predecease him. Reliance is placed upon the use of the words "*matruka mutwaffia*" in connection with the ulterior bequests, and it is argued that from those words the Court must take it that Sher Bahadur Singh only contemplated *Musammat* Dilraj Kuar succeeding to the property if that property were left by *Musammat* Harpal Kuar, on her death; and that, therefore, as the property never vested at all in *Musammat* Harpal Kuar, owing to her death in the testator's lifetime, *Musammat* Dilraj Kuar cannot succeed. There is evidence to show that Sher Bahadur Singh personally dictated this Will. Its language is inartistic, but as pointed out by their Lordships of the Privy Council in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (4) and *Thakur Vasonji Morarji* v. *Chanda Bibi* (5), a testator is very often ignorant of legal phrases proper to express his intentions or of the legal steps necessary to carry them into effect, and a Court would be justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions.

The testator was very evidently anxious to avoid intestacy but it is noteworthy that he did not alter the Will in spite of the death of his wife in his lifetime, doubtless because he knew that there were ulterior dispositions still available to carry out his intentions. The words "*matruka mutwaffia*" were obviously used to describe and identify the property which, on the supposition that *Musammat* Harpal Kuar survived the testator, was to go in the first instance to her, and on her dying intestate, to *Musammat* Dilraj Kuar. In *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (6), their Lordships of the Privy Council had to deal with a case in which a bequest was made by a person in favour of his widowed daughter-in-law with an ulterior disposition in favour of her daughters as heirs to her estate, and the conclusion at which their Lordships arrived was that the daughters inherited the estate on the death of the former by virtue of the ulterior disposition made in their favour, and not as heirs of the first legatee who

(4) 23 Ind. Cas. 166; (1914) M. W. N. 299; 12 A. L. J. 715; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328; 37 M. 199; 41 I. A. 51 (P. C.).

(5) 29 Ind. Cas. 781; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 22 C. L. J. 180; 37 A. 369; 29 M. L. J. 130 (P. C.).

(6) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.).

held a life-estate. In *Parakkal Arippayil Kader* v. *Parakkal Arippayil Pakkremmer* (7), a case similar to the present one came up for decision; and it was held that the death of the legatee in the lifetime of the testator merely accelerated the ulterior disposition, though the ulterior disposition was described, in the manner described in this case, as a devolution of the estate held by the prior legatee.

Had *Musammat* Harpal Kuar survived the testator, the gift over or ulterior disposition in favour of *Musammat* Dilraj Kuar would, as pointed out by the learned Subordinate Judge, have been treated as void. The authorities dealing with the matter have been discussed by the learned Subordinate Judge at great length, and it is unnecessary to repeat them here. Her death in the lifetime of the testator had the effect of making the ulterior disposition in favour of *Musammat* Dilraj Kuar operative, and *Musammat* Dilraj Kuar, therefore, became entitled to the estate on the testator's death.

The next point to consider is the nature of the estate acquired by *Musammat* Dilraj Kuar under the Will. It is necessary for a consideration of this question that the provisions of the Will should be set out at greater length than we have seen necessary above. Let it be remembered that clauses, 1, 2, 3 and 4 are made applicable to *Musammat* Dilraj Kuar by clause 8 of the Will. In clause 1 Sher Bahadur Singh sets out that his wife shall be *malik* and in possession of the whole of his property moveable and immoveable, the *taluka*. To this devise there is in this paragraph no qualification whatever; and this is one of the four clauses which are distinctly made applicable to *Musammat* Dilraj Kuar in the event of her taking the estate. In paragraph 2 Sher Bahadur Singh says: "it shall be incumbent upon the aforesaid wife to keep up the maintenance (*guzara*) of my *bhawaj* (sister-in-law)." This sister-in-law is the widow of the previous *talukdar* Dan Bahadur Singh, who died without leaving any issue. This clause is also made incumbent upon *Musammat* Dilraj Kuar. Clause 3 provides that the aforesaid legatee is to perform the marriages of both the daughters at proper places according to the custom obtaining in the family, and to mete out the same treatment as it is the duty of parents to do both before and after the marriages. This clause is also made incumbent upon *Musammat* Dilraj Kuar. So far it is fairly plain sailing. Clause 4 prescribes: "After me my wife shall be full proprietor and in possession of the entire *ilaqa* left by me and the whole of my property moveable and immoveable; but it shall not be competent to her to execute any deed of any description in favour of her personal relations. I do by this written instrument authorise her to adopt either of my daughters, or, if a son is born to either of them, then the daughter's son, or any other boy of the family; and the adopted son aforesaid shall, from the date of adoption, acquire all those rights, subject to the terms of the deed of adoption, as my own son, had he been in existence, would possess." Clause 6 prescribes that the wife shall maintain the respect and dignity of the family and keep the tenantry contented, while clause 7 indicates that the Will shall have no operation, if a son were born to the testator and be alive at his death. Clause 5 refers to the maintenance of *Musammat* Dilraj Kuar in the event of the wife succeeding to the estate and it is evident that this clause would have to be omitted where *Musammat* Dilraj Kuar were succeeding. In making clauses 1, 2, 3 and 4 applicable to *Musammat* Dilraj Kuar by clause 8, Sher Bahadur Singh says that in the event of his wife dying, without performing the marriages or making a Will, his mother shall be the owner and *malik* of the whole of the property left by the deceased, and on his mother dying without making a Will (*bila wasiyat faut karc*), both of his daughters will become *malik* (owners) of the estate and the property, moveable and immoveable, left by the deceased.

The power to make a Will indicates that Sher Bahadur Singh intended to confer on his wife, had she survived, and also on his mother, if his wife died intestate, an absolute estate. The power to impose any terms on the rights of the adopted

(7) 33 Ind. Cas. 988; (1916) 1 M. W. N. 190.

son in the deed of adoption also indicates that the ladies could reserve their rights or powers in the estate, if they chose, when making the adoption. Such a reservation would not be illegal [*Visalakshi Ammal* v. *Sivaramien* (8)]. The restraint imposed on the ladies against their executing any deed of any description in favour of their personal relations is an indication that the testator recognized that the power of transfer was less likely to be abused by them in favour of strangers than in favour of their personal relations, and he was, therefore, willing to leave them free to dispose of the property bequeathed otherwise, if they chose. A limited restraint of that character can have no other meaning. The use of the words "*malik*" (owner) in clause 8 and "*malik kamil*" (full proprietor) in clause 4, which was made applicable to the mother without any restraint except the one restraining transfers in favour of personal relations, is also consistent with the above view. In *Surajmani* v. *Rabi Nath Ojha* (9) it was held by their Lordships of the Privy Council that the use of the word *malik* implied absolute ownership, unless there was anything in the context or surrounding circumstances to qualify such meaning. In this case, as in the one which their Lordships were considering, the context and the powers conferred strengthened the presumption that the word was intended to bear its proper technical meaning. In *Tikram Singh* v. *Chet Kunwar* (10), where a Will was made by a person in favour of his wife declaring her to be the lawful owner of his property after his death, just as he was, with power to make a bequest in favour of any person she chose, it was held that the testator transferred to his wife the full power of ownership such as he himself possessed, and that the power to execute a Will in the way he himself could, indicated that his widow was to have an absolute estate.

A limited restraint on alienation implies a power to alienate outside the limits of that restraint, and as pointed out by Jarman, such restraint is valid, if it is limited to a particular member or class of persons (Jarman on Wills, Volume 1, page 562, and Majumdar's Hindu Wills, pages 348 and 349).

It is contended on behalf of Sitla Bakhsh Singh that the restraint on the diversion of property by transfer to the personal relations of the legatee, read with the power of adoption given to the legatee, indicated that the testator intended to confer a succession of life-estates, and to prevent his property from going outside the family. But had that been his intention, it is unlikely that he would have confined the restraint on alienation only to the personal relations of the legatee. A power to make a bequest is, moreover, inconsistent with an intention to confer successive life-estates; and so is a power to make an adoption. In the present case, the legatee was not directed by the Will to make an adoption. The testator gave permission to adopt, and at the same time recognized the right of the legatee to impose such terms as she thought fit in the deed of adoption. The decisions in *Musammat Salta* v. *Kashi Nath* (11) and *Punchoo Money Dossee* v. *Troylucko Mohiney Dossee* (12), relied on on behalf of *Thakur* Sital Singh, do not apply, because in those cases no power to devise was granted by the Will. The circumstances in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (6) and *Radha Prasad Mullick* v. *Ranee Mani Dassee* (13) were also different. As pointed out in *Toolsi Dass Kurmokar* v. *Madan Gopal Dey* (14), an authority to adopt given by a Will does not necessarily imply in every instance that the widow to whom the authority is given has only a life-estate. The intentions of the testator must be gathered from the terms of the Will itself, which may vary in each instance. In the present case there are several indications, apart from the use of the word *malik*, in the Will, of a desire to confer an absolute estate, untrammelled by any conditions other than this that the legatee was not to

(8) 27 M. 577.

(9) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

(10) 2 Ind. Cas. 924; 12 O. C. 157.

(11) 9 O. C. 119.

(12) 10 C. 342; 8 Ind. Jur. 440; 5 Ind. Dec. (N. S.) 229.

(13) 35 C. 896; 12 C. W. N. 729; 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 604; 8 C. L. J. 48 (P. C.).

(14) 28 C. 499.

execute any deed of any description in favour of her personal relations. We have no hesitation, therefore, in finding that the estate to which *Musammat* Dilraj Kuar succeeded under the Will of Sher Bahadur Singh was an absolute estate, subject to the limitation above described, and as held in *Tripurari Pal* v. *Jagat Tarini Dasi* (15), the gift over in favour of *Musammat* Sheoraj Kuar was null and void.

We have now to consider whether *Musammat* Dilraj Kuar executed a Will on the 26th February 1912 in favour of *Musammat* Sheoraj Kuar. We have to consider not only whether she actually executed a Will but whether, if she did, she knew and understood the contents and effect of the instrument. She was a *pardanashin* lady. The document, purporting to be the Will, which is Exhibit No. A2, purports to have been executed and registered on the 26th February 1902. The case, as put for those who found upon this Will, is that *Musammat* Dilraj Kuar produced a draft Will which at a personal interview she asked one Ajudhia Prasad Kayastha, a resident of the town, to write out and explain. Ajudhia Prasad, therefore, faired out the Will, explaining the provisions thereof as he went along. Meanwhile some one had gone to fetch the Sub-Registrar, who appeared before the Will had been executed. He took the Will from Ajudhia Prasad and himself read and explained it word by word.. The lady then signed the Will, and it was accepted for registration, and duly endorsed. The Will purports to have been attested by Raghubar Dayal and Chandrika Bakhsh Singh, but only Ajudhia Prasad and Ranghubar Dayal have been produced. A grievance was made in this Court that Chandrika Bakhsh Singh was summoned for examination several times on behalf of some of the defendants-appellants but he could not be examined on the date last fixed, as he was unwell; and that the Subordinate Judge did not allow further opportunity for summoning him again and getting him examined. On the 5th May 1916 we passed an order directing the Court below to summon Chandrika Bakhsh Singh, and to allow the defendants appellants to produce him; but when Chandrika Bakhsh Singh appeared they refused to examine him. His examination would probably have thrown a flood of light on the circumstances under which the Will and some other documents to which we shall have occasion hereafter to refer, were executed or obtained, as also on the nature of the negotiations which took place in regard to the proposed marriage of *Musammat* Sheoraj Kuar with a son of Sheo Ghulam Singh and the reasons which led to the engagement being broken off. The failure of the defendants-appellants to produce him is an indication that his evidence, if he had been examined, would have been unfavourable to them.

The very circumstances attendant upon the supposed execution and registration of the Will are not to our minds by any means free from suspicion. This lady, Thakurain by caste, was the widow of a *talukdar*, mother of another *talukdar*, and was herself the absolute owner of the *taluka* at the time this Will is supposed to have been executed: yet the only persons who could be found to prove its execution by her are her brother's son, Chandrika Bakhsh Singh, and two Kayasthas. These two latter persons admit that, besides relations, *Musammat* Dilraj Kuar had about thirty servants. They say that being *pardanashin* she did not appear before any of these persons, but that she did appear before them. They both pretend to have been long connected with this Estate. Raghubar Dayal purports to have been paid 2 annas a day seventeen years ago to teach Hindi to Sher Bahadur Singh, a gentleman whom, Raghubar Dayal himself says, was at school for seven or eight years at Nawabganj, and who, from the fact that he is alleged to have himself dictated his Will, had evidently received a considerable education in his youth. Ajudhia Prasad professes to have taught *Musammat* Sheoraj Kuar Hindi for a few years, and to have been paid 4 annas a day at the time he did so. Now judging from the manner in which servants are employed upon these big estates, it would be most unlikely that these two persons should have been employed at a daily wage in this manner. It was suggested in argument that there are large estate accounts, and that the names of these two persons do not appear

(15) 17 Ind. Cas. 696; 40 I. A. 37; 17 C. W. N. 145; 13 M. L. T. 1; (1913) M. W. N. 34; 17 C. L. J. 159; 15 Bom. L. R. 72; 40 C. 274 (P. C.).

therein. If they had been paid by the month, with or without food, some trace of this would have been found in the accounts; and it is for this reason no doubt that they describe connection in the above manner. Ajudhia Prasad also figures as the scribe of two curious documents, Exhibits E-1 and E-2 of Rs. 50,000 and Rs. 10,000 respectively, executed in 1903, of a receipt, Exhibit C-38 of 1909, which is also particularly doubtful, and of another receipt, Exhibit C-40, purporting to be of about the same date as Exhibit C-38. To these we shall have occasion to refer again. It does not appear whence *Musammat* Dilraj Kuar could have obtained this draft. If she had it ready with her, and if it were a fact that she called upon Ajudhia Prasad to explain all the details as he faired the document out, it would follow that she had not studied the draft; and that some person had prepared for her a draft Will which she was having faired out without having considered its provisions. It should have been easy to prove how the draft came into her possession, and who wrote it, and from whom that person who wrote it obtained his instructions. The story as told is not at all a likely one, unless there were something underhand going on. The question again arises how the Sub-Registrar came to be sent for at such a time, when there was no document for him to register. *Musammat* Dilraj Kuar is supposed to have been very carefully examining the details of the Will as it was being faired out; and from this it would follow that, if the provisions of this Will were not in accordance with her desire, she would not sign it; and this would make it all the more unlikely that the Sub-Registrar should have been sent for before the document was signed at all. A Sub-Registrar would ordinarily be sent for to receive the presentation of an executed document, and to register it. It is, therefore, surprising that he should have taken an inchoate document from the hands of Ajudhia Prasad and have explained it carefully to the lady at all. This premature arrival of the Registering Officer, together with the unexplained appearance in the lady's hand of the draft which she had not understood, indicates very strongly that there was some one behind the scenes, who had produced a draft of a Will which she was to execute and have registered at once. The above are points of suspicion which at once arise before the Will itself even comes to be looked at.

We now proceed to examine the Will itself. The Will commences by noticing that Sher Bahadur Singh *talukdar*, the son of *Musammat* Dilraj Kuar, had executed a Will on the 1st December 1895 in which he had admitted his wife as the first successor, *Musammat* Dilraj Kuar as the next *malik* and *qabiz*, if his wife died without making a Will, and after her his two daughters *Musammat* Sheorj Kuar and Raghuraj Kuar, in case *Musammat* Dilraj Kuar similarly left no Will. It goes on to recite that on the death of the *Thakur Saheb* mutation was effected in Dilraj Kuar's own favour, and that she took possession subject to the conditions of clauses 1, 2, 3 and 4 of that Will. It refers then to the fact that she has an authority to adopt according to clause 4, and that she is trying heart and soul to comply with clause 3, so that the marriage of *Musammat* Sheoraj Kuar may be performed early according to the custom of the family; and so that *Musammat* Sheoraj Kuar shall be *malik* after her as the *Thakur Saheb* had in his Will desired, when at the same time he authorised *Musammat* Dilraj Kuar to adopt *Musammat* Sheoraj Kuar's issue. The Will on this point is in the original obscure, and we have preferred to retain that obscurity in this *resume*. It continues that Sheoraj Kuar is still a minor, and not yet married, and that it is, therefore, *Musammat* Dilraj Kuar's duty as regards clause 4 to make a declaration of her final opinion (*izhar rai qatai*). Therefore she agrees (that is the word used) that she will remain *malik* and *qabiz* during her lifetime, and that after her *Musammat* Sheoraj Kuar, etc., shall be *malik* and *qabiz* according to the second portion of the 8th clause of Sher Bahadur Singh's Will, and according to this present document; and that after her "her eldest male issue, generation after generation, and her husband shall be proprietor and in possession of the *taluka*; and the property shall remain in the family of the aforesaid daughter's husband. No one else shall have any rights of any kind in the property left by him,

because according to Act I of 1869 *Musammat* Sheoraj Kuar has the right to be the legal heir and *Thakur* Sher Bahadur Singh has in his Will appointed her heir." The document goes on to prescribe that if *Musammat* Sheoraj Kuar be a minor at the time of *Thakurain* Dilraj Kuar's death, the Government shall take the Estate under its protection, and the Deputy Commissioner shall select a guardian; if she be not married, he shall have to arrange for her marriage. This is an unusual document. It teems with legal expressions, all of which Ajudhia Prasad states that he explained to the lady, but many of which he, when pressed to do so, was unable to explain himself. References to *Thakur* Sher Bahadur Singh's Will, with its date, and with the numbers of the clauses, look large in this document and they were, it seems to us, evidently inserted in order to catch the attention of *Musammat* Dilraj Kuar, and to make her imagine that she was simply carrying out her son's wishes. The early portions of the document seem to suggest that she was about to make an adoption, though she does not do so; and the declarations that along with *Musammat* Sheoraj Kuar her husband shall be the heir and that the property shall ever remain in that husband's family, are conveniently sandwiched in between expressions which will attract the lady's attention, such as a reference to the second portion of clause 8 of the Will dated 1st December 1895, executed by Sher Bahadur Singh deceased, and a reference to Act I of 1869 under which *Musammat* Sheoraj Kuar is regarded as having a right to be the legal heir. Ajudhia Prasad's scribing certain sale-deeds shows that he is a person who has some measure of understanding as to how documents are to be drafted. Chandrika Bakhsh Singh is the person who was interested in the management of the estate since the death of Sher Bahadur Singh, the person who had interested himself in the money transactions between Dilraj Kuar and Sheo Ghulam Singh and was himself a relation of the lady; and it seems unlikely, therefore, that such a confused document as this Will could have been prepared by one under the superintendence of the other, unless there were some concealed motives.

In considering the provisions of this so-called Will, it is impossible not to consider also the facts of certain money lending transactions, and also the subsequent history of *Musammat* Sheoraj Kuar's marriage relations. *Thakur* Sher Bahadur Singh had borrowed certain moneys from *Thakur* Mahabir Singh who had left a widow named *Musammat* Motimala Kuar. *Musammat* Motimala Kuar had three daughters, *Musammat* Sarjudei, *Musammat* Bishundei and *Musammat* Pragdei. *Musammat* Sarjudei was married to Sheo Dayal Singh, son of Sheo Ghulam Singh, who was himself a son of Sheodat Singh. *Musammat* Bishundei was married to Sheopal Singh, brother of Sheo Dayal Singh. These two brothers, therefore, married two sisters, daughters of *Musammat* Motimala Kuar, to whom the estate of Sher Bahadur Singh was indebted. Sheo Ghulam Singh had a third son Durga Bakhsh Singh. It is alleged that negotiations were in progress to marry *Musammat* Sheoraj Kuar to this Durga Bakhsh Singh. Sher Bahadur Singh's transactions with *Thakur* Mahabir Singh had taken place in 1893 (Exhibit F.-1), in 1898 (Exhibit F-2) and again in 1898 (Exhibit F 5). Negotiations for *Musammat* Sheoraj Kuar's marriage were suddenly broken off in June or July 1904. The Will under discussion was registered in 1902. It is argued that Sheo Ghulam Singh had been approached with reference to this marriage as early as 1902 and that the present Will was cunningly devised at his instigation to ensure his son's position after marriage. There is no evidence to show when the negotiations about the marriage of *Musammat* Sheoraj Kuar with the third son of Sheo Ghulam Singh were started, but they were probably started early enough, that, is soon after the death of Sher Bahadur Singh; because *Musammat* Dilraj Kuar was an old lady, and she was presumably anxious to see that her granddaughter's marriage was arranged in her lifetime. Now Sher Bahadur Singh was heavily indebted. In 1903 two mortgage-deeds were executed on behalf of *Musammat* Dilraj Kuar in favour of the two sons and one grandson of Sheo Ghulam Singh, Exhibit E-1 for Rs. 50,000 dated the 1st April 1903, and Exhibit E-2 for Rs. 10,000 dated the 2nd April 1903. These were

written on succeeding days, and by Ajudhia Prasad. The consideration for this second document was Rs. 10,000 to be taken by the mortgagees towards the expenses of the marriage of *Musammat* Sheoraj Kuar to Durga Bakhsh Singh, and Rs. 10,000 out of the first document was also to be devoted to that purpose, Rs. 40,000 being borrowed to pay up debts of Sher Bahadur Singh. At the time of registration, Rs. 15,000 was admitted to have been already received, although no receipt was produced; and the balance was supposed to have been paid to *Musammat* Dilraj Kuar at the time of registration. Debts to an aggregate total of Rs. 28,271-2-3 were paid; and either receipts have been produced, or evidence has been led, showing that payment was duly certified to the Courts in the cases where a decree had been obtained, but in all these cases, the payments were shown as made through the instrumentality of Sheodat Singh, father of Sheo Ghulam Singh, and not through *Musammat* Dilraj Kuar, to whom the money was supposed to have been paid. Sheo Dayal Singh and Sheopal Singh, the husbands of the two daughters of *Musammat* Motimala Kuar, both died. When they died is not quite clear; but it is said that the marriage negotiations were broken off, because these two young men having died, *Musammat* Dilraj Kuar came to the conclusion that this was an unlucky family. Still more so would this have been apparent to *Musammat* Motimala Kuar, whose two daughters had become widows, through the death of these two young men. But we find that Durga Bakhsh Singh, who was supposed to have been rejected as unlucky by *Musammat* Dilraj Kuar, was then married to *Musammat* Pragdei, the sister of the two unfortunate widows. We are inclined to believe that there is something suspicious in the whole tale, and that the real reason for breaking off the connection with Sheo Ghulam Singh's family has been carefully concealed. The result of the rupture was at once apparent. In June 1904 *Musammat* Dilraj Kuar, losing the support of Sheo Ghulam Singh, was pressed for payment by *Musammat* Motimala Kuar's family; and documents were executed in the name of the three ladies. *Musammat* Sarjudei of the three is now dead and is represented by Harpal Singh, her son, who is, it will be remembered, also the grandson of Sheo Ghulam Singh. The first transaction on this occasion was a deed for Rs. 40,000 (Exhibit F-3 dated 8th June 1904). By this deed the three documents Exhibits F-1, F-2, and F-5 were paid off, and Rs. 10,000 were supposed to have been left to pay Sheo Ghulam Singh's descendants, the mortgagees in Exhibits E-1 and E-2. *On the same date* a second document Exhibit F-4 was executed in favour of the same three ladies for Rs. 6,000 without interest, and all was left to pay the above mortgagees. The reasons for these payments are not stated in the documents. This transaction was followed by a mortgage-deed (Exhibit E-38), dated the 5th July 1904, in favour of Sheo Ghulam Singh's descendants, the mortgagees of Exhibit E-1 and E-2. According to this document the liability to them under the two documents Exhibit E-1 and E-2 had amounted with interest to Rs. 63,375. It is noted that of the money borrowed under these two documents Rs. 27,375 had not been spent, and were returned to the mortgagees; that Rs. 16,000 were to be repaid by *Musammat* Sarjudei, etc. (see Exhibits E-3 and F-4); and that the balance of Rs. 20,000 was the sum for which this bond was executed. It is a suspicious fact that two documents Exhibits E-1 and E-2 were executed on succeeding days, when one document would apparently have sufficed. And that suspicion is very materially enhanced when we find two documents, Exhibits F-3 and F-4, drawn up in dealing with the representatives of Mahabir Singh. The handing back of the unspent balance is clearly a pretence, when we remember that although the money is said to have been paid to *Musammat* Dilraj Kuar when Exhibit E-1 and Exhibit E-2 were registered, such debts, as were paid off, were paid off through Sheodat Singh, in whose custody that money had evidently remained. Evidently some serious rupture occurred that led Sheo Ghulam Singh to press for immediate payment of the documents Exhibits E-1 and E-2. It appears to us that, having been satisfied that his son's prospects were good after the execution of this Will in 1902, Sheo Ghulam Singh then arranged in a friendly way to take

over the liabilities of the estate by having mortgages executed in favour of his immediate descendants, except the debts due on *Thakur* Mahabir Singh's mortgages, which were already secured to his daughters-in-law, and about which it was not necessary for him, therefore, to trouble. He paid off those debts, and secured in the mortgage bonds ample provision in cash for himself, as a return for the proposed marriage of his son with Sheoraj Kuar. When the breach occurred, he would have nothing more to do with the Estate and demanded back at once the money which he had paid in clearing the Estate debts. At the time when this was done, fictitious transactions took place. He was paid off: but the opportunity was taken to deceive the lady into executing Exhibit E 38 for Rs. 20,000 when, if anything, only a nominal sum was due, and Exhibit F-3, for Rs. 16,000 too much, and Exhibit F-4 for a fictitious sum of Rs. 6,000. It is noteworthy that it was arranged that if interest were not paid the mortgagees were, under Exhibit E-38, to be entitled to claim possession: Umrao Singh says that *Musammat* Dilraj Kuar would not give up possession because so much was mortgaged: and they evidently did not dare to insist lest her eyes be opened: but we find them taking possession, after her death, in 1907. Chandrika Bakhsh Singh had either attested or was present at the time of the execution of most of these documents; and it is possible that had Chandrika Bakhsh Singh been put forward by any party to the case at an early stage, his evidence or a searching cross-examination might have revealed the true nature of many of these transactions, which at present are enveloped either in mystery or suspicion. As it is the impression left by a close study of these transactions and the evidence is that *Musammat* Dilraj Kuar was being exploited by Sheo Ghulam Singh and those around her to further their own interests, and that the Will was only the first of a series of transactions worked out between Sheo Ghulam Singh and Chandrika Bakhsh Singh, advantage being taken by them of the intense anxiety of *Musammat* Dilraj Kuar to secure an early and satisfactory marriage for her one grand-daughter, *Musammat* Sheoraj Kuar. Sher Bahadur Singh had not been dead long, and there was otherwise no occasion why *Musammat* Dilraj Kuar should have executed this Will at this particular time. It does not seem to us an unduly strained presumption that, recognising her anxiety, which undoubtedly existed, to see her grand-daughter successfully married, Sheo Ghulam Singh should have said, "I will not enter into negotiations for the marriage of my son to Sheoraj Kuar, unless you make definite disposition of the property, so that he shall be safeguarded."

Looking at it in this way, the so called Will may be taken as the first stage in the marriage arrangements. A draft was then prepared so cleverly that *Musammat* Dilraj Kuar should seem to be simply echoing her son's desire. The Will is written in such confused language that we should in any case find it hard to believe that *Musammat* Dilraj Kuar could possibly have understood what it all meant or realise that it did not even represent accurately what Sher Bahadur Singh had directed in his Will. Certain prominent phrases therein would attract her attention, and that no doubt is what the framers of the draft had in their mind.

We have examined with care the evidence of Ajudhia Prasad and of Raghubar Dayal, the second Kayastha who is supposed to have identified the lady at the time of registration. There are many discrepancies where discrepancies might not have been expected, and we cannot but think it extremely doubtful whether Ajudhia Prasad and Raghubar Dayal at any rate witnessed any signature of Dilraj Kuar upon this document. In discussing the monetary transactions which took place in 1909 between *Musammat* Sheoraj Kuar and certain defendants appellants, we shall show that *Musammat* Sheoraj Kuar was also a puppet in the hands of persons who were intent on lining their own pockets at the expense of the estate. This very Ajudhia Prasad Kayastha wrote out two receipts, which seem to us to betray the cloven hoof, in 1909. This continued exploitation of the unfortunate ladies is corroborative to our minds of the *mala fides* which we find existed in respect of this Will of *Musammat* Dilraj Kuar as far back as 1902.

We are not prepared to say that the so-called Will of *Musammat* Dilraj Kuar was

a forgery. In fact the probabilities are that some kind of document or Will was taken from her. Upon this it is not necessary for us to pronounce a definite opinion, as we are satisfied for the above reasons that if the mechanical execution of the document by *Musammat* Dilraj Kuar be taken as proved, she certainly did not comprehend the nature of the document which she was signing.

We now proceed to consider the question of succession to the absolute estate held by *Musammat* Dilraj Kuar under the Will of Sher Bahadur Singh. The learned Subordinate Judge has found that the succession was governed by the rule of lineal primogeniture laid down in the *sanad*. Section 15 of the Oudh Estates Act (I of 1869), as it stood, before the U. P. Amending Act III of 1910 was brought into force, declared that if any *talukdar* or grantee shall heretofore have transferred or bequeathed, or if any *talukdar* or grantee or his heir or legatee shall hereafter transfer or bequeath to any person, not being a *talukdar* or grantee, the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property, so transferred or bequeathed, shall be regulated by the rules, which would have governed the transfer of and succession to such property, if the transferee or legatee had bought the same from a person not being a *talukdar* or grantee. *Musammat* Dilraj Kuar was not a person who, but for the Will, would have succeeded to the estate of Sher Bahadur Singh either under the *sanad* or under section 22 of Act I of 1869 before it was amended, as the male paternal kinsmen of Sher Bahadur Singh, who would have been entitled to step in under the rule of primogeniture, were alive. The succession to her in the present instance will, therefore, be regulated by the rules which would have governed the succession to such property, if the legatee had bought the same from a person not being a *talukdar* or a grantee. The result of the Will, in other words, to put it shortly, is to take the case, for the purposes of transfer or of succession to the property bequeathed, out of the Act. The succession, being regulated as if such property had been acquired from a person not being a *talukdar* or grantee, is regulated by the ordinary provisions of Hindu Law. On the death of *Musammat* Dilraj Kuar, therefore, this property, in which she had an absolute estate, devolved on her husband's heirs in order of their succession to him, she having left no daughter, no son, and no son's son. It is strenuously argued that in considering the ordinary law of succession in cases governed by section 15 of the Oudh Estates Act, reference must be made to the *sanad*; and this argument is sought to be supported by a reference to the decision of their Lordships in *Debi Bakhsh Singh* v. *Chandrabhan Singh* (16). That case, however, has no application whatever to the circumstances of the present case. In that case their Lordships were discussing section 22 of the Oudh Estates Act, which dealing with an intestacy provides in paragraph 11 "or in default of any such agnate, then to such person as would have been entitled to succeed to the estate under the ordinary law, to which persons of the religion and tribe of such *talukdar* or grantee are subject." Where this section has to be applied in a list III or list V case, their Lordships have ruled that by reason of the *sanad* read with section 8 of Act I of 1869 lineal primogeniture must be taken to be a part of the ordinary law of such *talukdar* or grantee.

But a case of succession to which section 22, sub-section 11, applies is a case of succession within the Act, a case of succession to the *talukdar* or grantee. The present case, as we said before, is a case to which section 15 applies, a case which for the purposes of succession is outside the Act, a case which has to be considered, as if the transferor was not a *talukdar* or grantee.

It is again argued that although the case may be taken outside the Act, yet the effect of the *sanad* still remains, because of the existence of the Crown Grants Act (XV of 1895), and we are referred to certain remarks of their Lordships in *Sheo Singh* v. *Raghubans Kunwar* (17), where they observ-

(16) 7 Ind. Cas. 724; 32 A. 599; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 13 O. C. 316; 20 M. L. J. 917; 3 I. A. 168 (P. C.).

(17) 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194 (P. C.).

ed: "Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, Act XV of 1895 (The Crown Grants Act)." It is said that no legislative enactment can prevent the operation of the *sanad* in view of section 3 of that Act. But section 3 of Act XV of 1895 is now controlled by the explanation appended and alterations made in section 3 of Act I of 1869 by U. P. Act III of 1901, which have been given retrospective operation.

The retrospective enforcement of section 3, as amended, would in this case have the effect not of divesting any estate but of keeping it where it was; for, as laid down in the explanation, the conditions of the *sanad* relating to succession would be inapplicable in so far as they may be inconsistent with section 15 of the Act, which applies in this case. The amendment of the Act brings the language of the section into line with the interpretation put upon it in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (18) before the Act was amended. The Crown Grants Act was not passed with any idea of superseding or in any way qualifying the provisions of Act I of 1869 or of any particular Act; nor of creating or reviving any particular *sanad*. It is not an Act having application only to the Province of Oudh, but it is an Imperial Act, extending to the whole of British India. It was enacted to ensure that no question could arise as to the right of the Government, by an executive order, to create a line of succession contrary to the ordinary law. A similar point was raised before a Bench of this Court consisting of Chamier and Wells, A. J. Cs. in *Musammat Parbati Kuar* v. *Rani Chandrapal Kuar* (19), where the point appeared so clear and simple to the learned Judicial Commissioners that an argument as to the effect of section 3 of the Act I of 1869 was simply brushed aside with the remarks: "Upon this we think it is sufficient to say that it is quite clear from sections 2 and 3 of the Crown Grants Act read together that the Act has no such effect." Finding that the succession to *Musammat* Dilraj Kuar is in her husband's heirs, and accepting the fact that section 5 of Act I of 1869 applies, the learned Subordinate Judge disregarded the effect of the amendment of section 3 and relied on the *sanad*, thinking that the Crown Grants Act had revived it, and proceeded to apply the rule of primogeniture, by holding that the word "successors" in the *sanad* included legatees.

Act I of 1869 was enacted, as its preamble shows, to remove doubts as to the nature of the rights of the *talukdars* and others in their estates, and as to the course of succession thereto, and from the time this Act came into force, the nature of those rights, and the course of succession thereto, are provided for and regulated entirely by section 8 and the other sections of the Act.

The *sanad* might be of some value in the case of an estate which never came under the Act at all, such as the Mahewa case, to which we have just referred, *Sheo Singh* v. *Raghubans Kunwar* (17), or in a case under list III or list V where a reference is to be had to section 22 (11) to discover the heir, as was the case in *Debi Bakhsh Singh* v. *Chandrabhan Singh* (16); but where a case is governed by the provisions of the Act, that is either by section 14 or section 15 of the Act, the provisions of the Act will supersede the *sanad*, if the *sanad* is inconsistent with them, by reason of the amendment made to section 3 of the Act. In a case governed by section 15, the ordinary Hindu Law would, therefore, apply and govern the succession to the estate of a Hindu transferee or legatee.

But even if the learned Subordinate Judge had been right in referring to the *sanad* (and the parties are agreed, though no *sanad* is forthcoming, that *Thakur* Ganga Bakhsh Singh's *sanad* must have been in the ordinary known form of primogeniture *sanad*, as shown at page 386 of Sykes' Compendium of Talukdari Law), he was not right in extending its operation to legatees. He has not given adequate weight to the interposition of the word *but* between the first and second clauses of the second paragraph. There can be no doubt that what was created by the *sanad* was something like an estate in the nature of an entail with a power superadded in

(18) 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 148; Rafique & Jackson's P. C. No. 48; 3 Suth. P. C. J. 474 (P. C.).

(19) 8 O. C. 94.

the owner to break the entail, or, what might otherwise be described, as an absolute estate or an estate in fee simple with a rule of succession superadded to govern its devolution in case of intestacy.

The owner could break the entail either by a transfer *inter vivos* or by a Will; and as the history and the circumstances under which the original *sanads* were withdrawn and fresh *sanads* containing the rule of primogeniture granted, set out at length in *Ghulam Abbas Khan* v. *Bibi Ummatul Fatima* (20), shows, the intention of those who were responsible for framing the *sanads* and making the grants was that the rule of succession laid down in the *sanad* was to apply, if the owner had not disposed of the property in his lifetime by transfer or bequest. The words "succeeded," "successor" or "succession" occur in the preamble to Act I of 1869 and in sections 8, 14, 15, 21, 22, 23, 30 and 31 of the Act, which was drafted shorty after the *sanads* were granted. They are everywhere used to denote intestate succession; and that was also the meaning in which those words were used in the correspondence which passed between the Government of India and the Local Government at or about the time when the *sanads* were granted.

The learned Counsel who appears for *Thakur* Sital Singh contends that the word "successor" means in the *sanads* any person designated by devise as the successor to the whole or unalienated residue of the estate, and not a legatee not so designated; but in an ordinary alienable estate or an estate in fee simple, devolution of which is governed in the case of intestacy by Statute or personal law, there can be no such thing as designation of a successor, unless the successor is a legatee. We are not dealing here with Sovereign state or a principality, and the distinction, pointed out, would, in case no legatee is designated a successor, create practical difficulties of a serious kind. If a *talukdar*, for instance, for some perverse purpose of his own, makes a Will of the whole or part of an estate in favour of his sweeper, could it have been intended that the rule of lineal primogeniture would be the rule of succession in regard to that property in that sweeper's family? Yet this is the effect of the interpretation which the learned Subordinate Judge has placed on the *sanad*. Neither party is prepared to endorse it. "Successors" in a list III estate can only mean the procession of single male heirs; and, as their Lordships said in *Balraj Kunwar* v. *Jagatpal Singh* (21), "if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the father of the entail, such as it is, should no longer apply to the estate."

Our finding, therefore, is that the estate vested, upon the death of *Musammat* Dilraj Kuar, half upon the branch represented by Sitla Bakhsh Singh, and half upon the branch represented by Sital Singh and Debi Singh. Sital Singh and Debi Singh were originally admitted on the record as the legal representatives of Kirat Singh, but having been brought on the record, they had a right to protect their personal interests both as plaintiffs in the one suit, and as defendants in the other, under Order II, rule 5, read with section 11, explanation IV of the Code of Civil Procedure, irrespective of any rights which they inherited from Kirat Singh. The ground of lineal primogeniture, originally set up by Kirat Singh, has been given up in this Court by his legal representatives; and Mr. Jackson, who had argued the case for Sital Singh, has explicitly confined himself to the rights claimed by him and Debi Singh in their personal capacity, and also as the legal representatives of Kirat Singh under the Hindu Law. Virtually from the time of their arrival on the scene, they have been contending for more than they could have obtained technically as the legal representatives of Kirat Singh, and the opposite parties have all along been opposing their contentions. A formal amendment of the plaint as to the capacities in which the right was claimed was, therefore, allowed, to admit of a complete adjudication of the matters in controversy in these suits, and

(20) 31 Ind. Cas. 748; 18 O. C. 188; 2 O. L. J. 636.

(21) 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384; 7 O. C. 248; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639 (P. C.).

obviate further litigation in regard to the matter.

In the memorandum of appeal, filed in this Court, Sital Singh claims half the estate in his own right and as the legal representative of Kirat Singh. It appears that Debi Singh has transferred or relinquished his rights in favour of Sital Singh during the pendency of the suit under a registered deed dated the 25th February 1913, of which intimation was given by him to the Court below on the 28th February 1913. Sital Singh has, therefore, become entitled to a half share.

All that now remains is to deal with the position of various transferees from *Musammat* Sheoraj Kuar and *Musammat* Dilraj Kuar.

The transferees from *Musammat* Sheoraj Kuar are defendants Nos. 2 to 4, the appellants in Appeal Nos. 25 of 1913. On their behalf is propounded a sale-deed for Rs. 19,200 (Exhibit C-34) dated the 28th January 1909. Execution of this sale-deed is admitted by the plaintiffs in both suits; but it is urged that, *Musammat* Sheoraj Kuar being a trespasser, she had no power to execute this sale-deed, and that any payments made thereunder by the vendees were mere payments as volunteers, and could not be allowed to bind the estate. Tha details of the consideration of this sale-deed are written as follows:—

Rs. 200 preliminary expenses for execution, registration, etc.,

Rs. 8,000 to discharge a mortgage executed by *Musammat* Dilraj Kuar on the 8th January 1901 in favour of the same vendees ;

Rs. 1,200 advance profits in connection with the said mortgage; and

Rs. 9,800, part to be utilized in discharging the decree of one Asharfi Lal and the rest to be held at the disposal of *Musammat* Sheoraj Kuar.

The propriety of the mortgage of *Musammat* Dilraj Kuar dated the 8th January 1901 (Exhibit C-3) is admitted by the plaintiffs. *Musammat* Dilraj Kuar mortgaged with possession a 4 annas share in village Mohsandi and a field No. 387/2 in village Raipur for Rs. 8,000 in favour of these vendees, defendants Nos. 2 to 4, with a condition that they should remain in possession, taking profits in lieu of interest, and that their possession should not be disturbed for twelve years. This mortgage-deed for Rs 8,000 had been executed in great measure to discharge a prior mortgage executed by Sher Bahadur Singh in favour of Shiam Sunder and Awadh Behari in 1893 (Exhibit C-1). The lower Court has found that the defendants Nos. 2 to 4 are entitled to remain in possession as mortgagees of 4-annas in village Mohsandi and of the field in village Raipur, until they are redeemed on payment of Rs. 8,000. This, as we have said, is accepted by the plaintiffs; and we have no hesitation in agreeing with the learned Subordinate Judge that his finding in this matter is correct. It is hardly necessary to quote authorities for the proposition that a mere trespasser has no power to execute sales of land in his possession as trespasser; and that payments made by his transferees, they having no interest to protect, cannot be held binding upon the rightful owner. But at the same time we deem it advisable to make some reference to the details of this sale-deed, because we consider, as we have mentioned in an earlier portion of this judgment, that they go to show that the weakness of this *pardanashin* lady was being exploited in the interest of some scheming person, and thus go to justify our finding as to the circumstances under which the so-called Will of *Musammat* Dilraj Kuar came to be executed. We may consider first Rs. 9,800, which was to be devoted to paying Asharfi Lal's decree, the balance to be held at ths disposal of *Musammat* Sheoraj Kuar. Now Sher Bahadur Singh had executed a bond in favour of Asharfi Lal on the 1st October 1898 for Rs. 2,000 (Exhibit C 30). Asharfi Lal obtained a simple money decree for no less than Rs. 9,656-2 0 on this bond against *Musammat* Sheoraj Kuar on 17th November 1908 (Exhibit C-35). A suspicious alacrity to discharge this decree is betrayed. This sale-deed was executed on 28th January 1909. Rs. 9,800 was left, as if the amount to be paid was uncertain. On the 27th May 1909 an application was made to the Court by Asharfi Lal to certify the receipt of Rs. 8,750, which was Rs. 1,000 less than the amount then due with interest (Exhibit C-36). The Court certified

payment on that same day (Exhibit C-37). It is said that Rs. 1,000 too little were paid to him as that sum was required by *Musammat* Sheoraj Kuar to pay an urgent revenue demand. Asharfi Lal being examined swore that he had an interview with *Musammat* Sheoraj Kuar in May, who asked him to receive Rs. 1,000 less at that time because she had had to pay a Government demand. Exhibit C. 39, *tahsil dakhila*, is filed which shows that on the 12th July 1909 Rs. 1,523-10-5 were paid for revenue by *Musammat* Sheoraj Kuar. This is nearly two months after the time when according to Asharfi Lal she had pleaded with him, on the ground that she had had to pay revenue. This money to pay Asharfi Lal had been left with the vendee; and if it became necessary for a portion of this sum to be diverted to pay revenue, the vendee could have paid it; but we find a receipt Exhibit C-38 dated the 10th July 1909 in the handwriting of Ajudhia Prasad, one of the gentlemen mixed up in the transaction of *Musammat* Dilraj Kuars's so-called Will in 1902, for Rs. 1,000 paid to *Musammat* Sheoraj Kuar. There would remain, therefore, Rs. 50 to account for; and for this receipt Exhibit C-40 was produced for Rs. 50, supposed to have been executed by *Musammat* Sheoraj Kuar on the 17th July 1909; and this also is in the handwriting of the same gentleman. To prove Exhibit C-38 two persons Ram Sarup and Gajadhar were put forward. Their evidence the lower Court has discredited, and, in our opinion, rightly so. Nor do we believe the evidence of Parshan Singh vendee himself, or of Angad Singh. The latter pretends that he saw the money paid to *Musammat* Sheoraj Kuar at a time when Tahsil peons were seated waiting for a revenue demand; but even if that was so, it is possible that the payment may have been made out of the profits of the Estate. The property in the possession of *Musammat* Sheoraj Kuar yielded her, according to the rent roll of 1316 *Fasli*, a net profit of about Rs. 14,808 per annum. If Asharfi Lal had agreed to the revenue being paid out of the money left for the satisfactions of his decree, there is no reason why the payment should have been delayed so long. In our opinion these two receipts Exhibit C-38 and Exhibit C 40, if they do represent actual transactions, represent transactions for which no legal necessity is established. The item of Rs. 1,200 representing four years' advance profits is also an unfair item. The mortgagees were by this sale-deed purporting to acquire the equity of redemption. Eight years had passed since the mortgage. In the mortgage-deed, it was arranged that the mortgage should not be redeemed for twelve years. The mortgagees put the annual net profits at Rs. 300, therefore, it was said they take Rs. 1,200 for the profits of the four years for which the mortgage had still to run. Even if it be taken that by remaining for four years longer in possession as mortgagees, they might have made Rs. 1,200 profits, then the mortgagees were themselves liable to pay the same, because they had purchased the equity of redemption; if as purchasers, they redeemed the mortgage four years earlier, they did so in their own interest. In our opinion, the sale effected by *Musammat* Sheoraj Kuar in favour of defendants Nos. 2 to 4 is not binding on the heirs of *Musammat* Dilraj Kuar, and the payments made by the vendees, other than what was credited in satisfaction of their prior mortgage, were voluntary and did not bind the estate. We agree, therefore, with the learned Subordinate Judge that the defendants Nos. 2 to 4, appellants in Appeal No. 125, are entitled to remain in possession as mortgagees of 4-annas of *mauza* Mohsandi and the field in Raipur under the mortgage-deed executed by *Musammat* Dilraj Kuar on the 8th January 1901 until they are redeemed in the ordinary course.

We now turn to *Musammat* Dilraj Kuar's transactions, and here again we are in accord with the finding of the learned Subordinate Judge.

*Musammat* Dilraj Kuar was a *parlanashin* woman, and it is not at all proved that she had any access to any legal advice or to any advice except that of Chandrika Bakhsh Singh, her brother's son. We have already referred to the transactions Exhibit F-3 and Exhibit F-4, which purport to be loans from the daughters of *Musammat* Motimala Kuar, now represented by defendants Nos. 5, 6, 7, appellants in appeal No. 129 of 1914, taken to discharge prior encumbrances, Exhibits F-1, F-2, and F-5, the balance of Rs. 10,000 of Exhibit F-3, and the whole of Rs. 6,000 of Exhibit F-4 to be paid to Sheo Ghulam Singh's relations, the mort-

gagees under Exhibits E-1 and E-2. It appears from the evidence that both Sheo Ghulam Singh and *Musammat* Motimala Kuar had extensive account books. But all are suppressed and it is sought to prove these transactions by oral evidence such as the statements of Sheo Charan and Darshan, which are untrustworthy. We agree with the lower Court that Rs. 16,000 must be taken as purely fictitious, and that, therefore, no rights arise out of Exhibit F-4. Exhibit F-3 we agree in upholding to the extent of Rs. 30,000 which is accepted by the plaintiffs in both the suits. The actual possession, therefore, of village Umri can be obtained by the plaintiffs by a formal redemption on payment of the mortgage-money found to be due.

There remains to consider the mortgage bond for Rs. 20,000 (Exhibit E-38), which *Musammat* Dilraj Kuar is said to have executed in favour of Sheo Ghulam Singh on the 5th July 1904. To this also we have above referred in some detail. This sum is supposed to represent the balance due under Exhibit E-1 and Exhibit E-2 after deduction of Rs. 16,000 which were to be received from the mortgagees of Exhibit F-3 and Exhibit F-4 and after refund of Rs.27,375 by *Musammat* Dilraj Kuar. We have no hesitation in agreeing with the learned Subordinate Judge that the account which is supposed to have been made up when this bond was executed is an entire fiction; *Musammat* Dilraj Kuar could not have understood, if mechanical execution be taken as proved, the arithmetical intricacies on which this document was based. The oral evidence is of a most unsatisfactory nature. We have been taken through it at great length and we have considered the elaborate comments for and against its reliability which have been pressed upon us; and we agree that the learned Subordinate Judge has rated it as highly as it deserved. The direct evidence, *e. g.*, to prove the execution of Exhibit E-1 and Exhibit E-2 consists of the statements of a *pujari*, a barber and a servant Ganesh, who drew Rs. 2 a month and his food from the Estate.

It is important to notice, in respect of the transactions evidenced by Exhibit E-1 and Exhibit E-2, that these two documents are simple and not usufructuary mortgages. The dealings with Parshan Singh etc., and with *Thakur* Mahabir Singh had been by usufructuary mortgages. Yet only simple mortgages were executed for so large a sum as Rs. 60,000. Umrao Singh says, *Musammat* Dilraj Kuar would not consent to a transfer of possession, as so much property was being mortgaged. It seems to us quite evident that the real enormity of the transaction was being concealed from *Musammat* Dilraj Kuar and that the perpetrators were careful not to raise the lady's suspicions by suggesting a transfer of the four villages hypothecated. But soon after her death, the mortgagee under Exhibit E-38 obtained possession against the unfortunate *Musammat* Sheoraj Kuar, on the ground that interest was unpaid. We do not find it proved that any payments were made out of Exhibit E-1 and Exhibit E-2, save and except Rs. 28,271-2-3, the payment of which is admitted by the plaintiffs. That, and no more, is all that *Musammat* Dilraj Kuar was liable to pay under Exhibit E-1 and Exhibit E-2. According to Exhibit E-35, she did re-pay Rs. 27,375. This is a curious sum. The learned Subordinate Judge finds that Rs. 896-2-3 that is to say the balance between Rs. 28,271-2-3 and Rs. 27,375, remains to be adjusted, and for this he would refer defendants Nos. 5, 8 and 9 to a separate suit. The plaintiffs have accepted this position; but there are certain points which we think call for remark. It is most probable that Rs. 27,375 represents the actual expenditure. The mortgagees discharged a large number of debts, and it is probable that in some instances they came to terms with some of the creditors. Again they were put in possession of property, the profits of which were to represent interest on Rs. 50,000 whereas we are finding that the outside figure spent was Rs. 28,271-2-3. And yet again if there remains Rs. 896-2-3 to be adjusted, they have been in possession since the 5th July 1904 in lieu of a debt of Rs.896-2-3 only, and this may have been more than satisfied out of the usufruct. And this is made the more profitable when we consider the amount of mesne profits which the learned Subordinate Judge has decreed. What the learned Subordinate Judge has found, and the plaintiffs have accepted, is not that a sum of Rs. 896

remains to be paid, but that it remains to be adjusted. We have very little doubt considering all the circumstances, that no payments remain to be made, and we do not, therefore, propose, even if we assume that *Musammat* Dilraj Kuar understood or realized the effect of the instrument, to interfere with the equitably just decision of the learned Subordinate Judge that defendants Nos. 5, 8 and 9 cannot be allowed, for the reason that the accounts have not been adjusted, to keep the plaintiffs out of possession. We have found that the preparation of Exhibit E-38, under which these defendants have professed to hold, did not represent a clear or an honest transaction, the amount remaining over in July 1904 for adjustment being no more than Rs. 896-2-3, against which the considerable profits realized, which were intended for the payment of the interest of a much larger but fictitious sum, were to be set off. The learned Subordinate Judge did quite right to adjudge mesne profits against them. No arguments have been addressed to us on the question of the measure of profits, though there is a ground of appeal to that effect. The sum awarded by the lower Court appears to us to be proper, but that sum under our finding will be recoverable by Sitla Bakhsh Singh and Sital Singh in equal shares.

On the above findings we allow the Appeals Nos. 126 and 127 of 1913 in part; we dismiss Appeals Nos. 125, 128 and 129 of 1913; and varying the decrees of the Court below, decree actual proprietary possession of one half of the entire property in dispute and a half share in the mesne profits decreed by the Court below in favour of Sital Singh; the claim of Sitla Bakhsh Singh being to that extent dismissed. The possession over the village Umri and the 4-annas share in Mohsandi and the field in village Raipur will be subject to the mortgagee rights of defendants Nos. 5, 6 and 7 and defendants Nos. 2 to 4 respectively as above indicated. The decrees for possession can be executed against Sitla Bakhsh Singh who is admittedly in possession of the entire property. The appellants in Appeals Nos. 145 and 127 will get their proportionate costs of both the Courts from Sitla Bakhsh Singh. The latter will get his proportionate costs in the said appeal also of both Courts from the said appellants, other respondents bearing their own costs. The other three appeals are dismissed with costs; one set of costs is allowed, recoverable half by Sital Singh and half by Sitla Bakhsh Singh from the appellants in those appeals, the other respondents bearing their own costs. We disallow the cross-objections in appeals Nos. 125, 128 and 129 filed by Sitla Bakhsh Singh; we make no order as to costs thereof.

*Decree varied.*

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PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 997 OF 1916.

February 1, 1917.

*Present*:—Mr. Justice Broadway.

AZIM—PLAINTIFF—PETITIONER

*versus*

GOPI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Punjab Tenancy Act (XVI of* 1887), *ss.* 4 (12), 70 (3) (j)—*Jurisdiction of Civil and Revenue Courts—Suit by water-carrier to recover dues—Village cess.*

Village cesses such as *haq buha, poochh baki*, etc., are cesses leviable by the proprietors of a village from non-proprietary residents or *kammis* and are dues leviable irrespective of any personal service rendered by them. [p. 488, col. 1.]

A suit by a water-carrier against the proprietary body of the village to recover dues as payment for personal services based upon an entry in the *wajib-ul-arz* is not a suit to recover a village cess, and is, therefore, cognisable by a Civil and not by a Revenue Court. [p. 488, col. 1.]

Petition, under section 25 of Act IX of 1887, for revision of the order of the Munsif, first class, with powers of a Judge, Small Cause Court, Rohtak, dated the 2nd September 1916 dismissing the suit.

Mr. *Badr-ud-Din Kureshi*, for the Petitioner.

Mr. *Nanak Chand Pandit*, for the Respondents.

JUDGMENT.—(1). The plaintiff in this case one Azim claimed to be a *saqqa* of village Sanghi, Tahsil Rohtak, and sought to recover Rs. 16-8-9 from the defendants, three of the *biswedars* of the village, on the ground that according to the terms of the *wajib-ul-arz* he was entitled, as *saqqa* of the village, to certain specified dues in return for his doing the work of water-carrier at marriages and at the camps of officers on tour. The defend-

ants denied the plaintiff's claim and his suit was dismissed by the learned Munsif on the 2nd of September 1916. Against this dismissal he has preferred this revision and the only point for determination is whether the suit was cognizable by a Civil Court or a Revenue Court.

(2). After hearing Mr. Badr-ud-Din for the petitioner and Mr. Nanak Chand Pandit for the respondents, it seems to me that the correct conclusion is that the suit is cognizable by a Civil Court. Mr. Badr-ud-Din urged that the claim related to "a village cess" within the meaning of section 4 (12) of the Punjab Tenancy Act and that, therefore, Revenue Courts alone could entertain the case under section 77 (3) (*j*). It seems to me, however, that the definition referred to does not apply. Village cesses such as *haq buha*, *poochh baki*, etc., are cesses leviable by the proprietors of the village from non-proprietary residents or *kammis* and are dues leviable irrespective of any personal service rendered by the claimant. In the present case the plaintiff distinctly alleges that he renders personal service for which, according to the *wajib-ul-arz*, a fixed payment had been agreed upon; in other words, he is seeking to recover a contribution or due as payment for personal service and clearly, therefore, the definition referred to cannot be held applicable.

(3). In these circumstances I hold that the suit is cognizable by a Civil Court. The learned Munsif had jurisdiction to try the case and there is no reason to interfere with his decision. The petition is, therefore, rejected with costs.

*Petition rejected.*

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OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 122 OF 1916.

September 15, 1916.

*Present*:—Pandit Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

*Musammat* FARID-UN-NISA—PLAINTIFF—APPLICANT

*versus*

M. MUKHTAR AHMAD AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. VI, r. 16—Pleadings—Plaint, amendment of—Inconsistent allegations—Court, position of.*

The rule that the Court is not to dictate to the parties how they should frame their case is one that ought always to be preserved sacred, subject to this limitation that the parties must not offend against the rules of pleadings, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass and delay the trial of the suit. [p. 489, col. 1.]

Where in a suit for possession, the plaintiff denied the genuineness of the deed of *wakf* set up in defence and pleaded in the alternative that the deed had been obtained from her by the defendants by fraud and undue influence:

*Held*, that there was nothing in the above allegations that could be regarded as likely to embarrass, delay or prejudice the trial, so as to justify the Court in taking action under Order VI, rule 16, Civil Procedure Code. [p. 489, col. 1.]

Civil revision against the order of the Subordinate Judge, Bara Banki, dated the 16th August 1916.

The Hon'ble Mirza *Sami Ullah Beg* and Mr. *Haidar Husain*, for the Applicant.

Mr. *Mumtaz Husain*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order, passed by the Subordinate Judge of Bara Banki, directing the plaintiff to elect, which of two inconsistent allegations made in the plaint she desired to maintain. The plaintiff sues for possession of certain property, in regard to which a deed of *wakf*, purporting to have been executed by her, has been produced in evidence by the defendants. Her allegation is that she did not execute that deed, and that the defendants, who were related to her, deceived her and falsely told her that in order to facilitate the management of her property and especially in view of the opposition of her paternal relations and as a matter of expediency, she should get a deed completed, suggesting thereby that the deed in question was obtained from her without her being actually told what it was by fraud and undue influence. There is nothing necessarily inconsistent in these allegations, but the learned Subordinate Judge treated them as inconsistent, and directed the plaintiff to elect which of those allegations she was going to maintain. In his order the learned Subordinate Judge states that of the two allegations, namely, that the deed was not genuine and that if it was genuine, its execution was obtained

by fraud and undue influence, the plaintiff should stand by one so that the fair trial of the suit may not be embarrassed, relying obviously on the provisions of Order VI, rule 16 of the Code of Civil Procedure, which empowers a Court at any stage of the proceedings to order to be struck out or amended any matter in any pleadings, which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit. But, as laid down by Bowen, L. J., in *Knowles* v. *Roberts* (1), the rule that the Court is not to dictate to the parties how they should frame their case is one that ought always to be preserved sacred, subject to this limitation that the parties must not offend against the rules of pleadings, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, and delay the trial of suit.

There is nothing in the allegation made in the plaint in the present case that can be regarded as likely to embarrass, delay or prejudice the trial, for what the plaintiff asserts is that she did not execute the deed of *wakf*, on which the defendants rely, and that what was represented to her was that in order to facilitate the management of her property and obviate the opposition of her paternal relations she might, as a matter of expediency, get a deed completed. What kind of deed she had consented to execute or was induced to execute is not clear from the pleadings. It is not for the Court to direct the plaintiff to amend her plaint, because she has made certain allegations, which to the defendants may appear embarrassing. The decisions, relied on by the learned Subordinate Judge, are inapplicable to the circumstances of the present case. We do not know what portion of the allegations made in the plaint the learned Subordinate Judge would direct to be struck out, in case the plaintiff fails to elect, and the procedure adopted by him seems to us to be more likely to embarrass the trial of the suit than are the plaintiff's pleadings as they stand. Ordinarily, we are not inclined to interfere in revision with an interlocutory order, passed in a suit or other proceeding, but in this case the decision arrived at by the Court below will hamper the trial of the case materially, and, unless the order already passed by that Court remains abortive, may render a fresh trial of the case necessary.

We, therefore, allow the application, set aside the order passed by the Court below, and direct that the trial should be allowed to proceed according to the allegations made in the plaint. No order is made as to the costs of this proceeding.

*Revision accepted.*

(1)(1888) 38 Ch. D. 263 at p. 270; 58 L. T. 259.

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2715 OF 1916.

April 2, 1917.

*Present* :—Mr. Justice Chevis.

TARA CHAND—PLAINTIFF—APPELLANT

*versus*

NIRMAL DAS—DEFENDANT—RESPONDENT.

*Vendor and purchaser—Sale—Consideration, non-payment of, whether renders sale void—Intention.*

Mere want of payment of consideration does not render a sale void, unless it is shown that it was the intention of the parties that title should not pass until consideration is paid. But the intention of the parties can be judged not merely from what they say or do at the time of the sale, but also from their subsequent conduct. [p. 490, col 1.]

Where a purchaser paid down a small fraction of the price in the first place, and this went in sale expenses, not into the vendor's pocket, and the balance of the price was promised to be paid on mutation, but for 9½ years he made no attempt to enforce the sale or to obtain mutation of names:

*Held*, that the presumption was that the purchaser had given up all his rights in respect of the sale. [p. 490, col. 1.]

Second appeal from the decree of the District Judge, Mianwali, dated the 13th July 1916, reversing that of the Munsif, third class, Bhakkar, dated the 7th March 1916, decreeing the claim.

Lala *Hargopal*, for the Appellant.

Chaudhri *Udai Bhan*, for the Respondent.

JUDGMENT.—(1). The land belonged to Bakhsha, but was under mortgage to defendant's father for Rs. 32 and 8 *chauths* of wheat. On 12th June 1916 Bakhsha sold the land to plaintiff by unregistered deed. The vendor took Rs. 2-4-0 cash for sale expenses. Rupees 20-8-0 was to be paid at

mutation and the rest was to redeem the mortgage. Ten days later Bakhsha sold the land to defendant's father by registered deed. Plaintiff sues to redeem.

(2). The first Court decreed the suit, holding that the registered-deed could not be given the preference as it was proved that the purchaser bought with knowledge of the former sale.

(3). The learned District Judge on appeal dismissed the suit, holding that the sale to plaintiff was incomplete for want of payment of consideration.

(4). Mere want of payment of consideration will not render the sale void, unless it be shown that it was the intention of the parties that title should not pass until consideration was paid. But the intention of the parties can be judged not merely from what they said or did at the time of the sale, but also from their subsequent conduct. In the present case plaintiff paid down the paltry sum of Rs. 2 4-0 in the first place; and this went in sale expenses, not into the vendor's pocket. So far as is apparent from the record, plaintiff made no attempt to get mutation of names attested, nor took action of any sort till nearly $9\frac{1}{2}$ years afterwards when he brought this suit. Lala Hargopal says his instructions are that plaintiff did apply for mutation of names but in vain. Then why did he not at once seek to establish his position by a suit to redeem, or if he did not want to redeem, by a suit for a declaration of title? The defendant's father is now dead, and according to respondent's Pleader (though this is not on the record) Bakhsha too is now dead. Why should plaintiff have kept silent all these years? Plaintff's Counsel does not suggest that plaintiff was not aware of the re-sale to defendant's father; he only says his instructions are that plaintiff and defendant are near relations (defendant's Pleader denies this) and living in the same village, and that plaintiff waited in hopes of an amicable settlement. All I can say is that $9\frac{1}{2}$ years is a very long time to wait.

(5). In my opinion the probabilities are that though a sale deed had been executed, plaintiff gave up his rights and allowed Bakhsha to re-sell to defendant's father.

(6). I uphold the decision of the learned District Judge dismissing the suit, and dismiss this appeal with costs.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2772 OF 19 4

February 26, 1917.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

HELALUDDIN MIA'S WIFE INNAT-UNNESSA BIBI—PLAINTIFF—APPELLANT

*versus*

JANAKI NATH SIRCAR—DEFENDANT No. 1—RESPONDENT.

*Guardians and Wards Act (VIII of 1890), s. 29—Contract to sell minor's property—Sanction—Minor, liability of.*

A contract, entered into by a guardian appointed as such under the Guardians and Wards Act to sell the minor's property, with the sanction of the District Judge, at a price higher than that fixed in the sanction, is valid and enforceable against the minor. [p. 491, col. 1.]

*Mir Sarwarjan* v. *Fakhruddin Mahomed*, 13 Ind Cas. 331; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 11 M. L. T. 8; 21 M. L. J. 1156; 39 I. A. 1; 14 Bom. L. R. 5; 39 C. 232, distinguished.

Appeal against the decree of the Subordinate Judge, Dacca, dated the 29th June 1914, confirming that of the Munsif, Dacca, dated the 23rd August 1913.

Dr. *Sarat Chandra Basak* and Babu *Mrityunjoy Chatterjee*, for the Appellant.

Babu *Surendra Chunder Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract for sale alleged to have been entered into by the defendant No. 5 as the guardian of defendants Nos. 2 to 4, who were minors, against the defendants Nos. 2 to 5, and also against defendant No. 1 who had purchased the property from the said defendants. The Court of First Instance dismissed the claim for specific performance of the contract but directed a refund of the earnest money against defendant No. 5. On appeal, the learned Subordinate Judge, without entering into the merits of the case, dismissed the appeal on the ground that the suit for specific performance of the contract against the minors was not maintainable on the authority of the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1). That case, however, has no application

(1) 13 Ind. Cas. 331; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 11 M. L. T. 8; 21 M. L. J. 1156; 39 I. A. 1; 14 Bom. L. R. 5; 39 C. 232.

to the facts of the present case. There the manager of an infant's estate entered into an agreement to purchase certain property on behalf of the minor, and their Lordships held "that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property" and that "as the minor was not bound by the contract there was no mutuality" and he could not on attaining his majority obtain specific performance of the contract. In the present case, the guardian of the minors, who had been appointed as such under the Guardians and Wards Act, entered into an agreement to sell the property with the sanction of the District Judge. He was, therefore, quite competent to sell the property. It is true that the Court, when authorizing the guardian to sell the property, directed him to sell it for Rs. 1,000. That obviously means that the guardian was to sell the property for not less than Rs. 1,000; and the guardian entered into the agreement to sell the property to the plaintiff for Rs. 1,300, which was clearly for the benefit of the minors. The contract, therefore, under these circumstances, was a valid one and enforcible against the minors. That being so, the decree of the lower Appellate Court must be set aside.

We accordingly set aside the decree of the lower Appellate Court and send the case back to that Court for a re-hearing of the appeal on the merits. Costs of this appeal will abide the result.

*Decree set aside; Case sent back.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 194 OF 1916.*

February 14, 1917.

*Present*:—Mr. Lindsay, J. C.

*Babu* YAR MUHAMMAD KHAN—PLAINTIFF—APPELLANT

*versus*

BAQAR KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Evidence Act (I of 1872), s. 94—Construction of document—Evidence, extrinsic, admissibility of—Compromise.*

Where the language of a document is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation. [p. 493, col 2.]

In a compromise entered into between *A* and *Z*, *A.* agreed to pay a certain annuity to *Z.* and her heirs, and subsequently a compromise was arrived at between *A.* and *B.* under which *B.* agreed to contribute towards the said annuity "for payment to *Z.*:"

*Held*, that the former compromise or any other extrinsic evidence was inadmissible to show that under the latter compromise *B.* had agreed to contribute towards the said annuity "for payment to *Z.* and her heirs." [p. 493, col. 2.]

*Balkishen Das* v. *W. F. Legge*, 22 A. 149; 4 C. W, N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind Dec. (N. S.) 1130 (P. C.), explained.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 25th March 1916, confirming that of the Munsif, Musafirkhana, dated the 23rd September 1915.

Mr. *Mohammad Wasim*, for the Appellant.

Babu *Ishwari Prasad*, for Respondent No. 1.

JUDGMENT.—The sole question which arises for determination in these four appeals is one of the construction of a document of compromise, Exhibit 12. In order to understand how the present suits have arisen it is necessary to refer to certain facts antecedent to the time of the present litigation. Four suits were brought in the Court of the Munsif of Musafirkhana in the Sultanpur District by Muhammad Ewaz Ali Khan, who is the *Talukdar* of the Mohan a Estate. Muhammad Ewaz Ali Khan died after the suits had been instituted and is now represented by his heir Yar Muhammad Khan. The claim in each instance was to recover a sum of Rs. 70-5-0 by way of contribution, the case for the plaintiff being that he had been obliged to pay a certain annuity by way of maintenance to a lady named *Musammat* Zainab-un-nissa. He stated that under the terms of a decree which was passed in this Court in the year 1905 on the basis of a compromise, the four sets of defendants who were impleaded in the four suits respectively were liable to contribute to the sums he had paid on account of this annuity. The defendants denied their liability, their case shortly being that they were under no obligation to contribute to the payment of any annuity to the heirs of *Musammat* Zainab un-nissa. This lady, it

*The judgment in this case disposes of four cases together, *viz.*, Second Civil Appeals Nos. 194, 195, 196 and 197 of 1916.—*Ed.*

may be remarked, died on 6th March 1913. Both the Courts below dismissed all four suits holding that the defendants were not liable to contribute to this payment, and hence these four second appeals.

Before coming to the terms of the document which regulates the rights of the parties it is necessary to refer to the following facts:—Muhammad Ewaz Ali Khan was *talukdar* and the present respondents were either under-proprietors or heritable lessees holding certain lands in four villages named Sadipur, Mardanpur, Chak Naib, and Kalyanpur. On 12th July 1888 eight of these under-proprietors or lessees executed a *hiba-bil-ewaz* in favour of *Musammat* Zainab-un-issa in consideration of a sum of Rs. 10,000. In this document the donors were described as being the holders of a perpetual lease. The estate of the *talukdar* was at this time under the control of the Court of Wards and a suit was brought by the Deputy Commissioner representing the Court of Wards in order to set aside this deed of gift, the allegations being that the deed had been executed in fraud of the right of the estate and in order to defeat proceedings which the Court of Wards had been taking for ejectment of the donors. The relief asked for was either a cancellation of this deed of transfer or a decree for pre-emption on payment of a sum of Rs. 10,000. The suit was dismissed in the Court of the District Judge of Rae Bareli. There was an appeal to this Court and on 27th August 1893 the litigation was put an end to by means of a compromise which was entered into between the plaintiff and *Musammat* Zainab-un-nissa. By this compromise the plaintiff *talukdar* gave up his claim for cancellation of the deed of transfer. Zainab un-nissa agreed to confess the claim for pre-emption. Out of the sum of Rs. 10,000 which was payable to her on account of pre-emption she gave up a sum of Rs. 3,000 odd in exchange for the grant by the plaintiff of an annuity, which was fixed at Rs. 250 a year and which was to be a charge on the *talukdar's* estate. A certain sum was left with the *talukdar* to pay off certain mortgages on the property which had been executed before the date of the deed of gift. The balance amounting to Rs. 4,000 odd was paid to Zainab-un-nissa in cash. In addition to Rs. 250 just mentioned the plaintiff undertook to pay a further allowance of Rs. 50 a year to Zainab-un-nissa. This undertaking was expressed to have been given "freely, without consideration and quite apart from the merits of the case." Judgment was given accordingly, but it is to be noted that the judgment did not bind a number of the donors who had been impleaded in the litigation and who were no parties to the compromise. It is admitted now that the four sets of defendants who are impleaded in the present suits are persons who are not bound by this decree which was passed in the year 1893. After the *talukdar* got this decree he went to the Revenue Court and asked for mutation. This application was opposed by the donors who, as already mentioned, were not bound by the decree I have just referred to. The result of the proceedings in the Revenue Court was that the *talukdar* only got mutation in respect of a five-annas four-pies share. Mutation was refused in respect of ten annas eight pies, which represented the shares of the donors who were not bound by the decree. The upshot of this was that another suit was brought by the *talukdar* against these donors, in which he claimed possession of the property which was left with them. This case eventually came before this Court and was decided by a compromise which was filed here on 16th November 1905. The document of compromise which is in English is a lengthy document and was obviously drawn up with great care and presumably in consultation with the legal advisers of the parties who were prosecuting the litigation in this Court. Under the terms of the compromise the plaintiff *talukdar* was to get possession of four annas eight pies out of ten annas eight pies in suit. The remaining six annas were to be left with the defendants-respondents as under-proprietors with a right of transfer, subject to an annual payment of rent amounting to Rs. 565 odd. This rent was to be payable by the four sets of defendants in equal shares, each share amounting to Rs. 141-4-6. A further term in the agreement was that the defendants agreed to pay a certain sum of Rs. 112-8-0 every year to the plaintiff for payment to *Musammat* Zainab un-nissa. The

exact words of the clause in the agreement relating to this payment may be reproduced here—

"(*b*) That the defendants-respondents agree to pay to the plaintiff-appellant annually along with the rent of the aforesaid villages Rs. 112-8-0 for payment to one Bibi Zainab in respect of her maintenance, which is charged upon the said villages in dispute. The entire *guzara* payable to her is Rs. 300 and the item of Rs. 112 8-0 payable by the defendants is a proportionate amount of the six-annas share held by the defendants."

It is upon the language of this last clause that the plaintiff claims in the present suits that the defendants are liable to contribute to payments which he has made in respect of the annuity, which he undertook to pay under the decree which was passed in the month of August 1893. In the 7th paragraph of each of the plaints it was stated that *Musammat* Zainab-un-nissa died on 6th March 1913, leaving three sons as her heirs, and it was alleged that the plaintiff had paid the annuity to these sons up to the end of September 1914. The claim covered payments which were made in respect of the years 1320, 1321, and *kharif* 1322 *Fasli*. The defendants' case is that they were not liable to pay any maintenance to the heirs of Zainab-un-nissa. They also take their stand upon the language of clause (*b*) of the *sulahnama*, Exhibit 12, which has been quoted *in extenso* above. Both the Courts below have held that there is nothing in the language of this clause which imposes any liability on the part of the defendants to contribute to the payment of any sum made after death of Zainab un-niss. The argument here has been that the Court is entitled to look at the language of the previous deed of compromise of the year 1893 and also the conduct of the parties and the surrounding circumstances, and to infer from all this evidence that when it was stated in the document Exhibit 12 that the defendants were to contribute to the maintenance payable to *Musammat* Zainab-un-nissa they meant to declare that they were liable to pay that maintenance not only to her but to her heirs in perpetuity. Clearly if this contention of the plaintiff is to be allowed, we should be introducing a new term into this document of compromise and into the decree in which the terms of the compromise were embodied. It is obviously one thing to say that certain persons are liable to contribute to the payment of a sum to be made to a lady and another thing to say that they are liable to contribute to the payment of that sum to her and her heirs for ever. It seems to me that the contention put forward by the learned Counsel, who appeared on behalf of the appellant, is untenable and my opinion is that no extrinsic evidence was admissible in this case for the purpose of adding to, varying or contradicting the terms of the *sulahnama* of 1905 or of the decree which was passed upon it and which now regulates the rights of the parties. The general rule is that where the language of a document is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation. I fail to see in what way it can be contended that there is any ambiguity in the language of the *sulahnama* which we are now considering. We have it stated clearly that the defendants in that case agreed to pay to the plaintiff a sum of Rs. 112-8 0 for payment to Zainab-un-nissa in respect of her maintenance. This language is clear enough and seems to me to show that nothing more could have been contemplated than contribution to payments made to the lady in her lifetime. If there was any intention in the mind of the parties to make the responsibility for contribution continue for ever or for as long as there were any heirs of Zainab-un-nissa in existence, nothing could have been easier than to have said so. Again in referring to the language of the clause relating to this payment we have it set out that the entire *guzara* "payable to her" is Rs. 300 a year. There is nothing said here about any payment to be made to her heirs. I can see no difficulty, therefore, in applying the language of this deed to the existing facts, and, this being so, no question of interpretation or construction arises so as to render it necessary to resort to any other evidence for the purpose of ascertaining the meaning of the parties. The learned Counsel referred to the well-known case of *Balkishen Das* v.

*W. F. Legge* (1). There no doubt it was laid down that in dealing with the case which was before their Lordships of the Privy Council, namely, the interpretation of two contemporaneous deeds, the case must be decided on a consideration of the contents of the documents with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the documents is related to existing facts. But, when we observe that extrinsic evidence is only to be called into aid when there is any necessity to show the manner in which the language of the deed is related to existing facts, if no such evidence is required there can be no reason to admit any other evidence except what is to be found within the four corners of the document itself. In order to justify the reception of extrinsic evidence there must be some doubt or ambiguity in the language of the document. In the case of the document which I am now considering it does not appear to me that there is any ambiguity or doubt whatever which necessitates the admission of any other evidence for the purpose of ascertaining its meaning. And so I fail to see how it can be maintained that there is any justification for referring to the terms of the compromise of 1893 in order to ascertain the meaning of the later compromise of 1905. If it is argued that evidence of conduct is admissible, this would not help here for no conduct can be imputed to the present defendants-respondents in respect of a document of compromise to which admittedly they were no parties. But I prefer to base my decision on the broad ground that the document in suit being free from all ambiguity no other evidence than the terms of the document itself is admissible for the purpose of varying its meaning in the manner desired by the present plaintiff. I hold, therefore, that the decision of the Courts below is correct and must be upheld. This was the only ground upon which the case was argued before me and it must fail. I notice that in 5th paragraph of the memorandum of appeal in each case it is pleaded that in any case the Courts below should have allowed the plaintiff any amount of maintenance paid to *Musammat* Zainab-unnissa during her lifetime. This point has not been discussed before me and I, therefore, come to the conclusion that the learned Counsel thought that he was not in a position to support it. The result is that all four appeals fail and are dismissed with costs.

*Appeal dismissed.*

(1) 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

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## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 692 AND 1184 OF 1914.

May 28, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

RAJ KUMAR MISSRA AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES NARAIN CHUNDRA MISRA AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

RAMA NATH SINGHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Lease, construction of—Agreement not to vary rent until actual measurement—Bengal Tenancy Act (VIII B. C. of 1885), s. 52, applicability of.*

Where by a permanent lease, a piece of land described as a plot of one thousand *bighas*, then in jungly state, was let out rent free for six years and thereafter at a progressive rent rising to 8 annas per *bigha*, and the lease provided that the tenant shall pay Rs. 500 every year, and after the rent-free period and the period of progressive rents were over, on a measurement being made....., for land found to be in excess the tenants should pay additional rent at the above rate from the time of the measurement and should from that time get an abatement at the above rate for land which was found to be less, and the tenant or his heirs or successors should never have to pay any additional *jama* for the above lands, and the landlord or his heirs and successors should never receive or be entitled to receive any additional *jama*:

*Held*, (1) that upon a proper construction of the lease what was demised was the land lying within the boundaries mentioned in the schedule to the lease at Rs. 500 per annum, with an option to the tenant or the landlord to have an actual measurement made of the land, and until that was done the rent was fixed at Rs. 500 per annum; [p. 495, col. 2.]

(2) that section 52 of the Bengal Tenancy Act did not apply because the lease was a permanent one, but that when the measurement would be actually made the tenant or the landlord would get the benefit of section 52 according as the measurement showed the land to be less or more than one thousand *bighas*. [p. 495, col. 2.]

RAJ KUMAR MISSRA *v.* RAMA NATH SINGHA.

Appeals against the decrees of the Additional District Judge, 24-Pergannahs, dated the 17th December 1913, modifying that of the Munsif, 1st Court, Barnipur, dated the 8th of April 1913.

Babus *Hiralal Chakeraburtty* and *Sita Ram Banerjee*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Satya Churn Siñha*, for the Respondents.

JUDGMENT.

FLETCHER, J.—These two appeals are preferred by the defendant against a judgment of the learned Additional District Judge of the 24-Pergannahs modifying the decision of the Munsif of Baruipur. The suits were brought for rent by the landlords. The defence was that there was a deficiency in the area demised and that, therefore, the tenant was entitled to abatement. The defendant's holding is governed by a permanent lease, and by that permanent lease was let out a piece of land described as a plot of 1,000 *bighas* then in a jungly state rent free for six years and thereafter at a progressive rent rising in the year 1305 to 8 annas per *bigha*. The lease provided: "I shall pay Rs. 500 every year according to the *kists* stated below and shall hold with sons, grandsons", etc., the ordinary form. Then the lease provided: "After the rent-free period and the period of progressive rent are over, on a measurement being made with a claim of 80 cubits, each cubit measuring 18 inches, for the land found to be in excess I shall pay additional rent at the above rate from the time of the measurement and shall from that time get an abatement of the above rate for the land which is found to be less. I or my heirs or successors shall never have to pay any additional *jama* for the above lands and you or your heirs and successors shall never receive or be entitled to receive any additional*jama*." The point that has been raised is this: It is said that, on a measurement being made, it was found that the tenant was not in possession of 1,000 *bighas*. The question is, whether on the construction of the lease on the contract that the tenant had entered into, namely, to pay Re. 500 for the piece of land being let and appertaining to Gheri No. 11 as per boundaries stated below, what was demised was with a fixed rent of Rs. 500 with option to either party at any time after the expiration of the rent-free period and the period of progressive rent to apply to have a measurement made and the actual amount of rent adjusted, or whether the land was let out at the rate of 8 annas per *bigha* subject to deduction on account of the diminution in area. Upon a proper construction of the lease, it appears that until one or other of the parties applied for a measurement the rent was fixed at Rs. 500 per annum.

The next point that was raised was that the case was governed by section 52 of the Bengal Tenancy Act and that the terms of the lease, so far as it was attempted to make the tenant pay rent for more land than he was in possession of, were in excess of the powers given by the Bengal Tenancy Act. This is a case to which section 52 does not apply because it is a permanent lease. Under the terms of that lease what was demised was this land lying within the boundaries mentioned in the schedule to the lease at Rs. 500 per annum, with option to the tenant or the landlord to have an actual measurement made of the land, and until that was done the tenant had to pay at the rate mentioned; and it was provided that either party might apply for a measurement. When the measurement is made, the tenant, of course, gets the benefit of section 52 of the Bengal Tenancy Act, if the measurement shows that the land is less than 1,000 *bighas* and the landlord gets the benefit if it is shown that the land is more than 1,000 *bighas*. I think the learned Judge of the lower Appellate Court was right in holding that the land was let out to the defendant at Rs. 500 a year until a measurement was made. In that view I think the decrees of the lower Appellate Court are correct. The present appeals, therefore, fail and must be dismissed with costs.

NEWBOULD, J.—I agree.

*Appeals dismissed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2270 OF 1914.

May 11, 1917.

*Present*:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

*Musammat* RADHA RANI—DEFENDANT—APPELLANT

*versus*

GUJAR MAL—PLAINTIFF AND *Musammat* SHIB DEVI—DEFENDANT—RESPONDENTS.

*Custom—Alienation—Sale—Suit for declaration that sale shall not affect plaintiff's reversionary rights—Sale, whether can be converted into mortgage—Decree, proper—Necessity—Appeal, second—Vague and unsatisfactory findings.*

Plaintiffs sued for a declaration that a sale-deed in respect of a certain house executed by defendant No. 2, in favour of defendant No 1, was null and void and shall not affect their reversionary rights. The First Court dismissed the suit, holding that the sale was for necessity. The District Judge on appeal held that necessity was proved only for Rs. 800 out of the total sale price of Rs. 2,000 and gave plaintiffs a decree to the effect that the sale should be converted into a mortgage for Rs. 800, which should be liable to redemption after the death of the alienor. The vendee preferred a second appeal to the Chief Court:

*Held*, (1) that whether the sale was for necessity or not, it could not be converted into a mortgage which could be redeemed anywhere within 60 years; [p. 496, col. 2.]

(2) that the proper decree in such a case would be a decree declaring that the alienation shall only affect the reversioners' rights to the extent of Rs. 800, it being open to them to pay down the Rs 800 and claim to recover the property anywhere within 12 years of succession opening out to them; [p. 496, col. 2; p. 497, col. 1.]

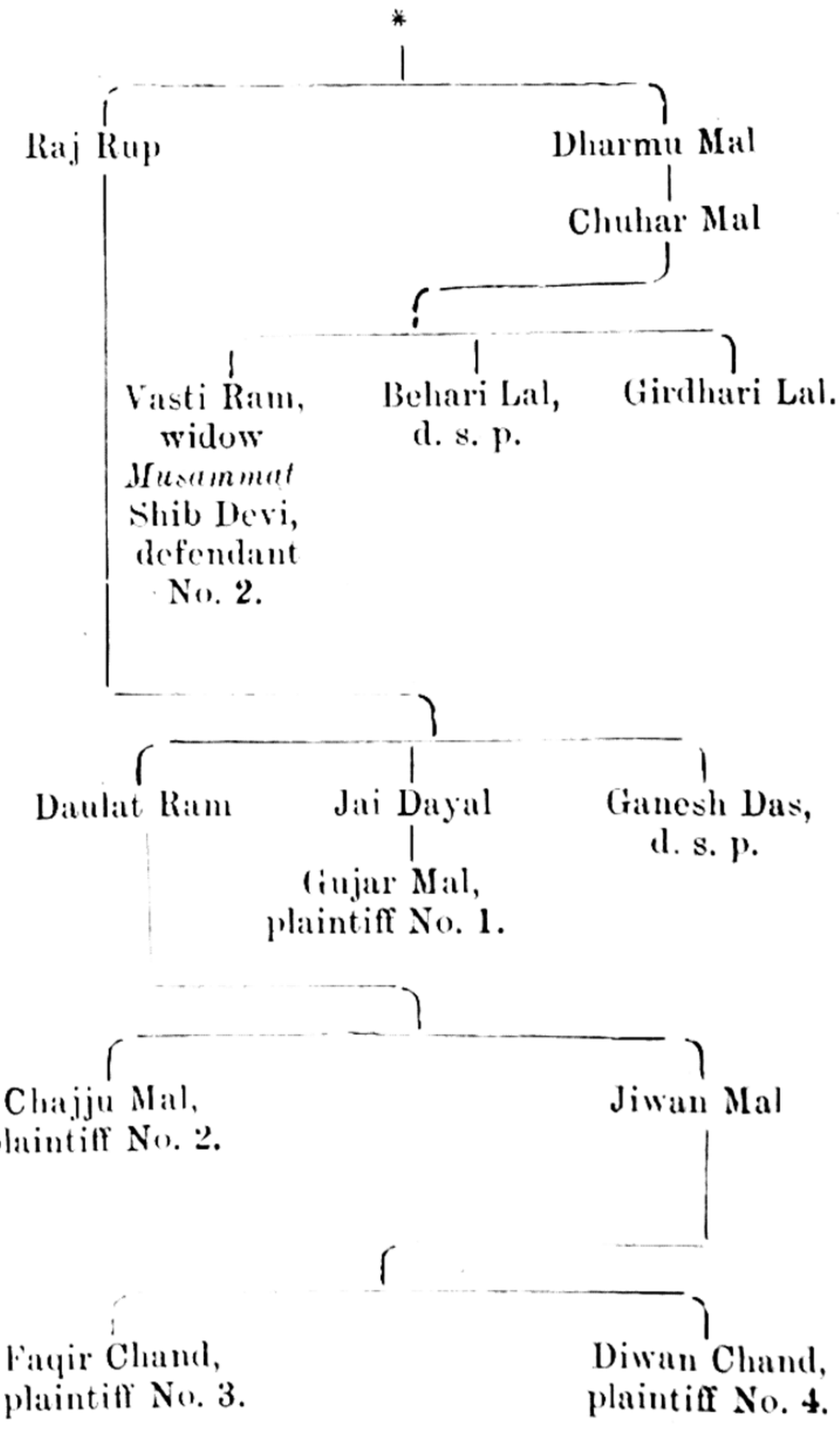
(3) that the findings of the District Judge with regard to the various items which formed part of the sale price were so vague and unsatisfactory that the Court was constrained to go into the merits of the case even in second appeal. [p. 497, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore, dated the 2nd June 1914, reversing that of the Subordinate Judge, second class, Lahore, dated the 24th August 1912, dismissing the suit.

Dewan *Mehar Chand*, for the Appellant.

Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—The genealogical tree is as follows:—




Girdhari Lal, so we are told, disappeared in his youth and has not since been heard of, so we may presume he is dead.

On 23rd April 1911 *Musammat* Shib Devi sold the house in suit to *Musammat* Radha Rani, defendant No. 1, for Rs. 2,000. The plaintiffs have sued for a declaration that the sale shall not affect their reversionary rights. The plaintiffs allege that there was no necessity for the sale. The First Court dismissed the suit, holding that the sale was for necessity. The learned District Judge on appeal held that necessity for Rs. 800 only was proved, and gave a decree to the effect that the sale should be converted into a mortgage for Rs. 800, which should be liable to redemption after the death of the alienor.

We would in the first place remark that, whether the sale be for necessity or not, it cannot be converted into a mortgage, which can be redeemed anywhere within sixty years. The proper form of decree in such a case is a decree declaring that the alienation shall only affect the reversioners' rights to the extent of

Rs. 800, which leaves it open to the reversioners to pay down the Rs. 800 and claim to recover the property anywhere within twelve years of succession opening out to them.

The alienee appeals to this Court urging that the sale was for necessity, and that the District Judge has not dealt properly with the case. Gujar Mal files cross-objections as to costs. For the plaintiffs-respondents it is urged that whether the sale was for necessity is a question of fact and that the finding of the lower Appellate Court on this point cannot be attacked in second appeal. But on examining the District Judge's judgment we find that his findings with regard to the various items which form part of the sale price are so vague and unsatisfactory that we are constrained to go into the merits of the case.

The consideration shewn in the sale-deed is as follows:

| | Rs. |
|---|---|
| (*a*) to be paid to the prior mortgagee ... | 400 |
| (*b*) taken as earnest money ... | 60 |
| (*c*) paid before Sub-Registrar for payment to creditors and for maintenance of the alienor... | 1,000 |

As the learned District Judge notes the plaintiffs do not allege want of consideration, so the only question is want of necessity.

As regards (*a*) there is no dispute. This sum of Rs. 400 is allowed by the District Judge, and also a further sum of Rs. 400 as needed for the marriage expenses of the alienor's younger daughter.

It appears that Vasti Ram died somewhere about the end of 1903, leaving two daughters. The elder, *Musammat* Durga Devi, was married about the end of 1904, and to meet her marriage expenses the house was mortgaged by her mother on 15th November 1904 for Rs. 400 in favour of Jiwan Mal, father of plaintiffs Nos. 3 and 4. This is the prior mortgage, which is mentioned in item (*a*). Gujar Mal himself signed this mortgage-deed, and he is the principal plaintiff, and the only person who appealed from the first Court's decision to the Court of the District Judge. So as to the sum of Rs. 400 there could of course be no contest.

Out of the remaining sum of Rs. 1,600 the defendents attempt to account for the majority as follows:—

| | Rs. |
|---|---|
| (1) due to Radha Kishen for *chaubarsi* expenses ... | 100 |
| (2) due to Radha *Pandha* for litigation expenses ... | 60 |
| (3) due to *Musammat* Kirpa Devi ... | 280 |
| (4) due to *Musammat* Lachhmi on bond ... | 129 |
| (5) spent on marriage of the younger daughter ... | 800 |
| TOTAL ... | 1,369 |

This leaves only Rs. 231 which it is said the widow needed for her own maintenance.

We will now take the above items one by one, and see what the District Judge finds with regard to each.

As to the item of Rs. 100 Radha Kishen, husband of *Musammat* Shib Devi's sister, says she borrowed Rs. 60 from his wife and Rs. 42 from him. He says the Rs. 42 was borrowed from him in 1909, which was more than four years after the death of Shib Devi's husband. But the date of the Rs. 60 loan is not fixed by his evidence, so this at least may have been spent on the *choubarsi* ceremonies. The District Judge here simply notes that Shib Devi executed no document in Radha Kishen's favour, and that the loan from his wife is not entered in his books. This, however, is by no means strange, remembering his relationship to *Musammat* Shib Devi.

(2) The item of Rs. 60 is said to have been spent on litigation. The District Judge here notes that no document was executed. But he notes that the suit was dismissed. True, but Gujar Mal's opposition to the widow's attempts to raise money seems to have driven her into Court, and though she may have been ill-advised in bringing such a suit we are not prepared to say that such an item should be disallowed.

(3) The item of Rs. 280 is made up of Rs. 200 borrowed from *Musammat* Kirpa Devi, on pledge of some ornaments, and 80 interest. Here the District Judge says "it looks very much as if *Musammat* Shib Devi had been anticipating her requirements."

But a widow must anticipate—if it can really be called anticipation—to some extent. When at the end of her tether for daily expenses she must borrow, and she cannot borrow from day to day, she is bound in practice to borrow a sum which will carry her on for some time to come. *Musammat* Kirpa Devi has given evidence which the First Court believes and the District Judge apparently does not disbelieve it.

(4) Rupees 129 borrowed from Jiwan Mal. After his death *Musammat* Shib Devi wrote a bond in favour of *Musammat* Lachhmi, widow of Jiwan Mal and mother of plaintiffs Nos. 3 and 4. *Musammat* Lachhmi herself says the money was taken for the marriage of the daughter *Musammat* Durga Devi. She also says the bond has not been re-paid, but the alienee, when advancing money to pay off debts has not to see to the application.

(5) Rupees 800 said to have been spent on the younger daughter's marriage. Here the District Judge allows Rs. 400 only, *i.e.*, the sum admitted by Gujar Mal, and the same sum as was allowed for the elder daughter's marriage. But the oral evidence is that a lot was spent on feeding the marriage procession, and more must have gone on clothes, jewelry and so on. There is evidence that the alienor's husband had left ornaments and clothes for the elder girl's marriage, so the younger girl's marriage would cost more. It may be noted that the Rs. 129 before discussed was not for this marriage but was for the *muklawa* and *tinwar* (or *tiwar*) expenses, *i. e*, cost of presents usually given on certain feast days to a married daughter in the first year of her marriage.

The learned District Judge notes that the alienor's own evidence shows her husband left her valuable ornaments, and that she raised Rs. 125 by sale of a *khola*. But there is ample evidence, which the District Judge does not find to be false, to shew that the widow was reduced to pawning her ornaments and borrowing from relatives and others.

As to the plea, which has been advanced before us on behalf of Gujar Mal, that the widow may have been spiting the reversioners, this overlooks the fact that the parties are *Khatris* and presumably governed by Hindu Law, so the daughters and their children would succeed and not the collaterals; so to waste the property would injure the daughters rather than the collaterals. We are told that one daughter has died without issue, and the husband of the other has disappeared, but *Musammat* Shib Devi had no reason to suppose that her daughters would have no children, and in any case she would not be likely to squander what would come to the daughter or daughters who might survive her.

As to the Rs. 231 not accounted for, there is full force in the argument of the learned Pleader for the appellant that in such a case the widow cannot sell for just the sum which she actually requires for present expenses, and that a widow who already owes Rs. 1,769 and has a house worth Rs. 2,000 is fully justified in selling it for its full value, and keeping the surplus for her own needs.

We accept this appeal, and reversing the decision of the learned District Judge we restore the decree of the First Court dismissing the suit. Costs in the First Court to be as ordered by that Court. Costs in the District Judge's Court and in this Court to be borne by Gujar Mal. The cross-objections are dismissed.

*Cross-objections dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3807 OF 1914.

May 11, 1917.

*Present:*—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

JANAKI NATH SAHA—DEFENDANT No. 1—APPELLANT

*versus*

KAILASH CHANDRA SINGHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Non-transferable occupancy holding—Purchaser in execution of money-decree not recognized by landlord—Suit for recovery of possession by purchaser against another purchaser recognized by landlord.*

Plaintiff, who had purchased a non-transferable occupancy holding in execution of a money-decree

but had not been recognized as a tenant by the landlord, brought a suit to recover his possession from the defendant, who was in possession under a fictitious purchase from the widow of the *ryot* and who was accepted and treated by the landlord as a tenant:

*Held*, that the plaintiff could not get a decree against the defendant, as the latter had been accepted and treated by the landlord as the tenant and that such treatment amounted to a settlement. [p. 500, col. 1.]

Appeal against the decree of the Subordinate Judge, Faridpur, dated the 4th August 1914, confirming that of the Munsif, Goalundo, dated the 11th July 1913.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Prokash Chandra Mozumdar*), for the Appellant.—My client purchased the holding from Melon's widow who had no knowledge of the execution proceeding and the sale held therein of the occupancy holding. No doubt the respondent purchased the occupancy holding of Melon in that execution proceeding, but the holding of Melon was a non-transferable occupancy holding and the auction sale at which the plaintiff-respondent purchased was in execution of a money-decree. The plaintiff was not recognized by the landlord, but my client, the defendant after his purchase of the same holding from the widow of the *ryot* Melon has been accepted by the landlord as a tenant and has been in possession. Even if his purchase from Melon's widow be not sufficient to give him title he can stand on the recognition by the landlord.

The plaintiff by his purchase in execution of a money-decree has acquired no right to the holding which he could enforce against my client who has got the consent of the landlord, and has been treated by the landlord as his tenant.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Probodh Chandra Roy*), for the Respondents.—My client purchased the holding at an execution sale and was put in possession through Court on the 2nd April 1909, and no objection was raised to the sale by the *ryot* or his legal representatives to the sale. Therefore, the purchase was operative against all persons deriving title from the *ryot* though it was not operative against the landlord without the landlord's consent to the sale. The defendant purchased the holding not from the original *ryot* but from his widow who claimed under a *hebanama* which has been found to be a paper transaction. That *hebanama* was executed after the institution of the present suit by my client. I submit none but the landlord can raise the question of the non-transferability of the holding. The defendant who derives his title from a fictitious purchase has no *locus standi* to question my title to the property acquired at an execution sale to which the *ryot* or his legal representatives did not raise any objection. After the tenant's death, the tenancy continued in his heirs and it was not open to the landlord to make any settlement with any person who did not derive title from those heirs. Here the defendant could not say that he derived title from the heirs of Melon, as Melon left not only a widow but several children and the widow purported to sell the whole of the occupancy holding to which she had no title. My learned friend is estopped from questioning the transferability of the holding, *vide*, *Radha Kant Chakravarti* v. *Ramananda Shaha* (1). Mere recognition by the landlord could not be sufficient to confer title upon a person who had acquired no right to the holding.

Babu *Jogesh Chandra Roy*, in reply.—Referred to *Narayani* v. *Nabin Chandra Chowdhari* (2), *Badarennessa* v. *Alam Gazi* (3). In the case of an involuntary sale the tenant can raise the transferability of a holding. If the landlord's recognition be not held sufficient, I may claim that under the circumstances of the case there was new settlement with me by the landlord. The plaintiff in his plaint stated that there was a complete abandonment of the holding. So the landlord had every right to make a new settlement.

JUDGMENT.—The plaintiff-respondent on the 20th November 1908 purchased a non-transferable occupancy holding in execution of a money-decree against one Melon Sheikh, (which was executed after his death against his heirs); but the plaintiff was not recognised as tenant by the landlord. He sued to recover possession of the holding

(1) 13 Ind. Cas. 698; 39 C. 513; 16 C. W. N. 4 15 C. L. J. 369.
(2) 36 Ind. Cas. 803; 21 C. W. N. 400; 25 C. L. J. 351.
(3) 29 Ind. Cas. 877; 19 C. W. N. 814; 21 C. L. J. 650.

from the defendant who was in possession. The latter set up a purchase in the year 1909 from one of the heirs of Melon, namely, his widow Kulo Bibi who is alleged to have obtained the entire holding from Melon by a deed of gift. He also pleaded that he was accepted as tenant by the landlord. The Court below gave a decree to the plaintiff and the defendant has appealed to this Court.

Now, an involuntary transfer of an occupancy holding not transferable without the consent of the landlord, is operative as against the *raiyat* where the *raiyat* with knowledge of the sale fails or omits, to have the sale set aside. As there was no finding whether Melon's widow had any knowledge of the sale in execution of which the holding was sold, the case was remanded for a finding on that point. The Court below has now found that she had no knowledge of the sale.

It is contended on behalf of the respondent that although the sale was not operative as against the widow of Melon, by reason of her not having any knowledge of the sale, the tenant's interests did not pass to the defendant because the *heba* under which Melon's widow is alleged to have acquired a right to the entire holding, is found to have been a paper transaction and Melon had other heirs also: and that, if the interests of the tenants did not pass to the defendant, the defendant did not acquire any title by recognition by the landlord. But it is the plaintiff's own case that the heirs of Melon had abandoned the land, at the time of his obtaining delivery of symbolical possession. That being so and the defendant having been accepted and treated by the landlord as the tenant, which in the circumstances of the present case amounted to a settlement, the former acquired a right to the holding. In this view it is unnecessary to consider the effect of the tenant's heirs not taking steps to have the sale set aside after they had knowledge thereof, which question, moreover, was not argued before us.

The appeal must, therefore, be allowed and the suit dismissed with costs in all Courts.

*Appeal allowed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 2134 AND 2364 TO 2366 OF 1915.

March 2, 1917.

*Present*:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

UDAI CHAND—PLAINTIFF—APPELLANT

*versus*

JANG BAHADUR SINGH—DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), ss. 116, 4—Mortgage—Construction of deed—Mortgagor left in possession of part of mortgaged property, position of—Occupancy rights, acquisition of*—Raiyats, *kinds of.*

Unless there are the strongest reasons for doing so, a Court ought not to give a construction to an alleged attornment clause in a mortgage-deed which will have the effect of creating rights of tenancy in derogation of the mortgagee's rights. [p. 502, col. 1.]

In order to determine whether a clause in a mortgage deed, allowing the mortgagor to remain in possession of a portion of the mortgaged property on payment of a nominal rent, amounts to an attornment clause, what is to be looked at is the real intention of the parties, and the facts of each particular case must be taken into account in order to see what the intention of the parties was. If the intention was to create the relationship of landlord and tenant, then the rent law of the country will apply. [p. 503, col. 1.]

Even when the alleged attornment is created by a conveyance other than the mortgage-deed, it is open to the Court to hold that the mortgage and the lease constitute one transaction and that the mortgagee is entitled to count the alleged rent as a charge upon the mortgaged property *qua* principal and interest. [p. 502, col. 2.]

Out of 200 *bighas* of *zerait* land mortgaged by the defendants to the plaintiff in 1896, an area of 50 *bighas* was left in possession of the former who were liable to pay a nominal rent of 8 annas per *bigha* for use and occupation. In 1902, a further area of 4 *bighas* was by a *kabuliyat* let out to the defendants at a rental of Rs. 14. Plaintiff brought a suit for arrears of rent and for *khas* possession in terms of the mortgage:

*Held*, (1) that the clause relating to the 50 *bighas* was not an attornment clause, but was merely an arrangement made by favour of the landlord by which the mortgagor was allowed to remain in possession in the capacity of something like a licensee, and that the land being *zerait* land, the protection afforded by section 116 of the Bengal Tenancy Act against the acquisition of occupancy rights applied; [p. 501, col. 2.]

(2) that the *kabuliyat* in respect of the 4 *bighas* created the relationship of landlord and tenant between the parties, and that the defendants had acquired occupancy rights in the land as against the plaintiff [p. 503, col. 1.]

The law does not preclude a mortgagor from securing the status of an occupancy *raiyat* under his mortgagee. [p. 503, col. 1.]

UDAI CHAND *v.* JANG BAHADUR SINGH.

*Obiter dictum.*—The Bengal Tenancy Act does not contemplate a *raiyat* who does not come under the classes enumerated in section 4 of the Act. [p. 503, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 10th July 1915, modifying that of the Munsif, 2nd Court, Shahabad, dated the 19th November 1914.

Messrs. *Susil Madhab Mullick, Satish Ch. Bose* and *Uma Ch. Laha*, for the Appellant.

Messrs. *Mritunjay Lal* and *Parmeshwar Dayal*, for the Respondent.

JUDGMENT.

MULLICK, J.—This second appeal arises out of a mortgage executed by defendants Nos. 1 and 2 and their father Mahabir Singh on the 14th August 1896 in favour of the plaintiff in respect of the shares in several *mouzas* inclusive of 200 *bighas* of *zerait* land. Out of the said 200 *bighas* an area of 50 *bighas* was, according to the plaintiff, left in the possession of the mortgagors as licensees, who were liable to pay a nominal rent of 8 annas per *bigha* for use and occupation. By a *kabuliyat* dated the 25th September 1902 a further area of 4 *bighas*, 10 *cottahs* was let out to the defendants at a rental of Rs. 14-5-6.

The defendants in the present suit comprise three sets of persons, (1) the mortgagors, (2) the subsequent mortgagees, and (3) certain persons recorded as *raiyats* upon the lands alleged to be *zerait*.

The plaintiff's suit is for arrears of rent and for *khas* possession in terms of the mortgage.

The Munsif found that the persons in occupation had acquired occupancy rights in all the lands and decreed only the claim for rent. On appeal the learned Subordinate Judge held that occupancy rights had been acquired in the jungle lands, but not in the 50 *bighas* which were *zerait* and which came under the operation of section 116 of the Bengal Tenancy Act, and he decreed the suit for rent and directed that if the mortgagor-defendants paid the arrears under section 66 of the Bengal Tenancy Act within 15 days they would be exempted from ejectment. With regard to the jungle land he dismissed the suit for ejectment. The plaintiff now prefers this second appeal.

The first and most important question for determination is what is the construction to be put upon the clause relating to the letting of the 50 *bighas*. Was it an attornment clause creating the relationship of landlord and tenant or was it a mere condition of the mortgage as between mortgagor and mortgagee, and was the stipulation for payment of Rs. 25 per year in essence a condition for securing the principal and interest.

We have most anxiously considered the bond and are satisfied that the relationship of landlord and tenant was not created by this stipulation. It was not an attornment clause at all. It was an arrangement made by favour of the landlord by which the mortgagor was allowed to remain in possession in the capacity of something like a licensee. It is admitted that the rent of 8 annas per *bigha* was not a fair and reasonable rent and I can conceive of no reason why the mortgagee should have brought the mortgagor upon the land at such a grossly inadequate rental, knowing full well that by the operation of our tenancy laws the latter might set up rights in derogation of his own rights as mortgagee. How dangerous such an act would have been if the lands had been ordinary agricultural lands has been shown by the fact that the Munsif found that the 50 *bighas* are not *zerait* lands and that the occupiers have occupancy rights. In the face of the learned Subordinate Judge's finding, however, that dispute no longer arises and we must take it that the lands are *zerait* and that the protection afforded by section 116 of the Bengal Tenancy Act against the acquisition of occupancy rights applies.

In England it has been held that a mortgagor who remains in possession of the mortgaged property by the terms of the mortgage-deed without express provision is only *quodam modo* a tenant-at-will. A tenancy may, however, be expressly created by an express provision in the mortgage-deed and in that case he becomes a tenant by attornment and the relationship of landlord and tenant is fully created. The effect of such an attornment is that the landlord by reason of the provisions of the Bills of Sale Act, which require registra-

tion, cannot as in ordinary rent executions levy by distress but with that exception all the other legal incidents arising out of the relationship of landlord and tenant fully operate between the mortgagor and the mortgagee.

When a mortgagor enters into a contract of tenancy with a mortgagee after the latter has entered into possession then if the rent is fair and reasonable and the transaction amounts to a re-demise of the land, the mortgagee as landlord is competent to avail himself of the remedy of distress also.

But in any event whether the attornment is by the mortgage-deed itself or by a separate subsequent-deed, the law in England appears to be that the relationship of landlord and tenant, if clearly and distinctly created, may subsist side by side with relationship of mortgagor and mortgagee [See *Daubuz* v. *Larington* (1), *Isherwood, Ex parte; Knight, In re* (2) and *Hall* v. *Comfort* (3)].

The policy of the law in allowing attornment by the mortgagor to the mortgagee was apparently in case of the mortgagee and to give him the additional remedies, for securing his principal and interest of distraint and summary recovery of possession.

The possibility of any prudent mortgagee creating a title in the mortgagor in derogation of his mortgage rights was never contemplated by the law of England. In India this consideration applies with still greater force. Here occupancy and non-occupancy rights are created by operation of statutory law, and unless there are the strongest reasons for doing so we ought not to give a construction to an alleged attornment clause in a mortgage-deed, which will have the effect of creating rights of tenancy in derogation of the mortgagee's rights. Is the intention to create the relationship of landlord and tenant so clearly and unequivocally expressed in the deed under consideration in the present case, that we are compelled to say that no other construction of the mortgage-deed is possible? In my opinion the answer is in favour of the mortgagee.

We ought not, unless we are compelled to do so, hold that the mortgagee did in this case what no ordinary prudent mortgagee would have done. In my opinion the deed may be construed as showing that the real relation between the parties was not that of landlord and tenant but mortgagee and mortgagor and that the arrears of rent claimed in the present suit are really on account of principal and interest. In England such sums are a charge upon the property but the mortgagee is entitled to re-enter if there is a clause to that effect. In America the stipulated rent is not a charge upon the property and the mortgagor may redeem without paying rent due to the mortgagee on the ground that the agreement to pay is only personal. *Nanu* v. *Raman* (4), *Altaf Ali Khan* v. *Lalta Prasad* (5), *Imdad Hasan Khan* v. *Badri Prasad* (6), *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (7) and *Baghelin* v. *Mathura Prasad* (8), favour the view that what is to be looked at is the real intention of the parties and that even when the alleged attornment is created by a conveyance other than the mortgage-deed it is open to the Court to hold that the mortgage and the lease constitute one transaction and that the mortgagee is entitled to count the alleged rent as a charge upon the mortgaged property *qua* principal and interest.

In *Chimman Lal* v. *Bahadur Singh* (9) and *Khuda Bakhsh* v. *Alim un-nissa* (10), the Court held that the leases which were executed subsequently to the mortgage-deed showed an intention on the part of the mortgagee to create a tenancy and not to continue the relationship of mortgagee and mortgagor.

(1) (1884) 13 Q. B. D. 317; 53 L. J. Q. B. 283; 51 L. T. 206; 32 W. R. 772.

(2) (1883) 22 Ch. D. 384; 52 L. J. Ch. 370; 48 L. T. 398; 31 W. R. 442.

(3) (1887) 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48.

(4) 16 M. 335; 3 M. L. J. 141; 5 Ind. Dec. (N. S.) 940.

(5) 19 A. 496; A. W. N. (1897) 128; 9 Ind. Dec. (N. S.) 320.

(6) 20 A. 401; A. W. N. (1898) 90; 9 Ind. Dec. (N. S.) 617.

(7) 26 M. 662.

(8) 4 A. 430; A. W. N. (1882) 71; 2 Ind Dec. (N. S.) 992.

(9) 23 A. 338; A. W. N. (1901) 95.

(10) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.

These cases are, however, only authority for the proposition that the facts of each particular case must be taken into account in order to see what was the intention of the parties. If the intention was to create the relationship of landlord and tenant then the rent law of the country will apply.

In this view of the case it is unnecessary for us to consider the status of the mortgagors and of the persons who have been recorded in the Record of Rights as occupancy *raiyats*. The plaintiff is entitled upon the terms of the mortgage-deed itself to a decree for the amount claimed as rent and for recovery of possession upon the terms of the mortgage of the 50 *bighas*.

With regard to the 4 *bighas* 10 *cottahs* of jungle land the matter is different. Here the letting was six years after the mortgage and it in clear terms creates the relationship of landlord and tenant. Here the mortgagee appears to have entered into the contract of tenancy with his eyes open and he must, therefore, take the consequence of the operation of the rent law. That law does not preclude the mortgagor from securing the status of an occupancy *raiyat* under his mortgagee.

I agree with the learned Munsif that the mortgagor has occupancy rights in this holding and that he cannot be ejected for non payment of rent. The decree in regard to this plot of land will be only for recovery of the arrears of rent and the prayer for recovery of possession will be dismissed.

A question has been raised before us as to the position of the mortgagors in respect of the *zerait* lands. In our view of the case that question does not arise. There is a conflict of opinion on this point in the Calcutta High Court, but we incline to the view that as the mortgagors have been held not to be occupancy *raiyats* they must be non-occupancy *raiyats* and that the Bengal Tenancy Act does not contemplate a *raiyat* who does not come under the classes enumerated in section 4 of the Act.

Mr. Mritunjay Lal, who appeared for certain minor defendants, attempted to attack the learned Subordinate Judge's finding that the mortgagors and other persons in possession of the *zerait* lands were non-occupancy *raiya's*. But that point was never argued before the learned Subordinate Judge. Mr. Mritunjay Lal says that the point was not taken because his clients were respondents but that is no answer. The plaintiff as appellant before the learned Subordinate Judge challenged all the findings of the Munsif and claimed to recover *khas* possession. It was the duty of Mr. Mritunjay Lal's clients at that stage to take all possible grounds for resisting the recovery of *khas* possession and they ought to have asked the Judge to hold, as they are now asking us to hold, that the Munsif's finding as to occupancy rights was correct and that the plaintiff was not entitled to re-enter. Having failed to raise the point in the lower Appellate Court, the defendants cannot now do so here.

The result, therefore, is that the order of the lower Court be set aside and the plaintiff will get a money-decree for recovery of the arrears claimed on the footing that they represent principal and interest. The plaintiff will also be entitled to recover *khas* possession of the *zerait* lands, but his prayer for *khas* possession of the jungle lands is dismissed. The appeal is decreed with costs in this Court. The order as to costs in the two lower Courts is maintained.

This judgment will govern the connected appeals in No. 2364 of 1915, No. 2365 of 1915 and No. 2366 of 1915.

JWALA PRASAD, J.—I agree that the plaintiff is entitled to re-enter and to recover *khas* possession of the *zerait* lands in terms of the clause in the mortgage-bond whereby the mortgagors were allowed to remain in possession of the lands on condition of their payment of the annual rent reserved and to vacate the lands on default of such payment. I also agree that the plaintiff is not entitled to recover *khas* possession of the jungle lands.

*Appeal decreed.*

JATINDRA MOHAN RAY *v.* RAMESH CHANDRA RAY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2504 OF 1911.

May 28, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

*Raja* JATINDRA MOHAN RAY—DEFENDANT No. 1—APPELLANT

*versus*

*Raja* RAMESH CHANDRA RAY AND OTHERS—RESPONDENTS.

*Hindu Law—Joint family property used for joint purposes—Right of one member to build upon joint land—Right of other members.*

Defendant, a member of a joint family, during the absence of the plaintiff, another member of the family, erected a building on a portion of the joint land which had been used for many years by the members of the family for certain purposes:

*Held*, that as the portion of the land on which the building was erected was such that neither party could have exclusive use of it without injury to the other, the plaintiff should have joint use of the building with the defendant, though the strict right of the plaintiff would have been to have the building demolished and to have the land restored to its original condition as it was before the defendant put up the building. [p. 505, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Zillah Khulna, dated the 20th May 1914, reversing that of the Munsif, 2nd Court at Satkhira, dated the 31st of March 1913.

Babus *Sarat Chundra Roy Chowdhury* and *Bhudeb Chandra Roy*, for the Appellant.

Babus *Mohendra Nath Roy* and *Mohini Mohan Chatterjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the first defendant against a judgment of the learned Subordinate Judge of Khulna, dated the 20th May 1914, reversing the decision of the Munsif of Satkhira. The plaintiffs brought the suit in the Court of first instance claiming a mandatory injunction and asking for an order on the appellant before us to demolish a certain building that he had erected on a portion of the joint property. In the course of the proceedings, the plaint was amended by permitting the plaintiffs to ask for joint possession. The parties belong to the same family and they occupy a homestead of 60 *Ighas*, parts of which are in the exclusive possession of them and the remaining portion is in their joint possession. A piece of land about one *cottah* in area, according to the finding of the lower Appellate Court, for many years had been used on particular ceremonies by different members of the family for certain particular purposes. The user was not continuous throughout the year; but whenever proper occasions arose the land had been used in this way by the different parties. The defendant No. 1 apparently during the absence of the male plaintiff in Calcutta representing himself as being anxious to foster the religious life of the inhabitants of the locality approached a religious minded person and asked him to advance him money as a gift for the purpose of erecting a building in which this religious minded person was told that all the inhabitants of the locality might go to perform their worship. Apparently, this religious minded gentleman was deceived by the first defendant because the first defendant instead of erecting this building for the benefit of the public at large erected it, as he says, for his own purpose. The learned Judge of the lower Appellate Court, has directed that the plaintiffs should have joint use of this building with the defendants. The building, as it appears, is going to be used by the defendants for lodging their guests and as the Judge points out, there is no reason why the guests of the plaintiffs should not be lodged there also along with those of the defendants. It is quite true that the use of the building would be substantially different to that for which the person who gave the money to erect it thought that it would be used. That is a matter for that gentleman to settle with the defendant No. 1, if he thinks it worthwhile to settle. We have nothing to do with that. The point that the learned Judge thought is that this is not an ordinary case of a large portion of *ijmali* land of which either party would take one portion without injury to the other. This is a portion of land of which neither party could have exclusive use, without doing substantial injury to the other. This piece of land has for many years been used by the different members of the family on different occasions. The learned Subordinate Judge has come to the conclusion, as far as I can gather, that the strict right of the plaintiffs would be to have the building demolished and to have the place restored to its original position as it was before the defendant No. 1 having deceived

the gentleman with the religious mind and during the absence of the male plaintiff in Calcutta put up this building for the accommodation of his guests. That view I think is right. If the building be removed, there is no doubt that the position of the defendant No. 1 would be the same as it was before he approached this gentleman who gave the money to erect this building for the benefit of the public of the neighbourhood. However, the lower Appellate Court has awarded to the plaintiffs joint possession of the building with the defendants. I see no reason to differ from the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 173 OF 1916.

April 23, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

LALTA PRASAD AND ANOTHER—PLAINTIFFS—APPLICANTS

*versus*

RAM SARUP—DEFENDANT—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1908), *s.* 20—*Jurisdiction—Contract for sale and purchase of cotton and grain*—Pukka arhat *system—Accounts, rendition of, place of.*

Plaintiffs, residents of Bareilly, sued the defendants, commission agents doing business in Bombay, in the Bareilly Court on the allegation that the defendants made a contract with the plaintiffs for the sale and purchase of cotton and grain under *pukka arhat* system and agreed to render accounts at Bareilly. The defendants pleaded *inter alia* that the Bareilly Court had no jurisdiction. The plaintiffs gave no evidence of the contract:

*Held*, that, under the circumstances of the case, the Bombay Courts had jurisdiction. [p. 506, col. 1.]

Civil revision against the decision of the District Judge, Bareilly, dated the 31st July 1916.

FACTS material for the report appear from the judgment.

The Hon'ble Mr. *Motilal Nehru*, for the Respondent, raised a preliminary point to the hearing of the application that no revision lay, as appeal was allowed by law under Order XLIII, rule 1 of the Civil Procedure Code.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *P. N. Banerji*), for the Applicants.—No appeal lies as only one appeal is allowed and that was preferred to the District Judge. There is no second appeal from the order. Only an application for revision is allowed.

[The preliminary objection was disallowed.]

The Hon'ble Dr. *Sundar Lal*, after stating the facts of the case, contended that no opportunity was given to the plaintiff to produce evidence. The plaintiff made an application to give evidence. If the application had been granted he would have shown beyond the custom of *pukka arhat* that the contract was made at Bareilly and it was agreed that the moneys would be paid at Bareilly and the accounts would be rendered at Bareilly. An opportunity should be given to the plaintiff to tender his evidence.

The Hon'ble Mr. *Motilal Nehru* was not called upon.

JUDGMENT.—This application in revision raises a question of jurisdiction. The facts, so far as we are concerned with them, may be briefly put as follows :—The plaintiffs are residents of Bareilly. The defendants are commission agents who do business in Bombay. The plaintiffs' case is that the defendants came to Bareilly, there made a contract as commission agents for the sale and purchase of cotton and grain etc., under what is known as the *pukka arhat* system and they agreed to render accounts at Bareilly and to make all payments of amounts remaining due after rendition of accounts at Bareilly. Among other defences the defendants pleaded that the Bareilly Court had no jurisdiction, they alleged that the contract was made at Bombay, that the account was to be rendered at Bombay and that it had been agreed that any amount due thereunder was payable at Bombay. Neither party gave any evidence on the question. This point of jurisdiction was treated as a preliminary point. The plaintiffs' Pleader said that he wished to give no evidence. The Court of first instance held that in the circumstances the Bareilly Court had no jurisdiction and returned the plaint for the presentation to the proper Court. The plaintiffs appealed. As the

judgment of the Court below shows, the learned Pleader, for plaintiffs entirely waived two grounds on which one plaintiff had pleaded that the Bareilly Court had jurisdiction. The *first*, was that the contract was made at Bareilly and the *second*, was that the parties had specifically agreed to make payments of money at Bareilly. But the point was pressed on two grounds (1) that according to the custom of the trade under the *pukka arhat* system the Bareilly Court had jurisdiction to try the suit and (2) that according to the contract between the parties the defendants had agreed to render accounts at Bareilly. On neither question (of custom and of contract) did the plaintiff produce any evidence. The case was argued out and the arguments were finished, and when they were over, a petition was filed in the lower Appellate Court asking that Court to give plaintiffs an opportunity producing evidence on both the points. The Court declined to do that after the case had been completed. It agreed with the decision of the first Court and dismissed the appeal. So far as the record stands, it is quite clear that the decision on the question of jurisdiction depended upon certain facts *i.e.*, the terms of the contract between the parties and the custom of the *pukka arhat* system. In the absence of evidence on these points the Court below was bound in the circumstances to decide against the plaintiffs. We are asked on their behalf to allow them an opportunity of producing evidence to prove that the Court at Bareilly had jurisdiction to try the suit. The opposite party has been put to a considerable expense already and has been dragged into two Courts and up to this Court by reason of what may be called an over-weening confidence of the plaintiff's learned Pleaders in the Courts below in their knowledge of law. It is quite clear that the Court in Bombay has jurisdiction. As the record stands, it is not shown that the Bareilly Court has jurisdiction and we can see no benefit to arise in allowing a further waste of time and money in going into the points. We, therefore, must decline to send back the case as the decision of the Court below is quite correct. We, therefore, dismiss the application with costs including fees on the higher scale.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 863 OF 1914.

April 23, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

MOHENDRA NATH MADAK—DEFENDANT—APPELLANT

*versus*

PARESH CHANDRA GHOSH—PLAINTIFF, SATYA BHUPAL BANNERJEE AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

*Vendor and purchaser—Sale—Suit in name of vendor after sale of his interest, maintainability of—Landlord and tenant—Co-sharer landlord, right of, to recover his share of rent by suit.*

After the sale of a landlord's interest in land with all claims for rent in arrears, a suit for rent is maintainable in the name of the landlord as plaintiff, where the document under which the property is sold authorises the purchaser, as the irrevocable attorney of the vendor, to continue and prosecute in the name of the vendor suits with reference to the moneys and claims transferred by the document. [p. 507, col. 2.]

A co-sharer-landlord can by a suit recover his share of the rent when there has been separate collection in respect of that share. [p. 508, col. 1.]

Appeal against the decree of the Additional District Judge, 24 Pergannas, dated the 22nd December 1913, affirming that of the Munsif at 24-Pergannas, dated the 30th April 1913.

FACTS of the case will appear from the following extracts from the judgment of the lower Appellate Court:—

"Plaintiff's case was that the defendant had three *jamas* under him the whole of which appertained to the Estate No. 70, though originally they had been under two Estates Nos. 70 and 71; 12 annas of the land appertaining to these holdings belonged to the owners of Estate No. 70, and the remaining 4 annas to the *pro forma* defendants who were the proprietors of the other estate. There was a Record of Rights under Chapter X of the Bengal Tenancy Act, in respect of Estate No. 70, and the *jamas* as stated in the plaint were recorded therein as the correct rental The chief contention on behalf of the defendants was that plaintiff had no right to sue or to maintain the suit.

As regards the competency of the plaintiff's maintaining the suit, the learned Munsif found that although plaintiff's right had been conveyed to a third party by a deed of

transfer * * * there was a clear provision contained therein giving him the right to sue.

From that decision the present appeal has been preferred and the learned Vakil has contended on behalf of the appellants that inasmuch as the plaintiff had parted with all the rights by the sale-deed Exhibit A he had no right to maintain the suit.

In my opinion the argument is not well founded. What is said on page 6 (of the sale-deed) is that the vendor transferred and assigned all rents and cases in arrears to the vendee but on the following page it is said that they are transferred * * to the purchaser with full power to the purchaser as the irrevocable attorney of and in the name of the said vendor but at his, that is, the purchaser's own cost to ask, to demand, sue for, recover and receive the said several sums, so that there can be nothing which prevents the plaintiff from maintaining the suit in its present form.

The appeal is dismissed with costs."

Babu *Baranashibasi Mukherjee*, for the Appellant.—My first point is that the plaintiff has no right to bring this suit as he has transferred his share in the estate together with the arrears of rent to some other persons who have not been joined as defendants. The plaintiff has no right to recover arrears of rent because he has already parted with that right.

[FLETCHER, J.—Was this point raised in the lower Courts ?]

Yes. It was raised. As the right to sue for arrears of rent was transferred to the purchaser the purchaser should have been substituted in the place of the vendor, the plaintiff. The lower Courts were wrong in going upon the supposition that even after the transfer the vendor would have the right to sue in his own right.

The next point is that the suit as framed is not maintainable, because it is not a suit under section 148A of the Bengal Tenancy Act. The plaintiff here does not sue for the whole rent making the co-sharer landlords parties to the suit. He has sued only for the 12-annas share of the rent, whereas he ought to have sued for the whole rent asking the co-sharer landlords to join, and if the latter did not join he could get a decree for his 12-annas share. The suit as framed is not maintainable by the co-sharer landlord in the absence of his other co-sharers. The suit must be for the whole rent, and then if the co-sharer landlords do not join or if the tenant proves that he has paid the co-sharer landlord's shares of the rent then he can get a decree for his share of rent. A suit to recover rent by a co-sharer landlord is not maintainable unless the suit is framed under section 148 A, Bengal Tenancy Act. So upon the pleadings as framed this suit should be dismissed.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant from a decision of the learned Additional District Judge of the 24-Pergannas, dated the 22nd December 1913, affirming the decision of the third Munsif at Alipore. The suit was brought to recover the rent in arrears for the years 1311 to 1314. B. S. The amount claimed was Rs. 54 2-5. The suit was instituted as long ago as the year 1908. So far about nine years, this litigation has been pending. Both the Courts below have decreed the suit. The defendant has appealed to this Court.

Two points have been raised in this appeal. The first point is that the plaintiff had no right to maintain this suit for rent on the ground that there had been an assignment of his interest in the land. The document under which the property was sold is Exhibit A on the record. It is a document in the English language and in the English form being an indenture expressly made between the plaintiff of the one part and the purchaser of the other part. The document purports to transfer to the purchaser all claims for rent in arrears in the suit then pending. It authorized the purchaser as the irrevocable attorney of the vendor, that is, the plaintiff, to continue and prosecute in the name of the present plaintiff the suit then in existence or any future suit with reference to the moneys and claims transferred by that document. It is quite clear that the sole object of the appointment of the attorney was to enable the suit to be continued in the name of the plaintiff without a new assignment being made and it does not matter to the defendant if he gets a perfectly good receipt when he pays the money to the plaintiff notwithstanding this assignment. There is no force in that objection although I do not agree in the construction

that the learned Judge has put on the appointment of the purchasers as the irrevocable attorney of the vendor.

The other point was that the plaintiff could not sue to recover his share of the rent only and that the suit ought to have been brought to recover the whole rent due to the plaintiff and the *pro forma* defendants. This point was not taken in the lower Appellate Court. In the primary Court, it was taken and the learned Judge in that Court found that the defendant's documents showed that the plaintiff's father brought a rent suit in respect of his separate share and that a cess-return was filed in respect of that share. That finding seems to have been assented to and I think it could not be challenged as the cess-return and the decree showed what is called in this country a separate collection. That finding made by the learned Judge of the primary Court was not challenged in the lower Appellate Court Therefore, it is too late to raise it here. As a matter of fact, there is little doubt that the Munsif was right when he stated that this finding was arrived at on the cess-return and the decree passed in the other suit. The appeal fails and must be dismissed.

Babu Jogendra Nath Ghose who filed a *vakalatnama* in this appeal on behalf of the respondent says that he has no instruction. The appeal has, therefore, been treated as uncontested. We, therefore, make no order as to costs.

NEWBOULD, J.—I agree.

*Appeal dismissed.*

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PATNA HIGH COURT.

MISCELLANEOUS APPEAL NO. 38 OF 1916.

April 24, 1917.

*Present:*—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Roe.

*Maharaja* SIR RAVENESHWAR PRASAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

*Rai* BAIJNATH GOENKA *Bahadur*—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 47, O. XLV, r. 15—Revenue sale of* ijmali *share—Annulment of sale and recovery of possession of shares in* ijmali *share, suit for—Order in Council—Decree—Partition of* ijmali *share—Execution—Decree-holder, whether entitled to share substituted by partition for share decreed*

Plaintiffs brought a suit for the annulment of a revenue sale and recovery of possession of separate and distinct shares in an *ijmali* share and got a decree. The share had in the meantime been partitioned. On appeal the High Court reversed the judgment of the Subordinate Judge and dismissed the suit. Seven of the original plaintiffs then appealed to His Majesty in Council and their appeal was allowed. Some of the appellants then applied to the High Court under Order XLV, rule 15 of the Civil Procedure Code. The matter was sent down to the Subordinate Judge, who held that the applicants were not entitled by means of proceedings in the Execution Department to ask the Court to enquire and determine what estates or interests had been substituted by the partition for the shares originally claimed and that the decree-holders could not get possession without bringing a regular suit to establish their title to the substituted estates or interests:

*Held*, that the decree-holders were entitled to ask the Subordinate Judge under section 47 of the Civil Procedure Code to ascertain in execution proceedings what estates and interests had been substituted for their original shares in the *ijmali mahal* and to give them possession of the substituted estates or interests. [p. 512, col. 2.]

Appeal from an order of the Subordinate Judge, Monghyr, dated the 22nd February 1916.

Messrs. S. *Sinha*, *Kulwant Sahai*, for the Appellants.

Mr. *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal and Miscellaneous Appeals Nos. 37, 39, 54, 69, 81, 90 and 131 are appeals against an order of the Subordinate Judge of Monghyr, dated February 22nd, 1916, dismissing applications by the appellants for execution of an order of His Majesty in Council, dated January 15th, 1915. The applications of all these appellants and others were heard together by the Subordinate Judge and were disposed of by one order. The appeals were heard in this Court together and this order will govern them all.

*Mahal* Bist Hazari included 360 villages and in the Collector's register bore *Tauzi* No. 336. The owners of specified but undivided shares in the *mahal* applied for and obtained from the Collector a separation of accounts. It is said that there were no less than 148 separate accounts. This left, however, a large residue commonly called the *ijmali* or joint share, the owners of which remained jointly liable for the revenue due in respect thereof. In 1901 the *ijmali* share was found to be in

arrears for the March and June instalments of Government revenue and was sold by the Collector on September 9th, 1901, and was purchased by the respondent Baijnath Goenka for a sum of Rs. 33,500. An appeal to the Commissioners of the Division by the owners of the *ijmali* share under section 25 of Act XI of 1859 having been dismissed 15 owners of shares in the *ijmali* share brought a suit in the Court of the Subordinate Judge of Monghyr on September 30th, 1902, for annulment of the sale and for recovery of possession of their shares. As it was suggested before us by Counsel for some of the appellants that this was a suit by or on behalf of the whole body of owners of the *ijmali* share, it is necessary to point out that it was not so. Only fifteen persons were originally plaintiffs in the suit and they set out in paragraph 1 of their plaint their specific shares in the *ijmali* shares. In paragraph 22 they specified the price which each plaintiff or set of plaintiffs had paid for each of the shares claimed and after claiming that the sale of the *ijmali* share should be set aside or declared null and void and inoperative in law the plaintiffs claimed possession of the shares described in the second Schedule to the plaint, which shows against the name of each plaintiff or set of plaintiffs the precise share which each plaintiff or set of plaintiffs sought to recover in the suit. The *ijmali* share comprised 31 or 32 villages. The claim for possession does not extend to all these villages but extends only to the specified share claimed by the different plaintiff. A large number of sharers in the *ijmali* share were impleaded as defendants. The Subordinate Judge held that the sale was null and void and on June 30th, 1904, he decreed the claim with costs and with mesne profits to be assessed in the Execution Department. When dealing with issue No. 3 in the suit the Subordinate Judge said: "If the plaintiffs succeed in setting aside the sale there will be no difficulty in their obtaining possession of the specified shares of the properties comprised in the *ijmali* share which are held separately by the several plaintiffs. The *jama* of the *ijmali* share is joint but the properties comprised in this *jama* are held separately and the shares are also specified," and when dealing with issue No. 11 the Subordinate Judge said: "The plaintiffs are entitled to recover the properties claimed by them, the shares of which are separately held." It thus appears to be clear that though there was only one suit all the plaintiffs or sets of plaintiffs claimed separate and distinct share. On appeal the High Court on May 1st, 1907, reversed the judgment of the Subordinate Judge and dismissed the suit. Seven of the original plaintiffs then appealed to His Majesty in Council with the result that on January 19th, 1915, their appeal was allowed, the decree of the High Court was set aside and the decree of the Subordinate Judge was restored save and except as to two villages named Matasi and Mirzaganj in regard to which the claim was permitted to be withdrawn with liberty to the appellants to institute a fresh suit in respect thereof if so advised. On June 10th, 1915, four of the appellants to His Majesty in Council, namely, the appellant in Miscellaneous Appeal No. 38 now before us and the three appellants in Miscellaneous Appeal No. 39 now before us applied to the Calcutta High Court under Order XLV, rule 15 praying that Court to direct that the order of His Majesty in Council might be transmitted for execution to the Court of the Subordinate Judge, to issue a certificate as to the costs incurred in the Privy Council Appeal in the High Court and to direct the Subordinate Judge to proceed to ascertain the mesne profits due to the applicants. On that application the High Court made the following order "Let the decree of His Majesty in Council be sent down to the lower Court for execution." The decree was sent down accordingly. Fifteen applications for execution were then presented to the Subordinate Judge. Three of them related only to costs and we are not now concerned with them. Another application resulted in a compromise. The order of the Subordinate Judge with which we are concerned related to the remaining eleven applications. For reasons which will be stated hereafter all eleven applications were dismissed. One of the applicants filed no appeal in this Court. The remaining ten appealed. Two of the appeals have already been dismissed for default and the remaining eight appeals are now before us.

Applications for the partition of *mahal*

Bist Hazari were made to the Collector as long ago as 1876. It does not appear exactly what stage in these proceedings had been reached when the sale for arrears of revenue took place or when the suit was filed in the Court of the Subordinate Judge or when his decree was made, but it is common ground that before the decree was made the proceedings required by section 57 of the Estates Partition Act, 1897, had been held. The partition was completed in 1908 shortly after the decision of the Calcutta High Court. It appears that at the time of the decree the plaintiffs in the suit were still recorded in the books of the Collector as owners of the shares which they claimed in the suit. The respondent who purchased the *mahal* at the revenue sale did not obtain mutation of names in his favour until 1903. Under the partition the different plaintiffs in the suit were allotted other shares in lieu of their original shares in the parent estate. In some cases they obtained shares in the same villages, in other cases they obtained shares in different villages. The matter is complicated by the fact that several of the plaintiffs held shares not only in the *ijmali* share but also in the separate accounts and it is further complicated by the fact that the respondent also was the owner of interests in some of the separate accounts before he purchased the *ijmali* share at the revenue sale.

At this stage it is convenient to mention that when the suit was pending in the Court of the Subordinate Judge some co-sharers in the *ijmali* share who had been impleaded as defendants applied to be made plaintiffs in the suit and orders seem to have been made by the Subordinate Judge that they should be made plaintiffs. That appears to have been the case with reference to the appellants in Miscellaneous Appeals Nos. 81 and 131. All the papers are not before us but it appears that the appellants in these two appeals applied also for amendment of the plaint so that they too might obtain decrees for their separate shares. It is, however, doubtful whether the plaint ever was amended. The decree of the Subordinate Judge appears to give shares only to the original plaintiffs. In the view which I am disposed to take of this case it is unnecessary to pursue this matter further. For the purpose of my judgment I am prepared to assume that the plaint was amended as prayed.

It is also necessary to notice that the appellants in Miscellaneous Appeal No. 69 claim to be the representatives of certain defendants to the suit who never applied to be made plaintiffs. It is impossible to accede to the contention put forward by Mr. Ganesh Dutt Singh on their behalf that the decree of the Subordinate Judge should be treated as a decree in favour of all the holders of shares in the *ijmali* share. He sought to apply to the decree the analogy of decrees passed in suit for partition which can be enforced by all the persons found to be entitled to shares whether arrayed as plaintiffs or defendants in the suit. There can be no doubt that Miscellaneous Appeal. No 69 should be dismissed.

In consequence of the partition having been completed as stated above in 1908, the applicants for execution of the Order in Council have prayed not for possession of the shares specified in Schedule II to the plaint but for the estates or interests which according to them have by the partition been allotted to them in lieu of their original shares in the *ijmali* share. The Subordinate Judge dismissed all the applications on the ground that in consequence of the partition and on the authority of the decision of the Calcutta High Court in *Krishna Roy* v. *Jawahir Singh* (1), the applicants are not entitled by means of proceedings in the Execution Department to ask the Court to enquire and determine what estates or interests have been substituted by the partition for the shares originally claimed under Schedule II of the plaint in the suit. The Subordinate Judge was of opinion that the decree-holders could not get possession without bringing a regular suit to establish their title to the substituted estates or interests. He also held that all the applications except two, namely, those made by the appellants in Miscellaneous Appeals Nos. 38 and 39, should be dismissed on the ground that the applicants had not applied to the Calcutta High Court under Order XLV, rule 15.

It appears to me that the view taken by the Subordinate Judge regarding Order XLV, rule 15 is correct and that those persons only (or their representatives) were entitled to apply to the Subordinate Judge for execution who had applied to the Calcutta High Court under Order XLV, rule 15. It may be that where

(1) 20 C. 260; 10 Ind. Dec. (N. s.) 176.

a decree has been passed in favour of a number of persons jointly an application under Order XLV, rule 15 by one or more of them would be sufficient to entitle all of them to apply for execution in the Court below. But as explained above the suit in which the decree was passed was not a suit by several persons for possession of property to which they were jointly entitled. The claim was in reality a collection of claims by persons entitled to separate shares for possession of those separate shares and it is quite clear that each plaintiff or set of plaintiffs obtained by the decree a right to a separate share or separate shares. No single plaintiff is entitled to execute the decree on behalf of all of the plaintiffs. Each plaintiff must obtain possession of the share or shares to which he is entitled. The action taken by the plaintiffs themselves shows that they understood that each plaintiff must take out execution in respect of his own share. For these reasons I am of opinion that only those plaintiffs were entitled to apply to the Subordinate Judge for execution of the Order in Council who applied to the Calcutta High Court under Order XLV, rule 15, and obtained an order from that Court. In this view six of the appeals before us must be dismissed.

There remain Miscellaneous Appeals Nos. 38 and 39, the appellants in which applied to the Calcutta High Court under Order XLV, rule 15. The question which we have to decide is whether they were entitled to ask the Subordinate Judge to ascertain in the Execution Department what estates and interests had been substituted for their original shares in the *ijmali mahal* and to give them possession of the substituted estates or interests. Counsel for the respondent, Baijnath Goenka, contended that the decree of the Subordinate Judge which was restored by the Order in Council is now incapable of execution, that the plaintiffs ought to have informed their Lordships of the Privy Council that the *ijmali* share had been partitioned in 1908 and that if they had done so their Lordships would not have contented themselves with restoring the decree of the Subordinate Judge but would have gone on to declare that the plaintiffs were entitled to the substituted shares. Counsel also contended that the decree of the Subordinate Judge was contrary to the provisions of section 26 of the Estates Partition Act, which provides that every decree affecting a parent estate made by a Civil Court after the estate has been declared under section 29 to be under partition but before the date specified in the notice served under section 94, shall be made in recognition of the proceedings in progress under the Act for partition of the estate and shall be framed in such manner that the decree may be applied to and carried out in reference to the separate estates which the Collector in his proceedings recorded under section 29 has ordered to be formed out of the parent estate. Counsel contended that if the attention of their Lordships had been drawn to these provisions they would have passed an order in compliance with them. It appears that the provisions of section 26 of the Estates Partition Act, 1897, and of the corresponding section in the earlier Act of 1876, have been more honoured in the breach than in the observance. The most experienced Legal Practitioner present in Court was unable to say that he had ever seen a decree passed in compliance with or even with direct reference to section 26 of the Act. Sub-section (2) of section 26 does not appear to apply to the case at all. Only sub-section (1) can be held to apply. At the time when the Subordinate Judge made his decree all that he could have done by way of compliance with section 26 sub-section (1) would have been to add to his decree a provision that the decree should be executed with reference to the separate estate which the Collector had ordered to be formed out of the parent estate and which might in due course subject to any objections taken and allowed in the partition proceedings be formed out of the parent estate. At the time when he made his decree the exact form which the partition would take had not been finally determined and it appears from certain papers which have been shown to us that in fact part of the order passed under section 29 of the Act was subsequently modified. It appears that it would have been impossible for the Subordinate Judge when he made his decree to have indicated the exact substituted shares to which his decree would apply. In other words the Subordinate Judge could have done no more than make a formal order

that his decree should be executed in reference to the separate estates which might be formed at the partition. His omission to do this does not, in my opinion, oblige us to hold that his decree is altogether inoperative. If the attention of their Lordships of the Privy Council had been drawn to the fact that a partition had taken place in 1908, all that they could have done would have been to make a general direction that the decree should be executed with reference to the altered state of affairs. It was contended by Mr. Pugh that the Order in Council is at present inoperative and that the plaintiffs cannot obtain relief even by means of a separate suit. It appears to me to be quite clear that the plaintiffs must be entitled either by execution proceedings or by means of a separate suit to obtain relief. I cannot accept the suggestion that they should be required to apply to the Privy Council for amendment of the order. As I have already said, it appears to me that all that could be done by way of amendment would be to pass an order in general terms to the effect that the decree should be executed with reference to the altered state of affairs. In the case of *Krishna Roy* v *Jawahir Singh* (1), referred to above, the plaintiff had purchased a small share in Estate No. 831 and obtained a decree for possession against the defendants. Before he took out execution of the decree partition proceedings took place in which the interest in suit was converted into an Estate No. 2218. Instead of seeking to execute his decree he brought a separate suit for a declaration that he was entitled to Estate No. 2218, and it was held that the suit was not barred by section 244 of the Code of Civil Procedure. The decree made in that suit does not appear to have been made in accordance with the Estates Partition Act, but the High Court did not hold that the plaintiff was on that account unable to establish his right to the substituted estate. All that they held was that the proper course to pursue was to bring a separate suit. Their decision recognises the right of a decree holder to have recourse to the substituted share so also does the Estates Partition Act. I am of opinion that the irregularity or informality in the decree of the Subordinate Judge in the present case which was restored by the Order in Council does not deprive the plaintiffs of their right to recover what has been substituted for the original shares decreed to them. The question whether the plaintiffs should proceed by separate suit or in the Execution Department is not a matter of much importance. Section 47, sub-section (2), of the present Code of Civil Procedure was intended to put an end to the scandal of persons being deprived of their rights by the difficulty of determining whether they should proceed in the Execution Department or by a regular suit. That sub-section provides that the Court may subject to any objection as to limitation or jurisdiction treat a proceeding under that section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees. It appears to me that if the decree of the Subordinate Judge is operative to any extent notwithstanding the non-compliance with section 26 of the Estates Partition Act there is no reason why the plaintiffs should not obtain their rights in the Execution Department. In my opinion Appeals Nos. 38 and 39 should be allowed and the Subordinate Judge should be directed to restore the applications of these appellants to the pending file and hold the necessary enquiries. In these two appeals I would order that the costs of this Court including in each case a hearing fee of three gold *mohurs* should be costs in the cause and should be dealt with by the Subordinate Judge. Some of the difficulties which will confront the Subordinate Judge have been brought to our notice in the course of the arguments. We find ourselves unable to deal with them or to give the Subordinate Judge any detailed instructions inasmuch as he took no evidence and held no enquiry whatever. He should ascertain exactly the questions of law and fact upon which the parties before him are at variance and should endeavour by his order to put an end to a litigation which has continued for a great number of years. I would dismiss Appeals Nos. 37, 54, 69, 81, 90, and 131 with costs and in each case I would allow a hearing fee of three gold *mohurs*.

ROE, J.—I agree.

*Appeals Nos.* 38 *&* 39 *allowed*;
*Appeals Nos.* 37, 54, 69, 81, 90 *&* 131 *dismissed.*

PRODYOT COOMAR TAGORE *v.* KRISHNAMONI DASYA.

## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2245 TO 2248 OF 1915.

April 19, 1917.

*Present*:—Mr. Justice Richardson and Mr. Justice Walmsley.

*Maharaja Bahadur* SIR PRODYOT COOMAR TAGORE, KT., AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

KRISHNAMONI DASYA—DEFENDANT—RESPONDENT.

*Appeal, second—Tenure, whether permanent—Finding of fact—Landlord and tenant*—Kabuliyat, *construction of—Tenure, nature of—Heritable and permanent—Burden of proof.*

The decision of the question whether a certain *jote* (tenancy) is a tenure or a *raiyati* holding is a finding of fact which is not open to question in second appeal. [p. 513, col. 2.]

The question whether a tenure is a permanent tenure is not merely one of fact if it depends, at any rate to a large extent, on the construction of the *kabuliyats* executed from time to time by the tenant or his predecessors. [p. 513, col. 2.]

A permanent tenure may bear a variable rent. [p. 513, col. 2.]

Per *Richardson, J.*—*Quære*—Whether a non-transferable tenure can be a permanent tenure?

Per *Walmsley, J.*—The descent of a tenancy from father to son and then to the son's widow is not enough to establish that the tenancy is heritable. [p. 514, col. 2; p. 515, col. 1.]

A tenant who claims an hereditary right under a lease which does not contain the words "from generation to generation" has a heavy onus to discharge. [p. 515, col. 1.]

The right of alienation though not an essential feature of a permanent tenure, is commonly regarded as an invariable incident. [p. 515, col. 2.]

Per *Curiam*.—Where a tenancy was held for a long time and for a period of 70 years out of it only four *kabuliyats* were executed and the tenancy descended from father to son and then to the son's widow, but the *kabuliyats* bound the tenant to keep the trees intact and restrained him from making any transfer or partition of the lands and there were no words of heritability in the *kabuliyats*:

*Held*, that the tenancy was a non-permanent tenure. [p. 515, col. 2.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 5th June 1915, modifying that of the Assistant, Settlement Officer, Mymensingh, dated the 21st September 1914.

Babus *Ram Charan Mitra* and *Mukunda Nath Roy*, for the Appellants.

Babus *Dwarkanath Chakravarty* and *Romesh Chandra Sen*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—I confess that I have had some difficulty with this appeal and the analogous appeals which were argued along with it. I have been greatly impressed with what the Settlement Officer says in his judgment in the present case (paragraph 3) about the origin and special character of these *jotes*. He says that they are known as *khud jotes* and he observes with great force that the term is reminiscent of the *khud kasht raiyats* of an earlier period. He mentions other features in the evidence which go far to show that in the opinion at any rate of the landlord's officers, the tenants of these *jotes* possess rights which, to use a natural term, may be described as permanent residential rights. I have a strong suspicion that in spite of their present area the *jotes* were in their origin *raiyati* holdings, or they may have grown out of smaller holdings of a *raiyati* character. The special incidents now attached or sought to be attached to them by contract resemble very largely the ordinary incidents of a *raiyati* holding at the present day. On the question, however, whether the *jotes* are tenures or *raiyati* holdings, we are confronted with the concurrent findings of the Courts below that they are tenures. No attempt was made in the argument before us to displace that finding on any ground open in second appeal and it must, therefore, be accepted as final.

In the appeal before us, the tenant's rights being, as we must now take them to be, those of a tenure-holder, there is great difficulty in agreeing with the Courts below that the tenure is a permanent tenure. The question is not merely one of fact. It depends at any rate to a large extent on the construction of the *kabuliyats* executed from time to time by the tenant or his predecessors. It is a question of construction for instance whether the word "*sharashari*" or "temporary", which occurs in these documents or some of them, refers to the variability of the rent or the nature of the tenancy. The learned Special Judge in the lower Appellate Court has come to the conclusion that while the tenure is permanent and heritable, the rent is variable and the tenure is not transferable. Now there is no inconsistency at all between a permanent tenure and a variable rent, but permanency and non-transferability are

not so easily reconcilable. Section 179 of the Tenancy Act has no application because the tenure is not a *mukarari* tenure. If the tenure is permanent it falls under the provision in section 11 of the Bengal Tenancy Act, which says that "Every permanent tenure shall, subject to the provisions of this Act, be capable of being transferred and bequeathed in the same manner and to the same extent as other immoveable property." If this section be read with section 10 of the Transfer of Property Act, it may be that, as the *kabuliyats* do not provide for re-entry by the landlord in case of breach of the condition against transfer, the condition is in any case void, whether the tenure is permanent or not. But, however that may be, I express no opinion on the point. Taking the terms of the series of *kabuliyats* as a whole, it is not easy to suppose that the *kabuliyats* or any of them is either creative of, or refers to, a permanent tenure.

The difficulty and responsibility of deciding in the first instance whether a particular tenancy is a tenure or *raiyati* holding is often, in cases near the border line, enhanced by the fact that if the tenancy is held to be *raiyati* the tenant will have permanent rights of occupancy, while if it is held to be a tenure it may almost necessarily follow that the tenure is not permanent. The problem is sometimes specially difficult in the case of leases of new lands which are to be brought under cultivation, because the position of the tenant at the inception of the tenancy may be very different from his position, it may be many years later, when the land has been successfully reclaimed and the question arises. At first it may not be to the landlord's interest to deny that the tenant is a *raiyat* and there may be an understanding, probably on an informal basis, that he is a *raiyat*. As time goes on it may be very much to the landlord's interest to assert that the tenant is a tenure-holder.

The present is a case in point. The dispute between the parties really turns on the question whether the *jote* is a tenure or a *raiyati* holding and the decision on this question is not now open to review.

On the whole I am forced to the same conclusion as that arrived at by my learned brother and concur in the order which he proposes to make.

I may add that the relations between the landlord and his *khud jote* tenants appear to have been in the past of the friendliest character. I trust that the present controversy will not disturb the excellent relations hitherto existing and will not lead the landlord to treat his tenants with less consideration than he has hitherto done.

The judgments delivered in this case will govern the other analogous appeals.

In all these appeals the parties will bear their own costs.

WALMSLEY, J.—This appeal is by the landlord, and arises out of an application under section 106 of the Bengal Tenancy Act. The substance of the application is that the defendant-respondent's interest in a tenure has been entered in the record as permanent, whereas it should be only temporary.

The defendant pleaded that her interest was that of a *raiyat*, and was permanent. The claim of *raiyati* interest is no longer under discussion, and the question now is whether the tenure is permanent or not.

The Assistant Settlement Officer held that the tenure was permanent. On appeal the learned Special Judge upheld this decision with the qualifications that the tenure was not transferable and that the rent was liable to enhancement. The landlord now asks us to go further and hold that the tenure is not permanent. A permanent tenure is described in section 3 (8) of the Act as a tenure which is heritable and which is not held for a limited time.

I will deal first with the feature of heritability. Four *kabuliyats* have been laid before us, one produced by the defendant, and three by the landlord, the first executed in 1250 B. S. (1843 A. D.) and the other three in the years 1277, 1285 and 1295 B. S. From the evidence it appears that Rup Nath Das, who executed the first, was a *benamidar* for Bishnu Charan and that the second was executed by Bishnu's son Biseshwar, and the third and fourth by Biseshwar's widow, the present defendant. The learned Judge holds, and I think rightly, that the descent from father to son, and then to the son's widow, is not enough to establish the fact of herit-

ability and he finds that heritability is proved by the oral statement of plaintiff's first witness. This statement is set out in full by the Settlement Officer, and I need not repeat it. The part of it on which special emphasis is laid is the sentence "why should the *malik* do an injustice by settling the *jote* with a new tenant." It appears to me, however, that these words do not go very far. The witness only means that the dead man's heir is recognized as having a moral claim to succeed to his father's rights; he does not mean that the heir has a legal right which the *malik* cannot ignore. Against this evidence we have the very important omission in the *kabuliyats*: not one of them contains the words from generation to generation. These words form a well known phrase, and the tenant who claims an hereditary right under a document which does not contain them has a heavy onus to discharge. Not only does the oral evidence just referred to fail to discharge that onus, but the same witness by his reference to the payment of *nazarana* at least suggests that succession of son to father is not a matter of right, but a matter of grace and payment. In my opinion, therefore, the feature of heritability is not proved.

Next as to the words "which is not held for a limited time." The finding of the Courts below is that the settlement of the tenure was permanent, but the settlement of the rent payable in respect of it was temporary. It is not necessary to consider whether such a contract is possible, because there are other terms in these *kabuliyats* which call for remark, and help to decide the true nature of the arrangement.

In the first place all the *kabuliyats* bind the tenant to keep the trees intact; and in the second place they all restrain him from making any transfer of the land. The last three add that he must not partition the lands. In the ordinary way a tenure-holder has the right to cut down trees, and the right of alienation, though not an essential feature of a permanent tenure, is commonly regarded as an invariable incident.

Next, the three later *kabuliyats* speak of a *sarasari* and like the first they are for a term of years. They contain no clause to the effect that the rent only is temporary: The most that can be said for them is that each in turn gives the tenant the right to enter into a fresh arrangement on terms to be fixed by the landlord. More important than this is the condition in the three later *kabuliyats* for the landlord's right of re-entry in the event of the tenant not entering into a fresh arrangement. It is true that this condition is not in the *kabuliyat* of 1250 *B. S.*, but I think the learned Vakil for the appellant is right in asking us to look at the terms of the latest agreement rather than of the earliest. This condition cannot, I think, be reconciled with the defendant's claim for permanency and is by itself sufficient to prove that the tenure is held for a limited time. It seems to me impossible to hold in the face of such a condition that the temporary character of the agreement was limited only to the amount of rent. On the other hand, it is pointed out that the tenant has been in possession for a long time, and that for a period of 70 years only four *kabuliyats*, for terms aggregating 29 years, are produced. I fail to see that these facts alter the nature of the agreement between the parties, and it is to be remarked that the first *kabuliyat* is for an area less than one fourth of the area mentioned in the last *kabuliyat*. Repeated renewals of an agreement do not change the character of an agreement.

It is, I think, equally unsafe to draw any inference from the fact that the landlord has granted settlement again and again to the same man or to his successor-in-interest. Self-interest may be the explanation, or friendly relations between landlord and tenant.

In my opinion the decision of the learned Special Judge is wrong, and I would decree the appeal and order the entry in the Record of Rights to be corrected, that is to say, by substituting the word "non-permanent" for the words "permanent and heritable."

*Appeals allowed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 123 OF 1915.

November 24, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

PANKAJAMMAL—PLAINTIFF—APPELLANT

*versus*

SECRETARY OF STATE FOR INDIA BY THE COLLECTOR OF NORTH ARCOT AND OTHERS—DEFENDANTS AND LEGAL REPRESENTATIVES OF 4TH DEFENDANT—RESPONDENTS.

*Hindu Law and Usage*—Ubhayam *or festival, performance of, by female, right of—Burden of proof, question of, when evidence let in on both sides—Civil Procedure Code (Act V of 1908), s.* 100 (a)—*'Usage having the force of law,' meaning of—Private right, whether falls under s.* 100 (a)—*High Court—Appeal, second—Evidence of usage, decision on.*

The right to perform an *ubhayam* or festival being a secular privilege unconnected with the right to honours, a female is not disqualified by reason of her sex from performing an *ubhayam* in a temple. [p. 516, col. 2.]

It would ordinarily be the duty of temple authorities to receive money that may be tendered to perform a festival from whomsoever it may come. [p. 516, col. 2.]

The burden of proving that none but a male can perform an *ubhayam* or festival is on the person setting up such a special custom. [p. 516, col. 2; p. 517, col. 1.]

In cases where evidence has been let in by both parties to a suit, the best course is for the Court to weigh the evidence as a whole without throwing the burden of proof on either party. [p. 517, col. 1.]

The expression 'usage having the force of law' in section 100 (*a*), Civil Procedure Code, should ordinarily be confined to the usages of the country or of the community, the law merchant and usages referred to in section 11 of Act VIII of 1865. It is doubtful whether questions as to private rights fall within the section. [p. 517, col. 1.]

Where the judgment of a Court of Appeal on a question of custom or usage is reversed by the High Court in second appeal on a preliminary point, it should not take on itself to examine the evidence as to usage as if it were hearing a first appeal, but should remand the case for disposal by the lower Appellate Court. [p. 517, col. 1.]

Appeal under clause 15 of the Letters Patent, against the judgment of Mr. Justice Srinivasa Aiyangar, dated 21st July 1915, in Second Appeal No. 2376 of 1914, preferred against the decree of the District Court, North Arcot, in Appeal Suit No. 850 of 1913 (Original Suit No. 215 of 1912 on the file of the Court of the District Munsif, Ranipet).

Messrs. *T. R. Ramachandra Aiyar* and *T. M. Vedantam*, for the Appellant.

Mr. *V. Ramesam* (Government Pleader) and Mr. *N. S. Rangasami Aiyangar*, for the Respondents.

JUDGMENT.—The question in this case is whether the daughter of a Thathachari belonging to the Thandri family is disqualified from performing a festival in the Conjeevaram temple, by reason of the fact that she had been married into another family. The marriage may give her a different *gotram*, but it is not right to say that she ceases to belong to the family of her father on that account. She and her sons would be the heirs to her father's property. The right to perform a festival is a secular privilege, and has no connection with the right of Theerthams and other honours. The learned Judge in the Court below seems to have thought that the claim to perform the festival carried with it the right to Theerthams and to the other honours belonging to the Thathachari family. In this Court this portion of the judgment was not sought to be supported. It was argued that the right to perform a festival conferred an office and that such an office could be held only by a male member of the Thathachariar's family. There is no analogy between the holding of a subordinate trusteeship like a *kattalai dharmakartaship* and the performance of a festival. The cases quoted relate to the former class and have no bearing on the latter. On the other hand, it has been held in this Court that a female is not incompetent by reason of her sex from claiming the *archaka* right. *Tangirala Chiranjivi* v. *Raja Manikya Rao* (1) and *Rajeswari Ammal* v. *Subramania Archakar* (2). It would ordinarily be the duty of the temple authorities to receive the money that may be tendered to perform a festival from whomsoever it may come. In *Vengamuthu* v. *Pandaveswara Gurukal* (3) it was held that such a contribution from a dancing girl should not be rejected. *Prima facie*, therefore, the daughter of the last *ubayakkar* would be entitled to ask the temple trustees to receive the expenses of the festival from her. If it is objected to that none but a male could perform such a festival, it is for those that set up the special custom

(1) 25 Ind. Cas. 283; 27 M. L. J. 179.
(2) 32 Ind. Cas. 975; 40 M. 105; 30 M. L. J. 222.
(3) 6 M. 151; 2 Ind. Dec. (N. S.) 384.

to prove it. However, we do not want to decide this case on the ground that the defendants have not established their contention. We are clearly of opinion that the learned Judge is wrong in holding that the burden was on the plaintiff. In a case like this, when both sides have let in evidence, the best course would be to weigh the evidence as a whole without throwing the burden of proof on either party. In this view we must reverse the decree of the learned Judge of this Court and of the District Judge and remand the appeal to him for disposal on the merits.

Before we send the case down it is desirable to advert to the extreme contention that was put forward in this Court that in all cases, where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandra Aiyar, who came in at a later stage of the case, conceded that this contention is not supported by authority. The learned Vakil argued that the question whether on the facts as found, the Courts below were justified in saying that a custom has not been proved is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced, we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and in a measure its relevancy are all matters for the Court below and that the High Court would not be justified in weighing the evidence as if it were sitting to hear a first appeal.

It is open to doubt whether the expression 'a usage having the force of law' in section 100 (*a*) should not be confined to the usages of the country or of the community as suggested by Petheram, C. J., in *Nivath Singh* v. *Bhikki Singh* (4). Customs like presumption, the law merchant and usages like those referred to in section 11 of Act VIII of 1865 seem to have been in the contemplation of the Legislature. It seems doubtful whether a private right like the one we are considering falls within section 100, clause (*a*). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal. For the reasons already given, we allow the second appeal and remand it for disposal on the merits. The costs will abide the result.

*Appeal allowed; Case remanded.*

V. R. P.

(4) 7 A. 649 at p. 653; A. W. N. (1885) 151; 4 Ind. (N. S.) 830.

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## PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 305 OF 1916.

April 26, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

MAHAMAYA PRASAD SINGH AND OTHERS — JUDGMENT-DEBTORS—APPELLANTS

*versus*

*Musammat* SUKHDIYA KUAR—DECREE-HOLDER — RESPONDENT.

*Execution—Decision on preliminary point—Appeal, whether lies—Practice of Calcutta High Court, whether to be followed by Patna High Court.*

Where a judgment-debtor objected to execution on the grounds, *first*, that the decree was not capable of execution and, *secondly*, that there was nothing due under it, and the Court decided the first ground of objection against him:

*Held*, that no appeal lay against that decision before the second issue was gone into. [p. 518, col. 2.]

*Kamini Debi* v. *Promotha Nath*, 27 Ind. Cas. 317; 19 C. W. N. 755; 20 C. L. J. 476 and *Chanmalswami Rudraswami* v. *Gangadharappa Baslingappa*, 26 Ind. Cas. 885; 39 B. 339; 16 Bom. L. R. 954, followed.

Where there is a general practice sanctioned by concurrent decisions in Calcutta the Patna High Court will not depart from it. [p. 518, col. 1.]

Appeal against the decision of the Subordinate Judge, Darbhanga, dated the 5th December 1916.

Sir *Ali Imam* and Mr. *Murari Prasad*, for the Appellants.

Messrs. *Fakhruddin*, *Khurshaid Husnain* and *Jagannath Prasad*, for the Respondent.

JUDGMENT.—A preliminary objection is taken in this case that no appeal lies. The facts briefly are that the learned Subordinate Judge had before him two questions to consider—(1) Was the decree which he was asked to execute capable of execution? and (2) Was there anything due under it? The learned Subordinate Judge has decided the first issue against the judgment-debtor.

The judgment-debtor, therefore, wishes to appeal to this Court before the second issue is gone into. Whatever may be the rights of the matter in controversy it is quite certain that there has been a steady *cursus curiæ* in Calcutta that no appeal lies in such a case. Various authorities have been cited at length in the case of *Kamini Debi* v. *Promotha Nath* (1). The same view was taken in the Full Bench case *Channalswami Rudraswami* v. *Gangadharappa Baslingappa* (2).

It has constantly been said here that where there is a general practice sanctified by concurrent decisions in Calcutta we will not depart from it in Patna. The appeal is, therefore, dismissed with costs. Hearing fee three gold *mohurs*.

Let the record be sent back at once.

*Appeal dismissed.*

(1) 27 Ind. Cas. 317; 19 C. W. N. 755; 20 C. L. J. 476.

(2) 26 Ind. Cas. 885; 39 B. 339; 16 Bom. L. R. 954.

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MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 104 OF 1915.

October 11, 1916.

*Present*:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

KOVVIDI SATTIRAJU—DEFENDANT No. 2—APPELLANT

*versus*

PATAMSETTI VENKATASWAMI AND OTHERS—PLAINTIFF AND DEFENDANT No. 1 AND SUPPLEMENTAL RESPONDENT—RESPONDENTS.

*Hindu Law—Adoption by minor widow, validity of—Ratification of imperfect adoption, legality of—Majority Act (IX of 1875), s. 2.*

The age of capacity of a person, whether male or female, to make a valid adoption under Hindu Law commences at the age of 16, that is, on the completion of the 15th year. [p. 520, col, 1.]

A widow, therefore, has not the legal discretion to adopt a proper boy to her husband before she finishes the 15th year of her age. [p. 520, col. 2.]

It is only the widow's discretion exercised after she attains majority and is thus capable of legal discretion in civil matters that can validate the adoption made by her to her husband. The discretion cannot be replaced, when she is less than 15, by her guardian's intelligent and disinterested advice. [p. 520, col. 2.]

*Ranganayakamma* v. *Alwar Setti*, 13 M. 214; 4 Ind. Dec. (N. S.) 861, not approved.

Where a widow is directed by her husband to adopt a particular boy and she has no discretion in the matter, her adoption of that boy, even when she is under 15 years of age, is valid. [p. 521, col. 1.]

An imperfect adoption by a minor widow cannot be ratified by her after her attainment of majority. [p. 524, col. 1.]

Per *Oldfield, J.*—The ratification of an adoption should not be interpreted loosely as covering estoppel, which debars the party from denying, or conduct, which would establish against him a consent when the adoption was made. The only doctrine that is akin to it in its relation to adoption is the definition of ratification given by Lord Watson in *Stewart* v. *Kennedy*, (1890) 15 A. C. 75, as the 'confirmation of an imperfect obligation by the party who was not legally bound by it.' [p. 523, col. 2; p. 524, col. 2; p. 525, col. 1.]

**Appeal against the order of the Court of the Subordinate Judge, Cocanada, dated the 31st December 1914, in Appeal Suit No. 119 of 1914, preferred against that of the District Munsif, Cocanada, in Original Suit No. 624 of 1912.**

**Mr. *B. Narasimha Rau*, for the Appellant.**

**Mr. *S. K. Parthasaradhy Aiyangar* for Mr. *V. Ramesam*, for the Respondents.**

JUDGMENT.

**SADASIVA AIYAR, J.—The 2nd defendant is the appellant in this case. The plaintiff brought the suit for possession of the plaint lands as lessee from the 1st defendant who, the plaintiff alleges, was the adopted son of one Subbarayadu who died in 1907, having by his registered Will, executed shortly before his death, given authority to his widow, Viyyammal, about 11 years old at that time, to make an adoption, if, and when, she chooses. The 1st defendant is still a minor and the lease relied upon by the plaintiff was by his alleged adoptive mother's father acting as guardian of the 1st defendant and is dated July 1912. Viyyammal attained majority in February 1914, about 1½ years after this suit was brought. The 1st defendant's adoption is said to have taken place in May 1907 very soon after her husband's death. One of the defences raised in the case is that the 1st defendant was not validly adopted to Subbarayadu by Viyyammal and that, therefore, the plaintiff cannot maintain the suit as the 1st defendant's lessee. The District Munsif held that the 1st defendant's adoption was invalid and dismissed the suit.**

I think it convenient to consider at this stage some of the important precedents on this point. (*a*) In *Mondakini Dasi* v. *Adinath Dey* (1) it was held that an adoption by a widow who was a minor at the time (that is, who had not attained her 18th year according to the Indian Majority Act) would be valid, provided the widow had attained sufficient maturity of understanding to comprehend the nature of the act, especially if her husband had indicated the boy to be adopted and left her no discretion in the matter of 1st defendant's adoption, and it is found by both Courts that (Viyyammal was only about 11 years old) she had not attained sufficient maturity of understanding to exercise a proper discretion as to the boy to be adopted. Hence the adoption was invalid if her discretion was a *sine qua non*. (*b*) In *Ranganayakamma* v. *Alwar Setti* (2), it was held that a 13 years' old widow had not sufficient discretion of her own to choose a proper boy for adoption, but that the "intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard to her interest, so far as it is compatible with such necessity," can take the place of her own discretion. "There must, however, be cogent evidence of such intelligent and disinterested guidance." These observations were, however, *obiter dicta* as the adoption in that case was set aside on the ground that the consent of the widow of 13 years of age was obtained by coercion and she repudiated the adoption in the suit. (*c*) In *Jumoona Dassya* v. *Bamasoondari Dassya* (3) it was held that a youth of 15 or 16 had attained years of discretion according to Hindu Law and is capable of giving permission to his widow to adopt though, not having attained the age of 18 years, he was a minor for most other purposes. (*d*) In *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (4) this Court (Davies and Benson, JJ.) held that an adoption made by a major widow under coercion is only voidable by her and can be ratified by her; but when that case went up on appeal to the Privy Council [*Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (5)], the adoption was set aside on some other ground (namely, that the power given by the husband to the two widows jointly had lapsed by the death of one of them) and their Lordships had not to consider the question whether an adoption made under coercion can be ratified by a major widow. (*e*) In *Amrito Lal Dutt* v. *Surnomoye Dasi* (6) their Lordships of the Privy Council state that a husband could not give power to anybody except his widow to make an adoption. I shall quote the following passages from that judgment:—"That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu Law, and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in *various ways*, and among them by requiring the consent of persons named by the husband, is also familiar law." The learned District Munsif found as a fact in this case (*a*) that Viyyammal exercised no discretion in the matter of the adoption and (at her age at the time) wes not capable of exercising any discretion; (*b*) that her father who acted as her guardian did not give disinterested advice to her in the matter of the adoption; (*c*) that the authority to adopt given by the husband required as a *sine qua non* the exercise of her own discretion that is, the power to adopt was so *restricted* by the husband that it could be exercised only *according to her own discretion* and that even if the substitution of the guardian's disinterested advice allowed by *Ranganayakamma* v. *Alwar Setti* (2) could be applied, there was no such disinterested advice given in this case, the advice (if any was given) having been very much interested.

On appeal, the learned Subordinate Judge "quite" agreed with the District Munsif that Viyyammal was not at the time of the alleged adoption of an age which rendered her capable of exercising her own discretion in the matter of the adoption and that the advice of her legal guardian was not at all disinterested.

(1) 18 C. 69; 9 Ind. Dec. (N. S.) 47.
(2) 13 M. 214; 4 Ind. Dec. (N. S.) 861.
(3) 1 C. 289; 25 W. R. 235; 3 I. A. 72; 3 Sar. P. C. J. 602; 3 Suth. (P. C.) J. 222; 1 Ind. Dec. (N. S.) 182.
(4) 29 M. 437; 16 M. L. J. 178.
(5) 23 Ind. Cas. 166; 37 M. 199; (1914) M. W. N. 299; 12 A. L. J. 315; 16 Bom. L. R. 328; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 41 I. A. 51 (P. C.).
(6) 27 C. 996; 27 I. A. 128; 4 C. W. N. 549; 2 Bom. L. R. 446; 7 Sar. P. C. J. 633 14 Ind. Dec. (N. S.) 652.

KOVVIDI SATTIRAJU v. PATAMSETTI VENKATASWAMI.

He did not deal with sufficient clearness with the question whether the power given to her by her husband did not require as a *sine qua non* the exercise of her own discretion. He found that Viyyammal's father did not give her an opportunity to exercise her own discretion in the matter and did not even consult her about the desirability of adopting a boy. But he remanded the suit to the District Munsif in order that, as she was, on the date of the Subordinate Judge's judgment, nearly 19 years old and was in a position to state whether she would ratify the act that was done when she was 11 years old, she might be asked whether she ratified the act of adoption and that then the suit might be decided. Against this remand order, the present appeal has been filed by the contesting defendants. Several interesting questions of Hindu Law were discussed during the course of the arguments in this case, and I shall shortly state my views thereon, though I believe that for the decision of this case, it is unnecessary to express a final opinion upon most of these questions.

The Indian Majority Act fixing 18 years as the age of majority says in section 2: "Nothing herein contained shall affect the capacity of any person to act in the following matters:—(*a*) marriage, dower, divorce and adoption:" We have, therefore, to turn to the Hindu Law as to the age of capacity of a person to make a valid adoption. The age of majority for both males and females according to Hindu Law, in my opinion, commences at the age of 16 (Praptetu Shodase Varshe), that is, on the completion of the fifteenth year. [See *Methoormohun Roy* v. *Scorendro Narain Deb* (7) and also *Madhusudhan Manji* v. *Debi Govinda Newgee* (8).] Though the parents can give a girl in marriage before she completes her fifteenth year, the real and final marriage in the days of the old Hindu Law took place when both bride and bridegroom were majors over 15 years of age. Even when the damsel becomes "marriageable", that is has attained her 15th year, she is recommended in Chapter 9, Sloka 90 of Manu, to wait three years before she chooses for herself; even that is only a moral precept as is shown by the next Sloka 91, which says that she does not commit any offence if she chooses her bridegroom after she attains her marriageable age. The gloss of "eight years" in Sloka 88 of Manu is that of the ingenious commentator and is not in the text. (See also Sloka 93, which says that the father's dominion ceases when the damsel is of full marriageable age.) In the Privy Council case of *Jumoona Dassya* v. *Bamasoondari Dassya* (3), also, it is said that a male youth of the age of 15, of "the full age of adolescence", is regarded as having attained the age of discretion according to Hindu Law and capable of adopting. I do not think that Mr. Justice Mitter in *Rajendro Narain Lahoree* v. *Sooroda Soonduree Dabee* (9) intended to state that even before 15, a male Hindu could adopt, and if he meant it, I respectfully dissent from that opinion. I am also clear that, according to Hindu Law, a widow has not got the legal discretion to adopt a proper boy to her husband before she finishes the 15th year of her age. The *obiter dictum* also in *Ranganayakamma* v. *Alwar Setti* (2) is that a widow of 13 years was not possessed of such discretion. There is nothing in that judgment to indicate that she is capable of exercising such discretion before she completes her 15th year. The Privy Council having held in *Amrito Lal Dutt* v. *Surnomoye Dasi* (6) that the only person who could make an adoption to her husband is the widow, I am inclined to hold that the *obiter dictum* in *Ranganayakamma* v. *Alwar Setti* (2), that her discretion could be replaced (when she is less than 15) by her guardian's intelligent and disinterested advice, cannot be supported. Apart from the decision of the Privy Council also, I am clear on the Hindu Law that it is only the widow's discretion exercised after she attains majority and is thus capable of legal discretion in civil matters that can validate the adoption made by her to her husband. I am further of opinion that the dictum in

(7) 1 C. 108; 24 W. R. 464; 1 Ind. Dec. (N. S.) 71.
(8) 1 B. L. R. 49 (F. B.); 10 W. R. (F. B.) 36.

(9) 15 W. R. 548.

*Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (4) (the decision in which as I said was reversed by the Privy Council on another point) that an adoption under coercion may be ratified just as a contract under coercion can be ratified is not, with the greatest respect, sustainable as the act of adoption is not an act in the nature of a contract and the validity of an act changing the status of a person cannot be made to remain in suspense at the option of the acters in the transaction. The question of coercion and voidability again does not arise in the present case. It is not alleged that the adoption of Viyyammal was brought about through coercion and hence is voidable, but the contention is that she was incompetent to give a valid legal consent to take a boy in adoption and to accept the gift made of a boy in adoption to her husband having then not attained the legal age of discretion according to the Hindu Law. The analogy applicable (if analogy from the law of contract is at all legitimate) is rather that of a contract made by a minor than that of a contract made by a major under coercion.

Even assuming for the sake of argument (*a*) that Viyyammal's guardian's advice, if disinterestedly given, could supply the place of her own consent and discretion, (*b*) that the Hindu Law does not require her to have passed her 15th year before she could make a valid adoption, I must hold, on the finding that she was not asked her consent at all and that her guardian's advice was not disinterested, that the adoption was wholly invalid and could not be ratified. I am also clear that if her consent was an indispensable requirement under her husband's Will, her guardian's advice cannot be substituted for it. Where the widow was directed to adopt a particular boy by her husband and she had no discretion at all in the matter, then it may be that she might have validly adopted that particular boy even though she was less than 15. (See *Mondakini Dasi* v. *Adinath Dey* (1).

Before concluding, I should like to fortify myself with the opinions of the two text writers (whom I consider as the best Sanskritists among English knowing Hindu Lawyers) on the questions of minority and the age of competence to adopt. Jogendra Chunder Ghose says in his book on Hindu Law at page 851: "There is a divergence among Bengal and Benares writers about the age of majority under Hindu Law. The former says that it is the beginning and the latter that it is the end of the 16th year. The text of Angira shows that the Bengal writers are right." And then he quotes at page 855 texts of Angira, Manu, Vishnu, Sankha, Lakhita, Narada and Brahaspati, which, read as a whole, clearly establish that till the end of the 15th year (Una Shodesa) a person is a *bala* and then become a major on entering the 16th year. At page 584 the learned author says:—"The Privy Council have held that a minor of the age of 15 or 16 can give a valid permission to his wife to adopt. Mr. Mayne has interpreted the judgment of Mr. Justice Mitter on this matter to hold that a boy between the years of 10 and 16 can adopt. But the act of taking in adoption is not only a religious act but a legal transaction (*vyavahara*) and one who has not attained the 16th year is incapable of validly entering into such a transaction under the Hindu Law. (See Narada, XIII, 32 to 36)." I shall now quote a few passages on the Hindu Law of adoption, Tagore Law Lectures, 1888, by Golap Chandra Sarkar Sastry, M.A., B. L. At page 207 *et seq.* that learned author says:—"An important question arises whether there is any limit as to the minimum age under which a person should not be permitted to adopt. The question is beset with considerable difficulty in consequence of there being no express rule of Hindu Law on the matter; and the solution of it must, therefore, depend upon general principles of law and analogies." "It is worthy of remark here that as adoption imitates nature, the relative age of the adoptor and the adoptee should be such that the one may be looked upon as the son of the other. Accordingly it was required by Roman Law that the adoptor should be older than the person adopted by full puberty, that is, 18 years. The same thing appears to be implied by Saunaka's text, which says that the boy adopted should bear the reflection of a son, though it has been explained by Nanda Pandita in quite a different way. He says that the boy should be one who is capable of being begotten on his natural mother by the adoptive father. This explanation

is, no doubt, given for a different purpose but it has also an important bearing on this question. Judged by this test an adoption by a minor appears most unreasonable." "The boy adopted is entitled to become an heir not only of the adoptor but also of his relations and to become his co-parcener under the Mitakshara school. Therefore, the same reasons that require majority of a man for his competency to bequeath his property by a Will, apply with greater force to an adoption; for both are acts requiring judgment and reflection." "The religious duty of adoption attaches to a married man failing to get male issue. And regard being had to the provisions of the Codes, relating to the religious duties in the successive stages of life, there cannot be any doubt that a man cannot contract a marriage during his minority without a breach of religious duties. He is to commence the study of the sacred literature at the 8th year (Manu II, 36), to prosecute his studies for a period at the lowest of 12 or 9 years (Manu III, 1) and after the studentship is over, he is to become a householder by marrying a damsel before her puberty. He may, on the lowest calculation, get a son at the age of 20, and failing to get one, may adopt. It follows, therefore, that *religious considerations can by no means be put forward for supporting an adoption by a minor.*" "There is nothing to be found in the *Shastras* contemplating marriage by a man in his minority. The Hindu Law does nowhere provide guardianship of a male for the purpose of his marriage. On the other hand, its provisions on the subject show that a man is to choose his own wife and to maintain and protect her himself. A perusal of the prescribed ceremonial law of marriage cannot leave any doubt on the mind that the bridegroom passing through the rites must be a grown-up man of mature understanding. Manu ordains 'a man aged 30 years may marry a girl of 12 years; or a man of 24 years a damsel of 8; but if he finishes his studentship earlier, let him marry earlier.' Whatever interpretation you may put upon this passage, it shows beyond the shadow of a doubt that the marriage of men during minority cannot be justified on religious grounds. Far less can an adoption by a minor be supported by religious considerations." At page 249 in the same work it is said: "An act of adoption by a widow, which she is not legally bound to perform, which is not conducive to her spiritual welfare" (as "a widow may attain to heaven by practising religious austerities though destitute of male issue") "but which is highly detrimental to her temporal interests by causing divestment of her estate, must, in order to be legally binding on her, be shown to be done by her as a perfectly free agent." "When an adoption by a young widow is set up against her, the Court will expect clear evidence that at the time she adopted, she was fully informed of those rights and of the effect of the act of adoption upon them." "Regard being had to the above principles, it appears to be clear that an adoption by an infant widow, if not *ab initio* void, is voidable in law." "To hold that an adoption in which an infant widow is caused to take a part mechanically is valid in law, would be legalizing a pious fraud; for it must virtually be the act of those under whose custody the infant widow may be placed, and who abuse the authority they possess over the widow by making her to adopt when she is incapable of understanding the effects of the act on her own rights, apprehending that she may refuse to do so, after attaining majority, being influenced more by her personal interests than by the pious duty of adopting a son to her deceased husband. A Bombay Sastri gave his opinion *that a widow while under puberty cannot adopt.* (See Steele's Law and Customs, page 48.) The reason for the rule may be that she is incompetent to bring forth a son then, an adoption by a woman being supposed to be analogous to the production of a son". Then the author refers to the absurdity of the idea of a girl having a fictional son when she is naturally incapable of having a real son. Though I have quoted at length these two writers to support my views as against the views in *Ranganayakamma* v. *Alwar Setti* (2), *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (9) and *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (4), I think, on the facts found in this case by both the lower Courts, that there is no valid adoption even if the *dicta* found in these cases are accepted in their entirety. I would, therefore, allow the appeal and restore the decree of the District Munsif with costs here and in the lower Appellate Court.

OLDFIELD, J.—I agree with the conclusions reached in my learned brother's judgment, which I have had the advantage of reading. But I prefer to rest my decision on narrower grounds.

Plaintiff sued 2nd to 8th defendants for possession of certain properties, alleging that he held them on lease granted by the guardian of 1st defendant, alleged adopted son of one Subbarayudu. Second to eighth defendants, who claim under Subbarayudu, now deceased, denied that 1st defendant had been validly adopted. The adoption is said to have been made by Viyyammal, widow of Subbarayudu, in pursuance of a permission to adopt contained in his Will. First defendant is Viyyamma's brother. The first question is whether 1st defendant had been validly adopted, as he alleges, in 1907 before the plaintiff's lease in 1912.

In 1907 Viyyammal was aged between eleven and twelve and I respectfully adopt my learned brother's reasons for holding that for the purpose of adoption she was still a minor. No clear authority having been shown for the view that with reference to any special period of minority she had attained competency to adopt at the time in question, the decisions in *Mondakini Dasi* v. *Adinath Dey* (1) and *Ranganayakamma* v. *Alwar Setti* (2) are relevant. No doubt in each a decision as to the circumstances in which a minor widow could adopt was unnecessary since in the one the boy to be adopted was specified in the Will containing the authority to adopt and in the other the adoption was held to have been procured by coercion. But in the absence of any more recent or direct authority, the conclusion based on these two cases must be that "sufficient maturity of understanding to enable the widow to comprehend the nature of her act" is necessary, and further that, as this Court held in the second, there must be "cogent evidence of her having acted under the intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard for her interest so far as it is compatible with such necessity." I agree with my learned brother that in the present case the lower Court's findings of fact entail that the adoption in 1907 was invalid.

There is more room for controversy in connection with the remainder of its judgment, in which it remanded the case in order that Viyyammal might be impleaded and a re-trial might be held with reference to the possibility of her having validated or being able and willing to validate the adoption with effect from a date prior to plaintiff's lease. This remand will plainly be useless, if no such validation is legally possible. We have had Viyyamma made a party to the appeal, and she supported the contentions of plaintiff and 1st defendant.

The question is one of some difficulty, regarding which there is very little authority: and the value of that authority is impaired by the fact that in some cases the term "ratification" is used loosely, apparently as equivalent to conduct which would amount to evidence that a valid adoption had been made, or to an estoppel against the denial of one. Again we clearly have no concern with such interpretations of the term as that by Lord Macnaghten in *Stewart* v. *Kennedy* (10), where its use in a private letter was in question; or with cases of acceptance by one person of the acts of another, as for instance of an agent or guardian. What plaintiff requires is judicial recognition or ratification or some doctrine akin to it, as applicable to the case before us; such a doctrine in fact as is implied in the definition of ratification given by Lord Watson in the case just referred to; to quote the relevant portion of it, "the confirmation of an imperfect obligation by the party, who was not legally bound by it." I refer to a doctrine akin to ratification, because the accuracy of the description of an adoption as an obligation cannot be assumed. It is further material with reference to Indian Law that this definition is applicable to no power ordinarily exercisable by a minor, because a minor can incur no sort of obligation during minority, his contractual acts being void *ab initio*. *Mohori Bibee* v. *Dharmodas Ghose* (11) and *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (12).

The case of an adoption by a minor widow is *sui generis*. The decisions in *Mondakini*

(10) (1890) 15 A. C. 75.

(11) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.).

(12) 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233.

*Dasi* v. *Adinath Dey* (1) and *Ranganayakamma* v. *Alwar Setti* (2), already referred to, and that in *Amrito Lal Dutt* v. *Surnomoye Dasi* (6) show that notwithstanding her minority, the legal act can and must be performed by her, not by her guardian on her behalf. This is borne out in the present case by the terms of the authority under which the widow professed to act, which empowered her, not only to choose the boy to be adopted, but also to decide whether there should be an adoption at all. Does the right of independent action, conceded to the minor in this matter, place her act on the same footing as that of an adult with reference to ratification or any similar doctrine? It seems to me that it cannot do so, where, as here, the defect in the original act, which has to be repaired, consists in the failure to obtain the guardian's disinterested advice. For though the grounds on which such advice was insisted on by this Court in *Ranganayakamma* v. *Alwar Setti* (2) are not stated, that case to my mind lays down a condition precedent, which must be fulfilled before the act of the minor, a generally incapacitated person, can have any degree of validity, and does not, like the cases dealing with adult *purdanashin* ladies, merely lay down a rule of evidence. If the minor widow's act is *ab initio* totally invalid for want of independent advice, it cannot be validated later by anything of the nature of ratification.

The foregoing assumes that an adult widow can validate an adoption originally imperfect by subsequent conduct. That position also, however, is in my opinion unsustainable. It is supported by one authority only [*Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (4)]. It is material that no one's interest was prejudicially affected in that case by the subsequent ratification in consequence of anything which happened before it, and that the lady, who made the adoption, was dead when the litigation began. And accordingly when the Court had found that during the years, for which she lived after the ceremony she fully agreed to the adoption and was anxious to establish it, it would naturally strive to uphold it. It did so very shortly on the grounds that Hindu Law did not treat an adoption as void on account of coercion, the objection under consideration, and that under the Law of Contract, it would be only voidable. This conclusion was reached without reference to the decisions to be cited *infra* and it was not disputed when the case went on appeal to the Privy Council, the judgment there proceeding on other grounds.

The decisions in question were given in Bombay; and no doubt they deal directly with the ratification of an imperfect adoption, not by the widow who made it but by the person, in whom the inheritance had vested and whose consent to an adoption has been held essential to its validity in that Presidency. They do not, however, turn on any merely local conception of the effect of an adoption, in so far as they are relevant for the present purpose; that is, in so far as they deal with the possibility of validation by subsequent acts or conduct. That possibility is no doubt recognised in *Payapa Akkapa Patel* v. *Appanna* (13), where subsequent ratification by conduct or acquiescence on the part of the person] in whom the estate was vested by inheritance is referred to, as one condition of the validity of an adoption and as an alternative to his contemporaneous consent. But it must be added with all respect that the reference to ratification was merely *obiter*, since none was relied on in the case before the Court, and that it is hardly reconcilable with the marked insistence on the contemporaneous character of the consent to be required in the portion of the judgment in which consent is dealt with. It is significant that of the cases relied on by Ranade, J., as authorising ratification, three were evidently cases of estoppel and the fourth, *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* (14), was decided mainly with reference to the conclusion, based *inter alia* on the conduct of members of the family, that the Will containing the authority to adopt was genuine; and it is, therefore, possible that the learned Judge referred loosely to ratification as covering estoppels, which debarred the party from denying,

(13) 23 B. 327; 12 Ind. Dec. (N. S.) 217.
(14) 14 M. I. A. 67; 7 B.L.R. 216; 15 W.R. (P.C.) 41; 2 Suth. P. C. J. 422; 2 Sar. P. C. J. 666; 20 E. R. 711.

or conduct, which would establish against him, a consent when the adoption was made. This interpretation of the judgment is supported by the absence of any attempt to reconcile the portion of it relating to ratification with the previous Full Bench decision, *Vasudeo Vishnu Mànohar* v. *Ramchandra Vinayak Modak* (15), in which Ranade, J., had concurred, though on grounds of his own. His colleagues held that in the words of Farran, C. J.: "The adoption in question must have been either valid or invalid at the time it took place and its validity could not depend on the subsequent action of one of the persons, in whom the estate had vested and who was alleged to have consented later." As Fulton, J., observed, there was at that date no authority for holding that subsequent assent could validate an adoption, which was not valid when made. I am not able in the circumstances already stated to accept the later Madras decision above referred to, as conclusive in favour of an application of the doctrine of ratification, which appears to be objectionable on its merits. I, therefore, concur with my learned brother in deciding against it.

The result is that the appeal is allowed with costs here and in the lower Appellate Court and the decree of the District Munsif restored.

*Appeal allowed; Suit dismissed.*

(15) 22 B. 551; 11 Ind. Dec. (N. S.) 949.

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PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1016 OF 1916.

April 4, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

SUBALAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

RAMESHWAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage-decree against father—Execution—Sale—Redemption, suit for, by son not in existence at date of decree, maintainability of—Right of son not made party to suit.*

A son, who was not born at the date of a mortgage-decree and sale, cannot bring a suit for redemption of the mortgage; nor can a son succeed in a redemption suit after sale on the sole ground that he was not impleaded as a party in the mortgage suit against his father, even though the mortgagee had notice of his existence, unless it is proved that he was intentionally omitted from the mortgage suit in order to defeat his right to redeem. [p. 525, col. 2.]

*Ranjit Prasad Tewari* v. *Ramjatan Pandey*, 37 Ind. Cas. 833; (1917) Pat. 113; 1 P. L. W. 197, followed.

Second appeal from the decision of the District Judge, Darbhanga, dated the 14th July 1916.

FACTS appear from the judgment.

Mr. *Saroshi Charan Mitra*, for the Appellants relied upon section 85, Transfer of Property Act, and Order XXXIV, rule 1, new Civil Procedure Code.

Mr. *Pugh* (with him Mr. *Murari Prasad*), for the Respondents, cited *Ranjit Prasad Tewari* v. *Ramjatan Pandey* (1).

JUDGMENT.

CHAPMAN, J.—In this case three junior members of a joint Mitakshara family sought to redeem a mortgage. In the suit which had been brought upon that mortgage their fathers had been made parties and the litigation had ended in the sale of the mortgaged property.

Of the three plaintiffs it has been found that plaintiff No. 3 was not born at the time of the decree and sale. In respect of the plaintiff No. 1 it has been found that the mortgagee had no notice of his existence. These two cases, therefore, both upon the authorities and upon the law failed and there can be no doubt whatever that the suit was rightly dismissed.

With regard to plaintiff No. 2 the finding is that he was a party in another mortgage suit which was tried along with the mortgage suit which ended in this sale and that he actually prosecuted the defence and looked after both cases. No room, therefore, is left for any possible finding that this plaintiff No. 2 was intentionally omitted from the mortgage suit in order to defeat his right to redeem, and it is only in such cases that any concession has been made by this Court in favour of a son seeking to redeem his father's mortgage after sale. Four Judges of this Court* have concurred in holding that even if the mortgagee has notice of the existence of a son, the son has

(1) 37 Ind. Cas. 833; 1 P.L.W. 197; (1917) Pat. 113

*Ranjit Prasad Tewari v. Ramjatan, Pandey 37 Ind. Cas. 833; 1 P. L. W. 197; (1917) Pat. 113, Chamier, C. J., and Sharfuddin, J. and *Raghunandan Singh* v. *Permeshwar Dayal Singh*, 39 Ind. Cas. 779; 1 P. L. W. 636; 2 P. L. J. 306; (1917) Pat. 137; Chapman and Roe, JJ.—*Ed.*

no right to redeem merely upon the ground that he was not a party to the mortgage suit.

The appeal fails and is dismissed with costs.

JWALA PRASAD, J.—I agree.

*Appeal dismissed.*

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MADRAS HIGH COURT.

ORIGINAL SUIT APPEAL No. 26 OF 1916.

October 13, 1916.

*Present*:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Burn.

SOORTHINGJEE SAKALCHAND—PLAINTIFF—APPELLANT

*versus*

MAHOMED NASURUDEEN AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Contract, C. I. F., meaning and scope of—Mercantile usage—Contract Act (IX of 1872), ss. 56, 78—Effect of s. 78 on concluded C. I. F. contract—War Proclamation of 12th September 1914 (Commercial Intercourse with Enemies Ordinance VI of 1914)—Contract, C. I. F., for sale of goods by enemy firm—Declaration of hostilities before delivery of documents, effect of—Impossibility of performance—Non-enforceability of contract—Release of goods, effect of.*

The effect of a C. I. F. contract is that the buyer under it is entitled to the documents of title only on payment of the money due on those documents. Until then, he has no right to the goods. [p. 529, col. 2.]

Where the documents of title are made out to the order of the shippers vendors, the buyer does not acquire any right to the goods before he obtains the documents of title in exchange for payment and a contract of that description is not overridden by section 78 of the Contract Act which expressly reserves from its operation any special contract which the parties may enter into and impliedly accept the ordinary incidents attached to it by mercantile usage. [p. 529, col. 2.]

A buyer who had contracted for the supply of goods by an enemy firm before the commencement of hostilities under a C. I. F. contract cannot enforce its performance if, before delivery of documents to him, war had been declared. The contract had become impossible of performance and void by the combined operation of section 56 of the Contract Act and the Proclamation of 12th September 1914. [p. 530, col. 1.]

*Arnhold Karbery & Co.* v. *Blythe, Green, Jourdain & Co*, (1915) 2 K. B. 379; 84 L. J. K. B. 1673, followed.

*G. C. Sett* v. *Madhoram Hurdeodass*, 33 Ind. Cas. 540 at p. 544; *Esposito* v. *Bowden*, (1857) 7 El. & Bl. 763; 27 L. J. Q. B. 17; 3 Jur. (N. S.) 1209; 5 W. R. 732; 119 E. R. 1430; 29 L. T. (O. S.) 295; 110 R. R. 822, distinguished.

The fact that the goods were released by Government after having been temporarily detained will not have the effect of reviving the contract or renewing the validity of the contract which had become void before the order of release was passed. Its only effect is that the Government withdraws its hands so that any party entitled to the goods may establish his right to them. [p. 530, cols. 1 & 2.]

Appeal from the judgment of Mr. Justice Bakewell, dated the 14th March 1916, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 396 of 1915.

FACTS appear from the following judgment of

BAKEWELL, J.—The plaint in this case recites two indents, whereby the plaintiffs instructed an Austrian firm, of whom the 1st defendant was the agent, to import certain goods for the plaintiffs on C. I. F. contracts, and alleges that in July 1914 the plaintiffs accepted drafts drawn upon them by this firm and payable upon delivery of the shipping documents, but that the goods had been shipped in a German vessel which, after the outbreak of war, was detained at Colombo by the Crown. The plaint also alleges that the property in the goods became vested in the plaintiffs by appropriation to the contracts and by the plaintiffs according their assent to the appropriation by accepting the drafts. The drafts are addressed to "Mr. Soorthingjee Sakalchand, Madras, in case of need with Mr. Muhammad Narasudeen, Madras", and the indents authorise the latter, who is the 1st defendant, upon the plaintiffs' failure to pay the drafts to sell the documents or goods. The drafts accepted by the plaintiffs were originally held by the National Bank of India as agents for collection of the Austrian firm, and they were also in possession of the bills of lading which were drawn "to order" and had been endorsed by that firm in blank. The plaint alleges that the plaintiffs were always ready and willing to pay the drafts as soon as there was a prospect of the goods being delivered in Madras, and that the first defendant waived any delay in payment. But nevertheless, the first defendant paid the amount of the drafts to the Bank and obtained the shipping documents without informing the plaintiffs and by a collusive sale transferred the goods to the 2nd defendant. The plaintiffs' case, therefore, is that the defendants have obtained possession of goods belonging to the plaintiffs by means of a trick played upon a person who held the goods on behalf of the plaintiffs,

SOORTHINGJEE SAKALCHAND v. MAHOMED NASURUDEEN.

In the first place, it is clear that the foreign vendor of the goods by taking the bills of lading to order retained the power of dealing with the goods and the authority of his agents, the National Bank, was to deliver the documents of title only on payment of the price. The contract between the parties was, therefore, wholly executory, the vendor had still to deliver the documents and the purchaser had still to pay the price, when war was declared. I think that it is clear that such a contract is rendered void by the outbreak of the war, on the ground that it involved trading with the enemy. [See *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1). and *Janson* v. *Driefontein Consolidated Mines Limited* (2).] The Royal Proclamation of the 5th August 1914, which was extended to the monarchy of Austria-Hungary by a further proclamation, dated 12th August 1914, recites that it is contrary to law to trade or have any commercial intercourse with any person resident or carrying on business in that country and warns all persons not to obtain goods from any such person, "not to trade in or carry any goods, wares, or merchandise, destined for or coming from the said Empire or from any person resident, carrying on business or being therein." These proclamations were superseded by a further proclamation dated 12th September 1914, which contains the following prohibitions :—" 5 (1) not to pay any sum of money to or for the benefit of an enemy." " 5 (4) not to accept, pay or otherwise deal with any negotiable instrument which is held by or on behalf of an enemy."

I think that it is clear that, under those proclamations, the plaintiffs were prohibited from paying and the Bank from receiving the sums specified in the drafts accepted by the former and that delivery of the goods was also prohibited, that such payment and delivery became criminal acts, and the original contracts became unlawful and impossible of performance and void (Contract Act, section 56). The plaintiffs cannot, therefore, set up the suit contracts as conferring any right upon them.

(1) (1915) 2 K. B 379; 84 L. J. K. B. 1673.
(2) (1902) A. C. 484 at p. 509; 71 L. J. K. B. 857; L. T. 372; 51 W. R 142; 7 Com. Cas. 268; T. L. R. 796.

The learned Counsel for the plaintiffs argued that the goods in question had been released by the Colombo Prize Court, on the strength of the documentary and other evidence which he put in, but the only evidence which I can entertain of the proceedings of that Court is a duly certified copy of its records and as the record now stands, there is no evidence as to whether that Court has passed any orders with respect to these goods. I refused to grant an adjournment of the hearing made in the course of the trial because there has been previous litigation between the parties with respect to the same goods, and the plaintiffs have had ample time and opportunity to procure evidence. The Crown having admittedly seized the goods as prize and there being no evidence that they have been released, the plaintiffs have failed to prove their title to them and the suit also fails for this reason.

From some of the documents which have been put in, it would appear that the goods in question were sent to Madras in the vessel in which they had been originally shipped, that the bills of lading were returned to the National Bank, and that a local firm were acting as agents of the Colombo Prize Court with respect to these goods, and these facts are consistent with an order of that Court condemning the goods as enemy goods. The learned Counsel for the plaintiffs argued that, if this order had been made and if that Court had instructed its agents to sell to the plaintiffs at the invoice price, the defendants were liable to the plaintiffs for fraudulently obtaining a sale to themselves. It is sufficient to say that this is not the case alleged in the plaint, which is based upon plaintiffs' title to the goods under their contract of sale, and after the protracted litigation between the parties, the plaintiffs cannot be allowed at this stage to set up a new case.

Before judgment was delivered Counsel for plaintiffs applied again for an adjournment on the ground that they had received information that an order had been made on 15th August last for the release of those goods—that is no explanation of the delay in obtaining this evidence and I refuse the application.

The suit is dismissed with costs. I refuse

two sets of costs, there is no reason for the separate appearance of the defendants who have the same interest.

I cannot make any order in this suit with respect to the disposal of the goods in view of future proceedings.

Messrs. *D. Chamier* and *M. D. Deva Doss* (instructed by Messrs. *Short* and *Bewes & Co.*), for the Appellants.—The contract to sell bangles has become an executed contract and the declaration of war has no effect upon the rights of the parties. The samples were shown to the purchasers and they gave a draft for payment of the amount.

Under the Indian law the property in the goods vested in the plaintiffs immediately after the price was settled and the draft given, though its payment may be postponed to a distant date. See section 78 of the Indian Contract Act.

The decision in *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1) does not apply, because it is a decision on the Sale of Goods Act which was entirely different from sections 77 and 78 of the Indian Contract Act.

In *G. C. Sett* v. *Madhoram Hurdeodass* (3) Mr. Justice Chaudhuri says that the effect of the declaration of war was only to suspend the contract and not entirely to avoid it. *Motishaw & Co.* v. *Mercantile Bank of India* (4) is a similar case.

The first defendant is personally liable, though not the Austrian firm, and the plaint may be permitted to be amended.

Messrs. *C. P. Ramaswami Aiyar*, *V. V. Srinivasa Aiyengar* and *A. Duraiswami Aiyar*, for the Respondents.—This is what is called a C. I. F. contract. The purchaser is entitled to the goods and the right in them passes to him only on payment of the price. The fact that goods arrived in the port does not make any difference. *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1).

Here in this case, part of the contract remains unperformed, the documents of title had to be delivered by the Austrian firm. Until, that is done, the contract is not complete. Immediately after the declaration of war, the agency of the National Bank had ceased and the performance of the contract has become unlawful.

The case in *G. C. Sett* v. *Madhoram Hurdeo dass* (3) has no application. Also that reported as *Motishaw & Co.* v. *Mercantile Bank of India* (4), which is a case of a bill of exchange in which both parties were British subjects.

JUDGMENT.—This is an appeal from the judgment of Mr. Justice Bakewell, dismissing the plaintiff's suit which was instituted with the object of recovering a certain quantity of glass bangles from the defendants. The 1st defendant was an agent of an Austrian firm and in his capacity as such agent entered into a contract with the plaintiff for the supply of glass bangles. The contract was entered into some time in April or May 1914 and the plaintiff accepted two drafts for the price of the goods on 22nd July of that year. War was declared with Austria on the 12th August and the steamer "*Steinturn*", in which the goods were shipped, arrived in Ceylon on the 15th of August, that is, three days after the declaration of the war. It is sufficiently clear that the cargo which was at first detained by the Government was subsequently released, and the formal order of release so far as these goods were concerned was passed on the 26th of August 1914. The bills of lading were in the possession of the National Bank of India in Madras, who acted as agents for the collection of the drafts and for the purpose of making over the documents relating to these goods as agents of the Austrian firm. The bills were payable on the 22nd of August; the goods have not yet been delivered to the plaintiff and the drafts have not been paid.

Mr. Justice Bakewell has held that since the performance of the contract became wholly void on account of the outbreak of the war with Austria and as by virtue of the Royal Proclamation issued on the 5th of August 19.4 and 12th September 1914 it became unlawful to trade with the enemy, the suit of the plaintiff for recovery of the goods could not be maintained. Section 56 of the Contract Act seems to me to be perfectly clear on the

(3) 33 Ind. Cas. 540 at p. 544.
(4) 37 Ind. Cas. 258; 18 Bom. L. R. 521 at p 531.

point. It declares that "a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

It is argued by Mr. Chamier on behalf of the appellant that we must treat this case as one of 'executed' contract because the Austrian Firm, he says, have done their part of the contract and all that remains is for the plaintiff to perform his part which he has been ready and willing to do. But that is not the correct position. The Austrian Firm has yet to deliver the documents, which, as pointed out in a number of decisions are the symbol for the goods, and the plaintiff has to pay the purchase-money to the enemy firm. The agency of the National Bank must be taken to have been terminated by the declaration of the war. They are no longer the agents of the Austrian Firm for the purpose either of delivering the documents or of receiving the money due upon those documents. The mere fact that the goods have arrived and are now within the limits of British India can make no difference in this respect as the further performance of the contract has now become impossible or unlawful. The Proclamation of the 12th of September says: "(2) Not to compromise or give security for the payment of any debt or other sum of money with or for the benefit of an enemy.

(3) Not to act on behalf of an enemy in drawing, accepting, presenting for acceptance or payment, negotiating or otherwise dealing with any negotiable instrument.

(4) Not to accept, pay or otherwise deal with any negotiable instrument which is held by or on behalf of the enemy."

The result of that proclamation is clearly to make it unlawful on the part of the plaintiff to pay any money to the Austrian Firm or to receive any goods from them in return for such payment. This is the effect of the decision in *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1). But it is argued by Mr. Chamier that the property in the goods had passed to the plaintiff before the declaration of the war, and this he seeks to make out on the facts that the samples were shown to the plaintiff at the time he accepted the draft and the goods had been shipped before war was declared. We do not think that this is a correct contention. The contract is what is known in commercial circles as a C. I. F. contract the effect of which as held in a number of decisions of the English Courts and very fully discussed in the case which has been mentioned is that the buyer under such a contract is entitled to the documents of title on payment of the money due on those documents. Until then it cannot be said that he has any right to the goods. It is stated by Justice Scrutton in the same case at page 387 of the report: "I understand the effect of those judgments to be that where the seller by taking the bills of lading in his own name or to his own order has reserved the *jus disponendi* or power of dealing with the goods, the property does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange for the documents of title."

The documents in this case are made out to the order of the shippers and, therefore, it cannot be said that the plaintiff acquired any right to the goods before he obtained the documents of title in exchange for payment.

It was strenuously argued by Mr. Chamier that this decision is based on the Sale of Goods Act in England and that the Indian Contract Act lays down the law differently, and he referred us to sections 78 and 83. The last clause of section 78 says: "If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted." But then this is subject to any special contract which the parties may enter into and if the effect of a C. I. F. contract be as it is laid down in the English cases, that cannot be said to be overridden by anything in section 78. The parties to a contract like this, must be taken to have accepted the ordinary incidents which are attached to such contracts by mercantile usage. Section 83 does not seem to us to touch the point at all. It only says that the goods which are not ascertained at the time of making the agreement for sale may be appropriated afterwards by

the consent of the parties. Of the two Indian decisions which have been referred to in the course of the argument, one is a decision of Mr. Justice Chaudhuri of the Calcutta High Court in *G. C. Sett* v. *Madhoram Hurdeodass* (3). Reliance was placed by the appellants on a statement at page 544:

"Such contracts even with an alien enemy are merely suspended during the war as regards the right to performance and right of action, and are avoided or dissolved only in certain circumstances, among them, if its performance necessitates intercourse with the enemy during the war." This is laid down on the authority of *Esposito* v. *Bowden* (5). Now, even if that dictum was applicable to the case under our consideration it does not appear how it would help the plaintiff in any way. The suit will still be liable to be dismissed as it could not be maintained during the continuance of the war. The decision of the Bombay High Court reported as *Motishaw & Co.* v. *Mercantile Bank of India* (4) was also referred to. But that was a suit on a bill of exchange, the parties to which were both British subjects. That is sufficient to distinguish that case from the present. I may here mention that Mr. Chamier contended that in this case not only was the Austrian Firm liable on the contract but also the first defendant in his personal capacity and he asked us to permit him to amend the plaint so that he might obtain relief against the first defendant apart from his capacity as agent of the Austrian Firm. But this is inconsistent with the case sought to be made out in the plaint. The suit was brought against the first defendant as agent of the Austrian Firm and this is made clear in paragraph 3 of the plaint. Mr. Chamier also put forward another argument that since the Government has released the goods, that will have the effect of reviving the contract or renewing the validity of the contract although it had become void before the order of release was passed. That cannot be taken to be the effect of the order of release. Its only effect is that the Government withdraws its hands so that any party entitled to the goods may establish his right to them. Mr. Chamier in the course of his argument, asked us what will become of the goods: to whom will they go? It is not necessary in this suit to answer that question. The plaintiff's contract became void by reason of the outbreak of the war and he cannot recover the goods on the basis of such contract.

The appeal is dismissed with costs. There will be one set of costs. The costs of the interlocutory application will be included in the costs of this appeal.

*Appeal dismissed.*

V.R.P.

(5) (1857) 7 El. & Bl. 763; 27 L. J. Q. B 17; 3 Jur. (N S.) 1209; 5 W. R. 732; 119 E. R. 1430; 29 L. T. (o. s.) 295; 110 R. R. 822.

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## PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 15 OF 1917.

May 10, 1917.

*Present*:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Mullick.

PALKI PANDEY AND OTHERS—
PLAINTIFFS—APPELLANTS

*versus*

DWARKA PANDEY AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 11—Res judicata—*Parties, different, in subsequent suit.*

*D.* sued *P.* for rent on the allegation that he had settled certain *kasht* lands with him as under-tenant on produce rent. *P.* denied settlement under *D.* but set up direct tenancy under *D.* and his other co-sharers who were no parties to the suit. The suit was decreed. *P.* then instituted the present suit against *D.* and his other co-sharers for a declaration that he was a tenant directly under them:

*Held*, that the decision in the rent suit was *res judicata* so far as the question of settlement between *P.* and *D.* was concerned but not so with regard to the question of *P.*'s title. [p. 531, col. 2.]

Appeal against the decision of Mr. Justice Atkinson in Miscellaneous Appeal No. 7 of 1916, dated the 3rd January 1917, reversing that of the District Judge, Durbhanga, dated the 12th May 1915, reversing that of the Munsif, Samastipur, dated the 12th August 1914.

FACTS.—*D.* sued *P.* for rent in the previous suit on the allegation that he had taken usufructuary mortgage of the *kasht* land of *U.* and settled the same on produce rent with *P.* *P.* denied settlement and stated

that *D.* had been redeemed by *U.* who had surrendered the land to the *maliks*, and subsequently had left the village and died without any heir, and that the 16-annas *malik* had settled the land with him (*P.*) The suit was decreed and *P.*'s contention negatived. *P.* in the present suit impleaded *D.* and his other co-sharers, and sued for a declaration that the land was settled with him by the entire body of landlords, *U.* had redeemed *D.*, had surrendered the lands to his *maliks* and died without heir. *P.* further contended that even if *D.*'s mortgage was subsisting, he could not take his stand on it as *U.*'s death without heir had extinguished all his rights in his *kasht*. The Munsif dismissed the suit on the ground of *res judicata*. The Court of first Appeal held that the question of *P.*'s title to the land was not *res judicata* as between him and all the *maliks*, who were no parties to the previous suit. His decision was reversed by Mr. Justice Atkinson. Hence this appeal.

Mr. *Baidyanath Narayan Sinha*, for the Appellant, referred to *Dwarkanath Roy* v. *Ram Chand Aich* (1).

Mr. *Saroshi Charan Mitter*, for the Respondent, referred to *Sreenath Dutt* v. *Kaser Sheikh* (2).

JUDGMENT.

CHAMIER, C. J.—This is an appeal against the judgment of a learned Judge of this Court setting aside an order of the District Judge of Darbhanga, whereby the suit was remanded to the Court of first instance for trial on the merits. The Munsif had decided that the suit was barred by the rule of *res judicata*. On appeal the District Judge held that the suit was not so barred. On appeal to this Court the learned Judge held that the suit was barred by *res judicata*. It appears to me that the decision of the Court of first appeal was correct and should not have been disturbed. The plaintiff in the present case claims to be the tenant of whole proprietary body in a village. There was a previous litigation in which one of the defendants, Dwarka Prasad sued the present plaintiff as his tenant. Dwarka Prasad succeeded in establishing his case and obtained a decree for rent against the present plaintiff. The question raised as between the plaintiff and the defendants other than Dwarka Prasad in the present suit are not *res judicata* under the decision in the previous suit. It appears to me that the learned District Judge was right in saying that the decision in the rent suit is *res judicata* as far as the question of settlement between the plaintiff and Dwarka Prased is concerned but not with regard to the question of the plaintiff's title. I would allow this appeal, set aside the judgment of the learned Judge of this Court, restore the order of the Court of first Appeal and direct that the costs of both hearings in this Court should be costs in the cause and should abide the result.

MULLICK, J.—I agree.

*Appeal decreed.*

(1) 26 C. 428 at 432; 3 C. W. N. 266; 12 Ind. Dec. (N. s.) 876.

(2) 20 Ind. Cas. 344; 18 C. W. N. 116.

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## MADRAS HIGH COURT.

APPEAL SUIT NO. 52 OF 1915.

October 19, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

BALUSWAMI AIYER AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

VENKITASWAMY NAICKEN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Landlord and tenant—Lease, permanent, by head of* mutt, *validity of—Suit for possession by successor of* matadhipathi—*Adverse possession, plea of—Trust—Head of* mutt, *position of—Limitation Act (IX of* 1908*)*, *s.* 10, *Sch. I, Art.* 134.

The head of a *mutt* stands in relation to the *mutt* in the position of a trustee. The assets of the *mutt* are vested in him as the owner of the *mutt* in trust for the institution itself. [p. 533, col. 2.]

*Ram Parkash Das* v. *Anand Das*, 33 Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.), followed.

The head of a *mutt* cannot, in the absence of necessity, bind his successors-in-office by a permanent lease at a fixed rent for all time. [p. 532, col. 2.]

A lessee, however, holding under a permanent lease from a *matadhipathi* can perfect his title to the permanent lease by adverse enjoyment for more than twelve years under Article 134 of the Limitation Act, the permanent lease being a transfer within the meaning of the Article. [p. 534, cols. 1 & 2.]

BALUSWAMI AIYAR v. VENKITASWAMY NAICKEN.

*Ram Kanai Ghosh* v. *Raja Sri Sri Sri Hari Narayan Singh Deo Bahadur*, 2 C. L. J. 546, followed.

*Abhiram Goswami Mohant* v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234; 19 M. L. J. 520; 14 C. W. N. 1; 36 I. A. 148 (P. C.); *Narasaya Udpa* v. *Venkataramana Bhatta*, 16 Ind. Cas. 53; 23 M. L. J. 260; 12 M. L. T. 218; (1912) M. W. N. 870; *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* 19 Ind. Cas. 694; 38 M. 356; 25 M. L. J. 393; 13 M. L. T. 498; (1913) M. W. N. 581; *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*, 27 M. 435; 14 M. L. J. 105, distinguished.

The fact of the lessee's knowledge as to the restricted interest possessed by the lessor at the time of the grant may be an important piece of evidence in judging of what interest the transferee contracted to take, but such knowledge cannot by itself disentitle the transferee to the benefit of Article 134 of the Limitation Act. [p. 534, col. 2; p. 535, col. 1.]

Appeal against the decree of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suit No. 61 of 1914.

Mr. *A. Krishnaswami Aiyar*, for the Appellants.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.

BURN, J.—The facts of this case, as far as it is necessary to state them, are as follows:—On 17th March 1891, 2nd plaintiff obtained a permanent lease Exhibit A of certain land within the limits of Madura town from the *matathipathi* of Sri Vyasaraya *mutt* the seat of which is in the State of Mysore. Second plaintiff was a near relative of the grantor. The rent reserved was a fixed sum of Rs. 24 per annum. The grantor died shortly after the execution of Exhibit A. His successor held office till 1906 when 26th defendant became the head of the *mutt*. In 1902, 2nd plaintiff sublet (Exhibits D and D1) to 1st defendant for a period of ten years and in 1905, 2nd plaintiff and his son 3rd plaintiff sold their rights under Exhibit A to 1st plaintiff (Exhibit E). From 1905 the properties controlled by the heads of the *mutt* were managed by the Diwan of Mysore under powers-of-attorney executed by the *matathipathis* and the Diwan in turn empowered defendants' 1st witness to conduct the management. In 1908, defendants' 1st witness visited Madura and it was then only that he became aware of the nature of the lease granted to the 2nd plaintiff. He at once objected to it and tried to induce 1st defendant to attorn to him. This 1st defendant, at that time, refused to do. In November 1911, however, 1st and 2nd defendants took a lease of the land for seventeen years from defendants' 1st witness. (Exhibit V). At the end of September 1912, the term fixed in the lease deed Exhibit D, expired. The rent for the whole period had been paid in advance. First and 2nd defendants are admittedly in possession of the land and claim to hold it under Exhibit V. In 1908 defendant's 1st witness objected to the lease of 1891 on the ground that it was not competent to the head of the *mutt* to grant a permanent lease of the kind. He tried to get 1st plaintiff to come to terms but in vain. Certain payments were made by 1st plaintiff after 1908 and the effect of these is a subject of controversy between the parties. First plaintiff seeks (amongst other reliefs) a declaration that he is the permanent lessee of the property and a direction to the defendants to deliver up possession of it.

The main contentions on behalf of 1st plaintiff are (1) that the permanent lease is binding on the grantor and his successors, (2) that a valid title has been acquired under the provisions of the Limitation Act and (3) that the defendants are estopped from denying the 1st plaintiff's title. The findings of the learned Subordinate Judge are against the plaintiffs-appellants on all three points.

With regard to the first point there is no doubt that the head of a *mutt* cannot in the absence of necessity bind his successors-in-office by a permanent lease at a fixed rent for all time. This would be so, even if the rent had been adequate in 1891, *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (1). There is no allegation, much less proof, of any such necessity. The first contention must be rejected.

In connection with the second point, a question arises as to the nature of the endowment and the position of the head of the *mutt* in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, *i.e.*, for the worship of Gopala-

(1) 13 M. I. A. 270; 13 W. R. (P. C.) 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

krishnaswami who is described by the defendant's 1st witness as the "titular deity of the *mutt*." The evidence does not support this contention and it has been found against in the lower Court. A statement made by local agent of the *mutt* during the *inam* commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the *inam* as given at the close of the inquiry is, that it was granted "for the support of Vysaraya Madam" (Exhibit L); compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the *mutt*. I think the grant must be held to have been made for the general purposes of the *mutt*.

What then is the position of the head of the *mutt* in relation to the general endowments of the institution? In *Sammantha Pandara* v. *Sellappa Chetti* (2), there is a description of "the nature of the generality of such institutions and the incidents of the property which is devoted to their maintenance." The property is stated to be "in a certain sense trust property, it is devoted to the maintenance of the establishment but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution."

In *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (3), a description is given of how the endowments of *mutts* were acquired and this description appears to fit the case now under consideration in so far as the facts have been ascertained. The judgment then proceeds to lay down that the head of the *mutt* came to own its endowments "in trust for maintenance of the *mutt* for his own support, for that of his disciples and for the performance of religious and other charities in connection with it according to usage."

In *Vidyapurna Tirtha Swami* v *Vidyanidhi Tirtha Swami* (4) a different view was taken as to the position of the head of the *mutt* towards its endowments. It is this ruling which forms the basis of the judgment of the lower Court on the point now under consideration. The question was again examined by a Full Bench in the case reported as *Kailasami Pillay* v. *Nataraja Tambiran* (5). As I read the judgments in the last mentioned case, it was held that no general rule could be laid down and that each case must be judged on the particular facts. Sankaran Nair, J., appears to accept the statement of the law in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(3) as strictly accurate with regard to the endowments there referred to [Vide *Kailasami Pillay* v. *Nataraja Tambiran* (5)] which seems to me similar in kind to the endowment now in question.

It is not, in my opinion, necessary to discuss these cases in detail, because, in my opinion, the matter is now governed by the decision of the Privy Council reported as *Ram Parkash Das* v. *Anand Das* (6). The nature of the interest of the head of a *mutt* in the *mutt* property is declared in clear terms. "The whole assets are vested in him as the owner thereof in trust for the institution itself" (page 713*), again at page 714*, "the nature of the ownership is, as has been said, an ownership in trust, for the *mutt* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *mahant* this trust does exist and...must be respected." And at page 732* in referring to the retirement of the head of the *mutt* it is said, "the *mahant* in their Lordships' opinion is not only a spiritual preceptor, but also a trustee in respect of the *asthal* over which he presides." Their Lordships seem to me to lay this down as a rule of general applicability for whereas in the matter of succession to the headship the usage and custom of a *mutt* have to be considered in each case. This is expressly stated. It

(2) 2 M. 175; 3 Ind. Jur. 558; 1 Ind. Dec. (N. S.). 393.

(3) 10 M. 375; 3 Ind. Dec. (N. S.) 1015,

(4) 27 M. 435; 14 M. L. J. 105.

(5) 5 Ind. Cas. 4; 33 M. 265: 7 M. L. T. 1; 19 M. L. J. 778.

(6) 33 Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.).

*Pages of 43 C,—*Ed.*

is true that the point to be decided in the case related to the office of superior of the *mutt* and not to the management of the other property and that the latter decision of this Court does not seem to have been referred to. The judgment, however, opens with a considered pronouncement as to the position of a head of the *mutt* as to his functions and the legal position with regard to the endowments. The fact that certain decisions of this Court may not have been referred to, does not make the ruling any the less binding.

There do not appear to be any circumstances peculiar to the present case, which would exclude it from the operation of the general rule. It seems to me, therefore, that the sole beneficiary is the *mutt*. This is not an instance in which there is any individual interest in the head of the *mutt* independently of the institution itself. He is no doubt entitled to appropriate part of the income to his own maintenance on account of his position in the *mutt* but his rights in this respect are the same in kind as those others connected with the *mutt* who are entitled to be supported from its funds. In this view it is unnecessary to consider the bearing on the question of limitation of the cases where it has been held that the head of the *mutt* had a personal interest in the property alienated. [*e.g. Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (7) and *Narasaya Udpa* v. *Venkataramana Bhatta* (8)]. The decision in *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (9) proceeds on the footing that the position of the head of a *mutt* is that enunciated in *Vidyapurna Thirtha Swami* v. *Vidyanidhi Tirtha Swami*(4) but as already stated, this view appears to be overruled by the decision of the Privy Council.

I think, therefore, that the alienor held the property simply as a trustee. It has been held in *Rameshwar Malia* v. *Jiu Thakur* (10) that a permanent lease is a transfer within the meaning of Article 134 of the Limitation Act of 1908. The same decision and that reported as *Narasaya Udpa* v. *Venkataramana Bhatta* (8) are authorities for holding that the annual rent is a valuable consideration. The requirements of the Article would, therefore, seem to be fulfilled.

It has, however, been urged that the appellants are not entitled to take advantage of the Article because 2nd plaintiff was aware at the time he obtained the lease of the position of his lessor; the plaint alleges that the *mutathipathi* was a trustee and 2nd plaintiff in his evidence describes him as a trustee merely. There is nothing in the actual wording of section 10 of the Act or in Article 134 to support the contention. It is, however, argued that this has been held to have been the meaning of the provision in the Act of 1877, and that these rulings are not affected by the changes in wording made in 1908. *Vide Tholasinga Mudali* v. *Nagalinga Chetty* (11) The rulings relied on appear to rest on the remarks of Lord Cairns in delivering the judgement of the Privy Council in *Radhanath Doss* v. *Gisborne & Co.* (12). In that case the actual finding was that the transaction was consistent with the view that the alienee intended to take only such interests as the transferor was competent to alienate (*Vide* pages 17 and 19). This decision has been explained by Mookerjee, J., in *Ram Kanai Ghosh* v. *Raja Sri Sri Sri Hari Narayan Singh Deo Bahadur*(13) and quite recently by Ayling and Srinivasa Aiyangar, JJ., in *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (14). In the latter case, the later rulings of this Court have also been considered and distinguished. The fact of knowledge may be an important piece of evidence, in judging of what

(7) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.).

(8) 16 Ind. Cas. 53; 23 M. L. J. 260; 12 M. L. T. 218; (1912) M. W. N. 870.

(9) 19 Ind. Cas. 694; 38 M. 356; 25 M. L. J. 393; 13 M. L. T. 498; (1913) M. W. N. 581.

(10) 29 Ind. Cas. 537; 43 C. 34; 19 C. W. N. 1082.

(11) 32 Ind. Cas. 265; 3 L. W. 19; (1916) 1 M. W. N. 28.

(12) 14 M. I. A. 1; 15 W. R. (P. C.) 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 10 E. R. 687.

(13) 2 C. L. J. 546.

(14) 40 Ind. Cas. 50; 21 M. L. T. 62; 5 L. W. 690; 32 M. L. J. 85.

interest the transferee contracted to take especially where (as in most of the cases cited) the transferor was a mortgagee but such knowledge cannot by itself disentitle the transferee to the benefit of Article 134 of the Act. In the present case I entertain no doubt that it was the intention of the grantor to create a permanent lease and that 2nd plaintiff intended to take and did take the lease as a permanent one. Subsequent dealings with the property support this view. The grantor died a few months after the execution of Exhibit A. During the fourteen years that his successor held office the 2nd plaintiff continued to hold on the terms of the lease-deed. I would respectfully follow the view enunciated by Mookerjee, J., in the case referred to and hold that the 2nd plaintiff perfected his title to a permanent lease as more than twelve years elapsed since the grant. The lessor intended to grant and the lessee intended to acquire an interest greater than the transferor was competent to alienate and all the requirements of Article 134 have been complied with.

The above finding is sufficient for disposal of the appeal and it is, therefore, unnecessary to consider the question of estoppel which is raised by the appellants.

The Subordinate Judge has given the 1st plaintiff a decree for Rs. 116 6 6 as damages against the 1st defendant. A memorandum of cross-objections was filed but was not pressed and is dismissed.

There is a further claim for Rs. 500 as damages for breach of the agreement in Exhibit D prohibiting the letting of trees for tapping in the last two years of the lease. The Subordinate Judge recorded no finding on the point as he considered the claim unsustainable for reasons given in paragraph 29 of his judgment. The evidence adduced is of a very vague description and, in my opinion, insufficient to enable a conclusion to be come to as to whether any and if so, what amount, is due to the 1st plaintiff on this account.

In the result I think the appeal should be allowed and 1st plaintiff given a decree for possession of the property, and a declaration that he is a permanent lessee. He will also be entitled to mesne profits from the 1st October 1912, till delivery. These profits will be recoverable from defendants Nos. 1 and 2 and will be determined by the lower Court and embodied in a supplemental decree. Having regard to the uncertainty of the law in this Presidency prior to the judgment of the Privy Council, I think the parties should bear their own costs in both Courts.

SADASIVA AIYAR, J.—I agree.

*Appeal allowed.*

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MADRAS HIGH COURT.

CIVIL APPEAL NO. 96 OF 1914.

February 13, 1917.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

AVASARALA KONDOL ROW AND ANOTHER —PLAINTIFFS—APPELLANTS

*versus*

*Iswara Sanyasi* SWAMULAVARU *alias* AVASARALA KAMARAZU AND OTHERS —DEFENDANTS—RESPONDENTS.

*Hindu Law*—Sanyasam *or asceticism, incidents of—Will of* sanyasi, *construction of—Testamentary disposition of* sanyasi's *property, principles governing—Conduct negativing* sanyasam, *evidence of.*

The essentials of Sanyasam, according to Hindu Law, are that the postulant for Sanyasam should perform the necessary rites and ceremonies prescribed by the Sastras, in particular the *prajapathiyeshti* or *agneshti* and the *viraja homam*, and finally relinquish all property and abandon all worldly concerns, down to even a desire for them. The relinquishment need not be in favour of any particular person, but one about to become a Sanyasi may simply abandon his property in which case the law will vest it in his heirs. The mere adoption of the external symbols of Sanyasam as the wearing of coloured clothes or shaving of the head is not enough. [p. 538, col. 2.]

Hindu text-writers examined.

A Will made by a Sanyasi takes effect from its execution, as the Sanyasi becomes dead to the world from the date of his entry into the holy order, and not from his death. [p. 542, col. 1.]

Evidence may be tendered to show by the conduct of the Sanyasi that he did not intend to abandon his property and that a Will executed by him during his so-called Sanyasam was not intended to take effect. The non-delivery of the Will to the beneficiary named in it and its retention by the testator is one important test showing that the testator did not intend to abandon his property during his natural life. [p. 539 cols. 1 & 2.]

Where the Will of a Sanyasi directs the beneficiary under it to perform the testator's death ceremonies,

it negatives the intention that the Will should take effect immediately as there are no death ceremonies to be performed for a Sanyasi and a subsequent codicil will prevail over the earlier Will. [p. 538, col. 2; p. 539, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Cocanada, in Original Suit No. 7 of 1909.

FACTS of the case appear from the judgment.

Mr. *S. Srinivasa Aiyangar*, (Advocate General), for the Appellants.—Sir Thomas Strange, at page 154 of Hindu Law, lays down that, on a person becoming a Sanyasi the next heir succeeds.

[ABDUR RAHIM, J.—Has the view of Strange obtained sanction of Courts?]

The *Advocate-General*.—That is based upon Hindu text-writers, Vyavastha Chandrika, page 20. The term "physical death" means also entrance into another order. 1856 Calcutta Sadur Dewany Adalat Decision 35. There is another class of cases *i.e.*, when succession opens to him after he became Sanyasi, (3) there is a third class when he succeeds to the property owned by him before he becomes a Sanyasi.

Mr. *T. R. Krishnaswami Aiyar* (with him Messrs. *T. R. Ramachandra Aiyar*, *B. Narasimha Rao* and *D. Appa Rao*), for the Respondents.—It is the case of a widow relinquishing her right.

[ABDUR RAHIM, J.—Is there any case in which a Sanyasin is trying to get property.]

Mr. *S. Srinivasa Aiyangar*.—There are cases. A Sudra cannot become *yati*. By a change of status civil rights are affected.

[ABDUR RAHIM, J.—That is to say, the right has become forfeited.]

The *Advocate-General*.—That is, he ceases to be a member of the family.

[ABDUR RAHIM, J.—He could not acquire property afterwards. In such cases, the rights of inheritance are lost. Is there any direct authority?]

Mitakshara Chapter II, section 9, placitum 13, Stoke's Hindu Law Book, page 430, Smrithi Chandrika, Chapter V, section 29; Mitakshara, section 8.

[ABDUR RAHIM, J.—All this is divided property.]

The *Advocate-General*.—But the rule is applied to both sets of property. Mitakshara Chapter II, section 7, placitum 8. In all these cases the question is whether it is a question of principle or question of equity. Smritha Chandrika, Chapter XII.

[SRINIVASA AIYANGAR, J.—So far as rights are concerned he is dead.]

The *Advocate-General*.—Smrithi Chandrika Chapter XII, page 209, paragraphs 8 and 9.

[SRINIVASA AIYANGAR, J.—Here it is a question of a person becoming a Sanyasi after being re-united.]

It is simply a case of an application to a person who is re-united.

[SRINIVASA AIYANGAR, J.—Is there any case where he dies and does not re-unite.]

He is treated as if he is dead. Both are treated in the same position. Vyavastha Chandrika, Volume II, page 580, Smrithi Chandrika Chapter V, 2 (10) at page 60. It is not open to a person to change the inheritance; it does not depend upon his volition. See *Juggunnath Paul* v. *Bidianund Dutt* (1).

Mr. *T. R. Ramachandra Aiyar*.—My contention is that he is not a Sanyasi at all. See *Khoodeeram Chatterjee* v. *Rookhinee Boistoboo* (2). *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (3) does not apply this rule as to Sanyasi. *Gouri Sankar Byas* v. *Niader Sing* (4) lays down the test.

[ABDUR RAHIM, J.—Do you say that if a man pronounces certain *mantrams* he becomes an ascetic; then you say that the pronouncement makes him a Sanyasi and he cannot resume his former position.]

If a man becomes a *yati* and does not perform the austerities of the order, he does not come back as a Sanyasi. The facts in the present case show that he is not a real Sanyasi.

[SRINIVASA AIYANGAR, J.—Suppose he is a real Sanyasi what the books require, that he must actually give up.]

The secular act of giving and taking is essential for marriage and adoption. In

(1) 10 W. R. 172; 1 B. L. R. A. C. 114.
(2) 15 W. R. 197.
(3) 22 M. 302; 8 Ind. Dec. (N. S.) 215.
(4) 23 Ind. Cas. 287; 18 C. W. N. 59.

*Venkatacharyula* v. *Rangacharyulu* (5), Muthuswami Aiyar, J., is of opinion that giving and taking is quite essential; where there is fraud there is no real giving. Yagnavalkya (Mitakshara) Parukshit Kanda, Chapter IV, Sloka 56 shows that he must give up all what he has *i. e.*, have performed *prajapathiyeshi*. At page 101 he says he shall perform Sarvaveda Jakeshmati, *i. e.*, all that man possesses.

[ABDUR RAHIM, J.—If a man wants to become a Sanyasi, the most important act is that he must divorce himself of all that he possesses.]

The texts require a number of things to be performed. Manu Chapter VI, Sloka 33. Dharmasindhu, page 364, paragraph 365. In the case of Sanyasi a giving up of all worldly possessions voluntarily is quite necessary. Mitakshara, Chapter II, section 10, placitum 6.

[ABDUR RAHIM, J.—You say that the disposition must be according to law; if it is immoveable property, it must be by a registered instrument.]

Even if he divests himself with all that he has, there is nothing to prevent him from acquiring property afterwards; first he has secular heirs; then they become spiritual heirs. There is nothing equivalent to "civilly" dead in Sanskrit. Sir Thomas Strange is wrong in his statement at page 114. None of the text books support his view. Manu and Hartha upon which Sir Thomas Strange relies do not support him. There is nothing in the Mitakshara. There is nothing about civil death. An ascetic can acquire property, he is not civilly dead. *In the matter of Metcalfe's Trusts* (6), *Sree Mahant Kishore Dossjee* v. *Coimbatore Spinning and Weaving Co.* (7), Mayne, pages 828 and 844, paragraphs 590 and 603.

Mr. *Srinivasa Aiyangar*, in reply.—This is a topic of inheritance, one may call it by what name he likes, Mayne, pages 489, 698. Retirement operates as an extinction of property; *Dattatraya Sakharam Devli* v. *Govind Sambhaji Kulkarni* (8).

This appeal coming on for hearing on the 18th and 19th January 1917, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SRINIVASA AIYANGAR, J.—This is an appeal by the plaintiffs against the decree of the Subordinate Judge of Cocanada dismissing their suit to recover possession of the immoveable properties belonging to the 1st defendant, from him and his alienees. There are two plaintiffs, but as the 2nd is only an assignee from the 1st and as it is the right of the 1st plaintiff that is in question in the suit, I shall hereafter refer to the 1st plaintiff as the plaintiff. The claim is as the universal legatee, heir and successor of a living person the 1st defendant. According to the plaintiff the 1st defendant his uncle, made his Will on the 20th December 1905 at Benares by which he bequeathed all his immoveable properties—they are the suit properties—to the plaintiff, constituted him his heir and successor, and a few days after, became a Sanyasi or entered the fourth Asrama prescribed by the Sastras, became dead to the world and its concerns, and the plaintiff, therefore, became the owner of his properties as if the 1st defendant had died on the day he became Sanyasi. This remarkable claim—for this is the first instance to my knowledge of a claim to recover possession from a living person of his properties as his heir or legatee which involves the fiction of civil death—requires to be made out in the clearest possible manner. The plaintiff and the 1st defendant are Telugu Brahmins of the Godavari District and belong to the sect called Golakonda Vyaparies who though they wear *namams* and follow some of the practices of Sri Vaishnavas, in several other matters apparently follow the practices of Smarthas. Several interesting questions were argued at the hearing of this appeal, as to the acts to be done and

(5) 14 M. 316 at p. 320; 1 M. L. J. 85; 5 Ind. Dec. (N. S.) 221.

(6) (1864) 46 E. R. 321; 2 De G. J. & S. 122; 33 L. J. Ch. 308; 10 L. T. 78; 10 Jur. (N. S.) 224; 12 W. R. 538; 139 R. R. 58.

(7) 26 M. 79; 12 M. L. J. 439.

(8) 34 Ind. Cas. 423; 40 B. 429; 18 Bom. L. R. 258.

the ceremonies to be performed by a Brahman before he can become a Sanyasi as to the effect of that status on legal rights, as to the possibility of a reversion from or change of that status, and as to how far British Indian Courts are bound or entitled to recognise any such limited or inferior civil status; but in the view I take of the facts it is scarcely necessary to decide most of the questions so argued.

It must be remembered that there are a large number of sects with their peculiar rites, mode of initiation and practices who though in a general sense may be termed ascetics cannot come under the category of those who have entered the fourth order (Asrama) in the ideal of life prescribed for the Brahman by the Dharma Sastras. For example, in a passage cited in Sarkar Sastri's Hindu Law from Maha Nirvana Tantra, it is said that in this Kali age there are five castes (*varnas*) *i. e.*, besides the well-known four castes, a fifth caste comprising all other beings, that Sanyasam according to Vedic rites does not exist (***) and that all the above five castes can become Avadhutha Sanyasis according to the Saiva ritual. As regards ascetics of this class, it is impossible to apply the special texts in the Smritis or to hold that they are divested of their property or become incapable of holding any or that the special rules of inheritance prescribed for *Vanaprastas* (hermits) *yathis* (ascetics) and *Brahmacharies* (perpetual students) govern succession to their property on their death. It has been held in this Court that as a Sudra cannot become a *yathi* or Sanyasi according to the Smritis or the Dharma Sastras, his property on his death devolves on his natural heirs, though there can be no doubt that a Sudra is ordained as an ascetic according to the Saiva Agamas. So also in Bengal the rule of inheritance applicable to *yathis* is not applied to Bairagis who apparently may be of any caste. In Mr. Oman's Book on 'Ascetics etc'., and Dr. Bhattacharya's Book on 'Hindu Castes and Tribes' are described a considerable number of orders of ascetics who are not governed by the rules prescribed in Smritis or by Nibandakars whom for convenience I may call heretical sects; and so far as they are concerned, in the absence of any special custom, there is no reason to treat them as of inferior status for the purposes of civil law. Unless, therefore, the plaintiff proves that the 1st defendant became a Sanyasi according to the orthodox rites and ceremonies I shall show later on that it is essential for such a Sanyasam that there should be an actual gift or an actual relinquishment or abandonment of all worldly possessions—the plaintiff cannot succeed, even though he may be able to prove that the 1st defendant wore coloured clothes or shaved his head or acquired certain external symbols of Sanyasam; for some or all of these are adopted also by the heretical sects.

The 1st defendant lost his wife and children at the same time in an accident when he was young and did not marry again. He was naturally much affected by such a calamity, turned to his religion for consolation, had *puranas* read and expounded to him, and was often going on pilgrimage to holy places. In the latter part of 1905 he went to Benares with the plaintiff and stayed in the house of V. Narayana Rao (plaintiff's 1st witness) in whose house he had stayed for months on a previous occasion. While he was there, on the 20th December 1905 he made the Will, Exhibit A, under which the plaintiff claims as legatee, got it registered the next day at his residence as he was ill, and a day or two later, it is said, became an ascetic and had his name changed to Iswara Sanyasi in token of his having entered the holy order of Sanyasis. The plaintiff who evidently knows that a person about to become a Sanyasi should give up his property, says, that the Will, Exhibit A, was executed by the 1st defendant as a preliminary to his Sanyasam and with the intention of divesting himself of his property. If this was the intention of the 1st defendant, he not merely managed to conceal it but manifested a contrary intention; for in his Will there is no reference to any impending Sanyasam at all but a direction that the legatee should after the testator's death—he obviously refers to his natural death—perform his death ceremonies and take his property as his heir

and successor. The reference to the death ceremonies is significant, as there are none such to be performed by the relations of a Sanyasi after his natural death. There is one other matter in connection with this Will which also shows that the 1st defendant had no idea of relinquishing his property during his natural life. The Will after registration was asked by the testator to be delivered to one Ram Narain Singh, and acquaintance of his, and not to the plaintiff, and although the plaintiff stayed with the 1st defendant for over a month at Benares after the date of the alleged Sanyasam the 1st defendant never gave the Will to the plaintiff and never intended to give it to him. The plaintiff, however, obtained the Will long after, from the Singh against the wish of the 1st defendant. The conduct of the plaintiff and the 1st defendant after the alleged Sanyasam makes it difficult to believe that the 1st defendant became a Sanyasi at all as alleged by the plaintiff. On the 13th January 1906 (*i.e.*,) within a few days after the 1st defendant is said to have become an ascetic, he made another Will, or rather a codicil, leaving to others, a portion of the properties devised to the plaintiff by his previous Will (Exhibit VIII). On the 5th February 1906 he again made a third Will by which he distributed his property to his three nephews *i.e.*, the plaintiff, his brother, the 11th defendant and another brother Venkat Rao now dead, the father of defendants Nos. 13 and 14 (Exhibit X). These were executed at Benares while the plaintiff was with him, and the 1st defendant describes himself in his usual name and as the son of his natural father which he would not have done if he had become an ascetic and had assumed the name of Iswara Sanyasi. As a matter of fact, the 1st defendant described himself and was addressed by relations and friends including some of the important witnesses for the plaintiff by his ordinary name Avasarala Kamarazu, and the curious compound Iswara Sanyasi with its variant Iswaranandaswami and Iswara Sanyasiswami appears for the first time in the proceedings in this suit. The 1st defendant left Benares for his native place after executing Exhibit X and made another Will (Exhibit 1) on the 22nd February 1906 at Pittapur and has been dealing with his property ever since as owner, and there can be no doubt he has been living like a *grahasta* or a house holder. He denies that he ever became a Sanyasi or behaved as such. That is so far as the 1st defendant is concerned.

The conduct of the plaintiff is, however, much more important. On October 3, 1906, long after the 1st defendant had begun to deal with his property as owner, he and the 11th defendant claiming as legatees under the Will, dated the 5th February 1906, made a written demand of possession of certain properties from 3rd persons who held them under the 1st defendant as tenants, or otherwise by transfers subsequent to the 5th February.

In these notices, one of which is produced and marked as Exhibit XI in the case, the plaintiff and his brother, the 11th defendant stated that the 1st defendant became a Sanyasi after the 5th February and thereafter ceased to have any interest in his properties and on that ground challenged the title of the persons in possession. That statement if unexplained is obviously fatal to the plaintiff's present claim and the only explanation which he gives is that he never made that statement, but that his brother fraudulently filled up a blank paper in which he obtained the plaintiff's signature. Unfortunately for the plaintiff, this is proved to be untrue, for the plaintiff is proved to have been well aware of the draft of this very notice (Exhibits IX and IX A). The 11th defendant who equally with the plaintiff insists that the 1st defendant became a Sanyasi denies that he ever filled up a blank paper and there can be no doubt that he is speaking the truth in this matter. Further the plaintiff and the 11th defendant long after this notice on March 10th, 1907, obtained a *muchilika* from a tenant for some of the lands of the 1st defendant and the plaintiff does not explain this transaction either, beyond stating that his brother fraudulently obtained this also without his knowledge. Finally the plaintiff makes this remarkable statement, namely, that he knew in October 1906 that his brother had made false recitals in the notice issued in his name—the 11th defendant apparently was quite frank about it and told the plaintiff that he inserted those false statements to obtain a share of the 1st defendant's properties which wholly belonged to the plaintiff—yet he thought and was advised by a leading Pleader that those statements were not pre-

judicial to his interest, so much so that he took no steps to correct them and had sufficient confidence in his brother to allow him to take a *muchilika* also jointly in the names of both. On February 23, 1909, only three days before the plaiut in this suit was filed, after he had made up his mind to claim the whole of the properties of the 1st defendant as his sole legatee under the Will Exhibit A, the 1st plaintiff sold a half of the suit properties to the 2nd plaintiff and in the sale-deed, in setting out his title, fixed the same day the 21st December 1905 for the Sanyasam and the Will. Evidently even this version did not suit him as probably the Sub-Registrar who registered the Will, who saw the 1st defendant at his residence on that day between 5 and 6 P.M., may be in a position to contradict the story of Sanyasam on that day, any how the plaintiff is wholly unable to explain how this date came to be fixed in the sale-deed as the date of the Sanyasam. In his re-examination by his own Pleader he says this "Exhibit E (*i.e.*,) the sale is in my own handwriting. I do not remember if a draft of it was first prepared. The recital in Exhibit E to the effect that the taking of Sanyasam and the execution of the Will Exhibit A took place at the same time was a mistake. I cannot say how it arose." In his plaint he fixed no date but paragraph 5 of the plaint reads as if the making of the Will and the Sanyasam were simultaneous. Even now the actual date is not fixed but it was said for the first time in March 1910 when the plaintiff's witnesses were examined in Benares that it took place on some day between the 23rd and 26th December 1905. These unexplained variations in the date cast a strong suspicion on the truth of the plaintiff's case. There are two other transactions in which the plaintiff has taken part to which I shall refer now. He was present when a brother of his (one Lakshmipathi adopted to another family) lent Rs. 1,000 to the 1st defendant on 3rd December 1906 when the 1st defendant, if the plaintiff's present case is true had no property at all, and also when the note was renewed in April 1908. The plaintiff obtained a transfer of this note on behalf of a minor ward of his, after a suit had been filed on the note and conducted that suit on his behalf. When asked to explain his conduct in allowing his brother to lend to a person who had no property and taking a transfer of the debt he was good enough to suggest that it was no concern of his if his brother foolishly lent to a person who had no property and denied that he had anything to do with the transfer of the debt or the conduct of the suit. But unfortunately for him he had been examined in the suit on the note and had admitted that he obtained the loan from his brother for his uncle and also that he negotiated and obtained the transfer; and explained that he did so because he and his uncle had settled their differences and that he was to succeed to his uncle after his death. He denies now that there was any such understanding, but he does not explain why if his uncle became an ascetic and he himself became the owner of all his properties, he took part in these transactions. His cross-examination as to these transactions is at pages 93 to 95 of the paper book. A perusal of his evidence as a whole leaves the impression that he has not an honest case.

The learned Judge in the Court below, however, accepted as reliable the evidence of plaintiff's witnesses Nos. 1 to 4 who deposed that the 1st defendant performed certain ceremonies and went through certain rites by which he became a Sanyasi; and he came to the conclusion that though the 1st defendant did become an ascetic he did not give up or relinquish his property, that he got tired of his Sanyasam very soon and discarded even the Symbols of his order. He evidently thinks that the vacillation of the plaintiff was due to his desire to obtain the co-operation of his brother in any action against his uncle or to settle with his perverse uncle who like a good Sanyasi would not quietly surrender possession of his property and go a-begging as he ought. It, therefore, becomes necessary to examine that evidence. Of the fourth witnesses the first three were examined on commission at Benares and the fourth was examined on the 12th January 1911 and the judgment was not delivered till the end of December 1913. Such a long interval considerably detracts from the value of the opinion of the Trial Judge on the credibility of the witnesses examined before him.

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Assuming, however, that that evidence is true and the witnesses accurately describe

what they saw, yet the evidence appears to be insufficient to prove that the 1st defendant entered the holy order of Sanyasis by the performance of the necessary rites and ceremonies prescribed by the Sastras; in particular there is no evidence that the 1st defendant pronounced the *presha mantram* which is absolutely essential for an orthodox Sanyasam. The ideal ascetic is he who having passed from order to order, having paid the three debts (that to the *Rishis* to the *pittris* and to the *devas)* in the evening of his life tired of the world gives up everything and determines on passing the remainder of his days in holy meditation calmly awaiting his release. (Manu Chapter VI, verses 33 to 37 and 45, Jabala Sruti cited in Apararka's commentary on Yajnavalkyaand Yajnavalkya, Chapter III, verse 57). The essence of such Sanyasam, as the word itself imports, is the relinquishment of all property and worldly concerns even of the desire for them. In the Taithireva Upanishad, it is said "not by works, not by sons, not by wealth, but by relinquishing these some obtained immortality." "Getting out of the desire for sons, for wealth, and the world, a Brahmin goes into mendicant state:" (*Bikshacharyam Charani*) Vajasayena Brahmanam cited in Parasara Madhaviyam, Bombay Sanskrit Series Volume 48, page 152. The rituals to be followed by a person desirous of becoming a Sanyasi are indicated in the Smritics and are set out in detail in the works of the commentators and text book writers (Manu Chapter VI, verses 38, 39, 41, 43; Baudayana II, 10, 17, Parasara Madhaviyam, pages 146 to 178; Dharma Sindhu, pages 363 to 370 Bombay Edition).

The postulant for Sanyasam after learning the duties of a Sanyasi should first perform his death ceremonies—this, however, is by some not considered necessary—and the eight *sradhas* the last of which is his own *sradhas*; he must then distribute his wealth to his sons and Brahmins reserving enough for the *homam* (sacrifice in the fire) to be subsequently performed. Then he has to perform *Prajapathiyeshti* or *agneshti* and finally *viraja homam*. These are sacrifices in fire and are purificatory ceromonies. At the end of ceremonies, the postulant has no property at all for even the sacrificial vessels if they are of wood must be burnt in the fire and if they are of metal must be given to the priest. After these are done he takes leave of his sons, and standing in water takes some water in his hand and drops it saying that he has given up desire for sons, wealth, world and everything (*Sarva Thyagam*). He makes a vow that he will not injure any living being. Finally there is the uttering of the '*Presha Mantram*.' The literal meaning of the *mantram* is 'have been given up by me' (*Sanyastham maya*). The *mantram* is to be pronounced low three times, and loud twice and till the *mantram* is pronounced the man does not become a Sanyasi. The above is common to all Sanyasams, but there is a difference of opinion as to the discarding of the sacred thread, as to the shaving of the tuft and as to the number of sticks in the staff. This is due to certain doctrinal differences which it is unnecessary to deal with for the present purpose beyond saying this; that the discarding of the holy thread which implies the giving up of all the duties prescribed not merely for the order (*ashrama*), but also for the caste (*varna*) including the obligatory *Sandhyavandanam*, is proper only to the highest kind of Sanyasi, *Paramahamsa*. It is said in the statement of the 11th defendant, that the 1st defendant became a *Paramahamsa*, but if he did, he should not have resided in a house or in a village; he can enter a village only in the evening for begging for his meals. It is to be observed that the essential feature of Sanyasam is the actual relinquishment of all property and an actual abandonment of all worldly concerns, down to even a desire for them; and it is said in the most emphatic terms that a person adopting Sanyasam, without this abandonment of all desires (*bairagyam*) goes to fearful *Narakam* (Dharma Sindhu, page 364). It is clear that in this case the 1st defendant did not abandon or relinquish his property and had no intention of doing so; and there is no evidence that he pronounced the '*Presha Mantram*' wthout which he cannot become a Sanyasi. The learned Subordinate Judge thinks that without relinquishing his property, a man may become a Sanyasi but the Sanyasam would be useless; and from the verse of Yajnavalkya, which prescribes a rule of inheritance for an ascetic's pro-

perty, infers that a Sanyasi may possess property. Perhaps it is a question of words but it appears to me that to speak of a Sanyasi retaining his property is a contradiction in terms. The rule as to inheritance is explained by the commentators as applying to the staff, water pot, and sandals of a Sanyasi, which alone is permitted to him (Manu Chapter VI, verse 41 '*Pavitropakitah*'). The learned Judge is not right in thinking that an ascetic can make a hoard of things for a day, a month, or six months or a year; for that can be done only by a *vanoprastha* or hermit. On the other hand it is said in a verse cited in Parasara Madhaviyam (page 184) that a Sanyasi should not even procure an extra staff for future use. Similarly in *Gouri Sankar Byas* v. *Niader Singh* (5), it appears to have been held that without actually relinquishing or abandoning his property a man cannot become a Sanyasi.

If, however, the first defendant became a Sanyasi, his heirs would take his property and probably his legatee even during his lifetime. In an interesting passage in Pollock and Maitland's 'History of English Law' the learned authors describing the status of a monk say, "A monk or nun cannot acquire or have any proprietary rights. When a man becomes professed in religion," his heir at once inherits from him any land that he has, and, if he has made a Will it takes effect at once as though he were dead. If after this a kinsman of his dies leaving land which according to the ordinary rules of inheritance would descend, he is overlooked as though he were no longer in the land of the living; the inheritance misses him and passes to some more distant relative. The rule is not that what descends to him belongs to the house of which he is an inmate; nothing descends to him for he is already dead. In the eye of ecclesiastical law the monk who became a *proprietarius*, the monk, that is, who arrogated to himself any proprietary rights on the separate enjoyment of any wealth, committed about as bad an offence as he could commit." Except that the Smriti writers and commentators had no conception of a Will, the above passage accurately represents the status of a Sanyasi under the Hindu Law. It does not seem to be necessary that there should be an actual transfer to, or a reliquishment in favour of any particular person, but one about to become a Sanyasi may simply abandon his property in which case the law will vest it in his heirs. In the Dayabhaga in the very beginning where the author discusses the meaning of the word '*Daya*,' and origin of right to property, he points out that not merely by gift, but by death, Sanyasam, etc., the right of the previous owner is lost, and that of the successor begins. The same principle is applied in fixing the time for partition. The author explains that the phrase "the death of the father" does not necessarily mean actual death, but includes Sanyasam, etc., (Stoke's Hindu Law Books, Dayabhaga, Chapter 1, placitum 4 and 31. The Sanskrit word translated as 'retirement' is '*Pravrajita*'). See also 2 Colebrooke's Digest, page 197. This appears also to be the opinion of text writers (Strange, pages 164, 185, Trevelyan, page 100; Mayne, page 828, Vyavasha Chandrika, page 20). It is, however, unnecessary to pursue this matter further as I have come to the conclusion that the 1st defendant did not enter the fourth order as prescribed in the Dharma Sastras; nor is it necessary to decide any other questions. The appeal must be dismissed with costs.

ABDUR RAHIM, J.—I agree.

*Appeal dismissed.*

V.R.P.

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 342 OF 1916.

January 11, 1917.

*Present*:—Mr. Mittra, Officiating, A. J. C.

HARIPRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

GOVINDRAO—DEFENDANT—RESPONDENT.

Lambardar, *power of, to grant leases—Co-sharers, rights of*—Wajib-ul-arz, *construction of.*

Where the *wajib-ul-arz* of a village provided that before granting leases of vacant lands the *lambardar* should consult the co-sharers of the village:

*Held*, that the co-sharers could not claim to avoid a *bona fide* lease merely on the ground that their wishes were not consulted before it was given. [p. 543, col. 1.]

HARIPRASAD *v.* GOVINDRAO.

Appeal against the decree of the District Judge, Nimar, dated the 28th March 1916, confirming that of the Munsif, Burhanpur, dated the 15th December 1915.

Mr. *J. C. Ghosh*, for the Appellants.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—The plaintiffs-appellants own eight-annas share in *Mauza* Deola, the other eight annas being held by the 1st defendant, who is the *lambardar* of the village. The 2nd defendant is a tenant under a lease executed by the *lambardar*. The plaintiffs sue for the ejectment of the latter on the ground that the lease was executed without the knowledge and consent of the plaintiffs. There is also a prayer for joint possession of the land to the extent of the plaintiffs' half share. The Courts below have dismissed the suit.

The contention on behalf of the plaintiffs is that, under the terms of the *wajib-ul-arz*, the *lambardar* shall consult the wishes of the co-sharers before leasing the vacant lands of the village. It is urged that, as the plaintiffs were not consulted, as required by the custom, the plaintiffs are entitled to have the lease declared void and to have joint possession of the holding. The terms of the Nimar *wajib-ul-arz* are substantially the same as those of Wardha. In *Kesho Rao* v. *Nana* (1), Ismay, J. C., held that the co-sharers cannot claim to avoid a *bona fide* lease merely on the ground that their wishes were not consulted before it was given. This was followed in *Bhima Shankar* v. *Krishna Mali* (2) by the present learned Judicial Commissioner. The same view was taken by Stanyon, A. J. C., in *Poonamchand* v. *Nandlal* (3).

The custom embodied in the *wajib-ul-arz* does not require the consent of the co-sharers. They are merely to be consulted. What the *lambardar* is to do if the proprietors are not agreed, is not stated in the *wajib-ul-arz*. The general rule in these Provinces is that the *lambardar* leases the vacant lands in the ordinary course of management. This departure from the general rule embodied in the *wajib-ul arz* does not appear to have ripened into a local custom with the certainty requisite for a valid custom. Probably, as suggested by Ismay, J. C., a *lambardar* who persists in ignoring the wishes of his co-proprietors renders himself liable on their application to be removed from office.

I have already pointed out that the consent of the proprietary body is not required by custom. The land is not required to be left by the proprietary body, but by the *lambardar*. In the case of a stranger, such as defendant No. 2 in this case is, he has a right to assume that the person held out as the customary agent of the proprietary body has done what his customary duty required him to do. It will be intolerable if a *bona fide* tenant is called upon to prove that the *lambardar* has consulted the wishes of the proprietary body. It is not alleged that the tenant had notice or knowledge of the fact that the *lambardar* did not consult the plaintiffs. Under the circumstances the plaintiffs' suit for joint possession has been rightly dismissed. Two cases have been cited before me, which have no material bearing on the point for decision. The first is the case of *Darya Singh* v. *Mukund Singh* (4). That case fully recognises the authority of the *lambardar* to manage an undivided village according to the ordinary custom. What was held in that case was that the persons put in possession as tenants became ordinary tenants not liable to ejectment, though some of the terms of the lease were held to be not binding upon the co-sharers. In the present case, the plaintiffs do not complain of any of the terms of the lease. They desire to eject the tenant on the sole ground that they had not consented to the lease. The other case cited is *Gopal Ramkrishna* v. *Govind Pandurang Rangari* (5), which lays down that anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body or by an agent acting on their behalf. The judgment of Ismay, J. C., recognises the *lambardar* as ordinarily the agent of the co-sharers for the management of the village. I hold that the case has been rightly decided, and the appeal is, therefore, dismissed. There will be no order for costs, as the case proceeded *ex parte* against the tenant, and the respondent

(1) Second Appeal No. 228 of 1901.
(2) Second Appeal No. 109 of 1903.
(3) Second Appeal No. 182 of 1912.

(4) 2 C. P. L. R. 103.
(5) 13 C. P. L. R. 113.

*lambardar* is not entitled to his costs as he failed to consult the plaintiffs before giving the lease.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 11 OF 1917.

May 18, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Walsh.

TEJ SINGH AND OTHERS—APPELLANTS

*versus*

BANWARI LAL AND OTHERS—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 16 (2) (a)—Civil Procedure Code (Act V of 1908), s. 60 (c)—Insolvent possessed of zemindari, whether agriculturist—House, whether can be sold.*

Where the chief source of income of an insolvent at the time of his application is his *zemindari*, he is not an agriculturist in the true meaning of the word, although he cultivates some land, and his house is not, therefore, exempt from sale under section 60 (*c*) of the Civil Procedure Code.

First appeal from an order of the District Judge, Meerut.

Mr. *A. H. C. Hamilton*, for the Appellants.

Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—The appellant applied to be adjudicated an insolvent. At the time of his application he owned and possessed considerable *zemindari* and many houses including the one now in question in which he resides. He also cultivated some land. The rest of the property has all been sold by the Receiver. He objects to the sale of his residential house and the plea taken is that he being an agriculturist, his house and property cannot be attached and sold in execution of a decree and, therefore, under the terms of the Insolvency Act, cannot be sold by the Receiver. The appellant's own application shows that he placed this house at the disposal of the Court for sale if necessary to satisfy his creditors. At that time he was not an agriculturist in the true meaning of the word. His chief source of income was his *zemindari* and his house property was not property exempt from sale in execution of a decree under clause (*c*) of section 60. There is, therefore, no force in this appeal, and we, therefore, dismiss it with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 18 OF 1914.

January 30, 1917.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

ZAMIR MUNSHI—DEFENDANT—APPELLANT

*versus*

BISSESWARI DEBYA CHOWDHURAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Sale of portion of non-transferable occupancy holding—Surrender, subsequent—Landlord, right of, to eject purchaser—Bengal Tenancy Act (VIII B. C. of 1885), s. 86—Incumbrance, meaning of.*

Per *Chatterjee, J.*—A tenant has no right to surrender a portion of a non-transferable occupancy holding after he has transferred the same to a purchaser, and the landlord has no right to eject such purchaser on accepting such surrender. [p. 547, col. 1.]

Per *Newbould, J.*—A sale of a portion of a non-transferable holding does not create an incumbrance on the tenancy within the meaning of section 86 (6) of the Bengal Tenancy Act. [p. 548, col. 1.]

The position of a tenant of a holding not transferable without the landlord's consent is similar to that of an English tenant, who has made a covenant not to transfer. [p. 547, col. 2.]

Where a tenant, after having transferred a portion of an occupancy holding not transferable by custom, surrenders that portion to the landlord, and takes a new settlement of the remainder of the holding, his act operates in law as an implied relinquishment of the holding, so as to entitle the landlord to eject the purchaser of the portion. [p. 548, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, third Court, Mymensingh, dated the 8th September 1913, reversing that of the Munsif, fourth Court, Netrakona, dated the 16th August 1912.

FACTS material to this report are as follows:—

The plaintiff's case was that the lands in suit forming part of three occupancy holdings were verbally surrendered by the respective tenants in favour of the plaintiff landlord in 1314 and the tenants took fresh leases in respect of the remaining portions. The plaintiff, when she went to take possession of the surrendered lands in 1315, was resisted by the defendant. Hence this suit

for recovery of possession on declaration of plaintiff's title. The defence was that the disputed lands were sold by the tenants to the defendant prior to their alleged surrender; that the story of surrender and fresh settlement with defendant's vendor was false, and even if true, the transactions were spurious, fraudulent and collusive; that there was an agreement by the plaintiff landlord to settle with the defendant and the defendant paid *nazarana* but the *kabuliyat* was not actually executed on account of a fraudulent attempt on the part of the landlord to include lands of the defendant's original holding in the *kabuliyat* which contained a stipulation for the payment of enhanced rent, that the defendant was not liable to ejectment as he was a transferee of a portion of an occupancy holding. The Munsif dismissed plaintiff's prayer for *khas* possession but declared her *zemindari* title. On appeal, the lower Appellate Court reversed the decision of the Munsif and decreed the suit fully. Hence this second appeal by the defendant.

Babu *Bimal Chunder Das Gupta*, for the Appellant, —Upon the facts found by the lower Courts the decree passed by the lower Appellate Court in favour of the plaintiff-landlord on a reversal of the decision of the learned Munsif cannot stand. The landlord cannot recover *khas* possession as against the purchaser of a portion of an occupancy holding, and the defendant as transferee of portions of occupancy holdings is not liable to ejectment. A transferee of a portion of an occupancy holding not transferable by custom can by suit recover possession from the landlord who has forcibly dispossessed him. This view was taken in the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy* (1). The surrender as set up by the plaintiff was alleged to have been made by the defendant's vendor subsequent to the sale of the lands, and any surrender made subsequent to the defendant's purchase cannot in any way affect the rights or interest acquired by the defendant, for the following reasons:—

The sale of a portion of a holding is an incumbrance within the meaning of sub-section (6) of section 86, Bengal Tenancy Act, which runs thus: "When a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer." The term 'incumbrance' has been defined in section 161 of the Bengal Tenancy Act, but the definition of the term as given in section 161 is not at all exhaustive but is expressly limited to the purposes of Chapter XIV, and there is nothing to prevent a wider interpretation being put upon the word "incumbrance" as used in section 86, sub-section (6), Chapter IX. In *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (2), 'exchange' has been held to be an incumbrance, and there is no difference in principle between a case of exchange and a case of sale. This position is also supported by authorities. See *Husani Bibi* v. *Sadir Mamud Sarkar* (3), *Asgar Ali* v. *Gouri Mohan Roy* (4). If this were not so, the result would be anomalous: the purchaser would be placed in a worse position than mortgagees or lessees.

Sale is a total extinction of the title of the vendor; as soon as the sale is completed the vendor becomes completely divested of all the rights that he had in the property sold; hence upon general principles, after sale of a portion, the tenant is divested of all his rights in respect of the portion transferred and hence can confer no title upon the landlord by surrender made subsequent to the sale. By surrender, a tenant cannot effect in favour of his landlord anything more than he can do in favour of a third person by assignment.

There is not and there cannot be any charm about the word "landlord." See Foa on Landlord and Tenant, third edition, page 624. There is nothing in the Bengal Tenancy Act which takes the case out of the purview of the general principles of justice, equity and good conscience. See *Ram Udar Singh* v. *William Cox* (5). The surrender alleged in this case cannot be a good surrender in law—it is merely illusory, and being obviously illusory it has not the effect of

(1) 27 Ind. Cas. 61; 18 C. W. N. 971 20 C. L. J. 52; 42 C. 172.

(2) 23 C. 254; 12 Ind. Dec. (N. S.) 170.

(3) 30 Ind. Cas. 252.

(4) 21 Ind. Cas. 58; 18 C. W. N. 601; 18 C. L. J. 257.

(5) 27 Ind. Cas. 564; 19 C. W. N. 263.

extinguishing the original tenancy, and the purchaser is protected from ejectment by the landlord. See *Naba Kishore Saha* v. *Dhananjoy Saha* (6). A surrender cannot be operative for purposes of section 86 where the condition mentioned in sub-section (5) cannot be fulfilled. "Another tenant" in that sub-section means a person other than the original tenant. See *Asgar Ali* v. *Gouri Mohan Roy* (4). If the alleged surrender is valid, the original tenancy subsists in its entirety. The acceptance of a "fresh" lease is a voluntary act of the landlord which amounts in law to a sub-division of the original holding and a consequent recognition of the transfer to the defendant. *Ram Udar Singh* v. *William Cox* (5). The Munsif has found that the surrender even if true was not voluntary, and this finding has not been displaced by the lower Appellate Court. The lower Appellate Court erred in holding that if there was an agreement to settle with the defendant, he is at liberty to have his remedy in a suit for specific performance. The defendant being in possession is perfectly entitled to resist eviction on the basis of such agreement and is not required to resort to a suit for specific performance.

Babu *Dwarka Nath Chakerbutty* (with him Babu *Ramani Mohan Chatterjee*), for the Respondent.—Unless the sale of a portion of a holding is an incumbrance the defendant has no case, but it has been clearly laid down that the sale of a portion is not an incumbrance. See *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7).

As against the landlord the transferee of a portion of a holding has no right, and the landlord has no duty or obligation towards the transferee—he is perfectly justified in resorting to any device or means he chooses in order to protect his rights. See *Ramoni Mohan Roy* v. *Kalimuddi* (8). Elsewhere the relationship of landlord and tenant is governed entirely by contract but not so under the Bengal Tenancy Act. So general principles can be of no avail to the defendant.

Babu *Bimal Chunder Das Gupta*, in reply.—After the Full Bench case in *Dayamoyi* v. *Ananda Mohan Roy* (1) it is hardly correct to say that the transferee of a portion has no rights—he has the right to be on the land even as against the landlord and the landlord has the corresponding duty of allowing him to do so. The decision in *Ramoni Mohan Roy* v. *Kalimuddi* (8) overlooks this aspect of the matter and is thus inconsistent with the Full Bench case, and is no longer binding. The case was decided *ex parte*, and matters in favour of the tenant were not placed before the Court. Besides, this case does not touch the second branch of my argument. Then again the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) has been doubted in *Asgar Ali* v. *Gouri Mohan Roy* (4). I adopt the considerations mooted out by the learned Judges in the latter case against the correctness of the decision in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7). Besides the case of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) favours the second branch of my argument, as it lays down that sale of a portion effects a complete extinction of the vendor's title so far as the portion transferred is concerned.

(6) 33 Ind. Cas. 611; 20 C. W. N. 610.
(7) 5 Ind. Cas. 116; 14 C. W. N. 229; 11 C. L. J. 16.
(8) 17 Ind. Cas. 682; 17 C. W. N. 1101.

JUDGMENT.

D. CHATTERJEE, J.—In this case certain tenants sold portions of their occupancy holdings to the principal defendant and surrendered those portions only to the landlord and took from him leases at an enhanced rent in respect of the residue of their holdings. The landlord by virtue of the surrender wants to eject the principal defendant. The first Court disallowed the prayer for *khas* possession and the lower Appellate Court has allowed it. The question before us is whether the decree for *khas* possession is right. The judgment of the lower Appellate Court finds support in the cases of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) and *Ramoni Mohan Roy* v. *Kalimuddi* (8). It is contended, however, that these cases were wrongly decided and in any case are no longer binding authorities, as they are inconsistent with the later Full Bench ruling in *Dayamoyi* v. *Ananda Mohan Roy* (1) and have been questioned in the case of *Asgar Ali* v. *Gouri Mohan Roy* (4). I think these contentions are right and that the judgment of the lower Appellate Court is wrong. It was held in *Dayamoyi's* case (1) that the sale of a portion of an occupancy holding is

valid and the landlord has no right to *khas* possession of the land. Now what more has taken place in this case? The tenants sold portions of their occupancy holdings and had no right or interest left in the same. Then they made a show of a surrender of the self-same lands to the landlord. They had nothing to surrender and the landlord had no right to eject the purchaser. Then there is an amalgamation of these two nothings and at once the landlord is competent to eject the purchaser. It is true the landlord was not bound by the sale and could, under section 86 (7), Bengal Tenancy Act, accept a partial surrender; but this means a surrender of something which the tenant had to surrender. Apart from the meaning of the word 'surrender' in English Law, the word has a meaning as a word in the English language, to give up or resign or yield to the possession of another; but the tenant has no right to give up or resign or yield what he has already sold. In this view of the case surrender is a misnomer for the act of the tenant and section 86 (5), even if it could apply to part-surrender (for the clause speaks of surrender of his holding), would not entitle the landlord to take *khas* possession. Nor in this view of the case is it necessary to consider whether the word incumbrance in section 86 (6) includes the sale of a portion of a holding.

Having regard to the fact that I differ from the decision of the Court in the cases of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) and *Ramoni Mohan Roy* v. *Kalimuddi* (8), the better course would perhaps have been to refer the matter to the Full Bench, but as I cannot do so alone and as the second branch of the argument, namely, the effect of *Dayamoyi's* case (1) may be sufficient to dispose of the case I would allow the appeal.

As we differ on a point of law, the case must go to the Chief Justice for reference to a third Judge. The point of law in respect of which we differ is—whether a *raiyat*, having sold a part of his occupancy holding, can surrender the self-same part to his landlord so as to entitle the latter to take *khas* possession of the said part by ejecting the purchaser?

NEWBOULD, J.—The facts as found in this appeal are as follows:—The tenants of these holdings with occupancy rights under the plaintiff sold the plots of land in suit, which form portions of the lands of these holdings, to the principal defendant who is the appellant in this appeal. Subsequently these tenants orally relinquished the lands in suit in favour of the plaintiff and took fresh settlements at enhanced rates by executing *kabuliyats* in respect of the remaining lands of their holdings. The appellant alleged that he had obtained a settlement of the disputed land from the plaintiff but this was found against him by the lower Appellate Court, who granted the plaintiff a decree for *khas* possession.

On behalf of the appellant it is contended that the tenants after their sale to the appellant-defendant were divested of all their interests in the land in suit and had nothing left to surrender to their landlord and consequently there was no valid surrender. It is also contended that the appellant-defendant, as a transferee of a portion of an occupancy holding, is not liable to ejectment and further that he is protected by the provisions of section 86 (6) of the Bengal Tenancy Act, which provides that, when a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer.

In support of the first contention a passage from Foa's Landlord and Tenant (5th edition, page 624) was read to us. But the general principles of English Law that are relied on have no application to the present case. No English case could be cited to support the contention that the landlord would be bound by a transfer made by a tenant who had covenanted not to transfer. The position of a tenant of a holding not transferable without the landlord's consent is similar to that of an English tenant who has made such a covenant.

In my opinion the facts of the present case cannot be distinguished from the facts of the cases of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) and *Ramoni Mohan Roy* v. *Kalimuddi* (8). In both these cases it was held that the sale of a portion of a non-transferable holding did not create an "incumbrance" on the tenancy within the

meaning of section 86 (6) of the Bengal Tenancy Act. In the former of these cases the tenant sold a portion of his holding without the landlord's consent and then surrendered that portion. The landlord then settled this surrendered portion with the plaintiff and it was held that the plaintiff could eject the transferee. In the latter case the facts still more closely resemble the facts of the present case. The tenant after selling a portion of his holding surrendered that portion and executed a *kabuliyat* in respect of the remaining portion of the holding. It was held that upon such surrender the landlord was entitled to eject the transferee as a trespasser.

The learned Vakil for the appellant did not deny that these cases were in point but contended, *firstly*, that the decisions were erroneous and *secondly*, that they were opposed to the later decision of the Full Bench of this Court in *Dayamoyi's* case (1). In support of the first of these contentions he relies on the decision of a Bench of this Court in *Asgar Ali* v. *Gouri Mohan Roy* (4). There the accuracy of the decision in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) was doubted and Mookerjee, J., in his judgment pointed out that at least four points required consideration before that case could be held to furnish a correct exposition of the law. I will, therefore, consider these points *seriatim*. The first point is that "the learned Judges adopted for the purposes of the interpretation of section 86, which finds a place in Chapter IX of the Bengal Tenancy Act, the definition of the term incumbrance given for the purpose of Chapter XIV alone." This statement appears to be incorrect. The learned Judges remarked that the Subordinate Judge had accepted the definition of incumbrance in section 161 of the Rent Law. But though they quoted this definition and stated that the word was nowhere else defined in Indian Acts, they appear to have accepted the meaning attached to this word in the English Conveyancing Act of 1881 [44 & 45 Vict. c. 41, section 2 (vii)].

The second point noticed is that "the decision of this Court in the case of *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (2) shows that an exchange is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act,' and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale." The answer to this objection is that in the case cited the meaning of incumbrance as defined in section 161, Bengal Tenancy Act, was being considered and as pointed out above the definition in that section is not applicable to the word as used in section 86 (6).

The third point is that "the effect of the decision is to place the purchaser in a worse position than a mortgagee or lessee under sub-section (6) of section 86." The result may seem anomalous, but that does not make the decision bad law. It is similar to the effect of the Full Bench decision in *Dayamoyi's* case (1), which puts the purchaser of the whole of a non-transferable holding in a worse position than the purchaser of a part. The last point is that, "it may be a question whether there can be a surrender effective for the purposes of section 86 when the conditions mentioned in sub-section (5) cannot be fulfilled." Sub-section (5) of section 86 is as follows: — "When a *raiyat* has surrendered his holding, the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself." I cannot see that this clause is any bar to the landlord making a fresh settlement with the original tenant after his surrender. Even if the agreement to make a re-settlement was entered into before the surrender, this, in the absence of collusion, would not make the surrender invalid. There is nothing in the law to prevent a surrender being made subject to conditions. In the case of *Asgar Ali* v *Gouri Mohan Roy* (4) the question of the correctness of the decision in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (7) was expressly reserved. After considering the objections throwing doubt on its correctness, I see no sufficient reason for refusing to follow it, on the point that a sale of a portion of a holding is not an incumbrance within the meaning of section 86 (6), Bengal Tenancy Act. If it is not an incumbrance, clause (7) of that section clearly provides for the valid surrender of a part of the holding.

The learned Vakil for the appellant relied on the unreported case of *Hasuni Bibi* v. *Sadir Mamud Sarkar* (3), which was follow.

ed in *Ram Udar Singh* v. *William Cox* (5). Both these cases are distinguishable on the ground that the transfers made by the *raiyat* were by way of mortgage and were, therefore, obviously incumbrances within the meaning of section 85 (6). The recent case of *Naba Kishore Saha* v. *Dhananjoy Saha* (6) is not in point, as there the pretended surrender of the whole holding was held to be a collusive surrender and not a real surrender. Here there is no finding that the surrender was collusive and I see no reason for thinking that the landlord had any fraudulent intention in acting as he did.

Finally, the effect of the decision of the Full Bench in *Dayamoyi's* case (1) has to be considered. It was there decided that where the transfer is of a part only of the holding the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. This does not help the appellant, as in the present case there has been a relinquishment of the holding. It may be conceded that relinquishment of the holding means a relinquishment of the whole holding but the whole holding has been surrendered. The part sold to the defendant-appellant was expressly surrendered and the taking of a new settlement of the remainder of the holding operated in law as an implied surrender of the remaining portion. Clause (3) (*a*) of section 86 of the Bengal Tenancy Act shows that there can be implied surrender under that Act as well as under section 111 of the Transfer of Property Acts which is not applicable to leases, for agricultural purposes. It is contended that it was not the plaintiff's case as set forth in the plaint that there was a surrender of the whole holding. The facts that the tenants made *estifa* of some of the land of their holdings and executed separate registered *kabuliyats* in favour of the plaintiff in respect of the remaining lands are set out in the plaints It was open to the plaintiff at the trial to agree that these facts amounted to a surrender in law of the whole holding.

I consider, therefore, the lower Appellate Court was right in granting the plaintiff's decree of *khas* possession and would dismiss this appeal with costs.

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As their Lordships differed the case was referred to a third Judge, Chitty, J., who, however, did not decide the case as he thought that the judgment of the two Judges proceeded upon different views of the facts. The case was then sent back to the learned Judges, who dismissed the appeal with costs under sub-section 2 of section 98 of the Civil Procedure Code. We understand an appeal under section 15 of the Letters Patent has been preferred by the appellant and is pending.

*Appeal dismissed.*

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MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 179 OF 1916.

January 18, 1917.

*Present*:—Mr. Justice Oldfield and Mr. Justice Bakewell.

THE CHALAPURAM BANK, LTD., THROUGH ITS MANAGING PROPRIETOR K. C. SREEVEERA RAYAN RAJA AVERGAL—DEFENDANT—APPELLANT

*versus*

THE ZAMORIN RAJA AVERGAL, REPRESENTED BY THE REGULATION COLLECTOR AND AGENT TO THE COURT OF WARDS—PLAINTIFF—RESPONDENT.

*Principal and agent—Manager of Bank, powers of—Bank, whether can be sued 'by its Manager'—Plaint, amendment of, by claim for relief against Manager personally in alternative—Liability of Manager—Execution—Agreement to satisfy decree—Assignment, procuring of, in breach and execution—Suit by judgment-debtor for recovery of amount paid in execution, nature of—Civil Procedure Code (Act V of 1908), s. 47, whether bar.*

A Bank is a limited company and it can be sued only in its own corporate personality. It cannot sue or be sued in the name of its Manager and a suit against a 'Bank by its Manager' means at best only that it is proposed to serve the Manager. [p. 551, col. 2.]

In such a suit, the Manager cannot be treated as a party already on the record who can be made personally liable. [p. 551, col. 2.]

An application to amend the plaint by insertion of a prayer for relief against the Manager in the alternative should be refused, though he can be added as a party independently. [p. 551, col. 2.]

CHALAPURAM BANK, LTD. *v.* ZAMORIN RAJA AVERGAL.

The trial of the suit must be restricted to an enquiry into the question of the Bank's liability and the Manager's conduct can affect it only in so far as he may be found to have acted within the scope of his authority. [p. 552, col. 1.]

A suit for return of money paid by a judgment-debtor to a person, who, in violation of a contract to enter satisfaction of the decree, procured the assignment of it to himself and realized money in execution, is one for breach of contract and is not barred by the provisions of section 47, Civil Procedure Code. [p. 551, col. 1.]

Appeal against the order of the District Court, South Malabar, in Appeal Suit No. 324 of 1915, preferred against the decree of the Court of the Temporary Subordinate Judge, Palghat, at Calicut, in Original Suit No. 17 of 1914.

FACTS.—Plaintiff, the Zamorin of Calicut, brought a suit against the defendant Bank to recover money realised in execution of a decree passed against his predecessor. The Manager of the Bank had agreed to pay off the decree-holder but instead of entering up satisfaction, he got the decree assigned to himself and executed the same. The Subordinate Judge held that the suit was barred by section 47 of the Code of Civil Procedure. The District Judge, on appeal, held that the suit, being one for damages, was maintainable and directed the Manager to be made a party. The Manager appealed to the High Court.

Messrs. *C. V. Anantakrishna Aiyar* and *K. P. Ramakrishna Aiyar*, for the Appellant.

Mr. *A. Sundaram*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The main question argued is whether this suit is sustainable or is barred by section 47 of the Civil Procedure Code; and I, therefore, follow the lower Courts in dealing with it with reference only to the plaint and a few documents necessary to its understanding, assuming the truth of the allegations made.

In 1912, the late Zamorin of Calicut arranged with his Bank, the defendant-appellant, that it should satisfy a decree, in connection with which his property had been attached. The Bank, however, did not satisfy the decree, but obtained an assignment of it and afterwards recouped itself for the amount spent in doing so by deducting it from the Zamorin's next instalment of *malikana* or revenue, which was received to its credit in March-April 1912. The pending execution petition was, therefore, disposed of on 1st April, and the Bank on 28th June obtained recognition of its assignment in the order in Exhibit U. The present Zamorin, the plaintiff-appellant, succeeded on 30th December. The Bank had already applied for execution of the assigned decree and obtained it in spite of plaintiff's opposition and an unsuccessful attempt by him to obtain a review of the order of 28th June 1912. He, therefore, was constrained to pay the Bank the decree amount, though it had already once paid itself the amount from the balance in its hands. The plaint also refers to facts in explanation of plaintiff's predecessor's failure to oppose the assignment application, and the Bank's application for execution, and they will be the subject of enquiry at the trial. But the material allegations are those stated. On them plaintiff claims repayment of the amount of his last payment to the Bank and of the legal expenditure incurred in resisting its apparently unjust demand.

The Bank's first contention, which the Court of First Instance adopted, is that this suit is simply to recover money paid in execution and is, therefore, unsustainable. It is supported on the grounds that the original decree-holder and the Manager of the Bank, with whom the arrangement was made, are not parties and that no contract by the Bank to satisfy the decree is alleged. But even if the parties referred to were necessary, and I cannot see how they were (since deceit is not imputed to the decree-holder at all or to the Manager personally except in the alternative), their absence would not change the character of the suit; for they could, if necessary, have been impleaded. And in fact in paragraphs 5 and 6 of the plaint, an agreement by the Bank to satisfy the decree, in pursuance of which it recouped itself from the Zamorin's balance, is set up clearly. The suit, I agree with the lower Appellate Court, is framed as one for damages for the Bank's breach of its agreement with him.

The main objection to it is then that it involves adjudication on a question, which could have been raised in the assignment proceedings under section 47 of the Civil Procedure Code, and, therefore, cannot be raised now, whether the decree had been satisfied at their date. To this objection two answers are available, *firstly*, the decree

had not been satisfied and no plea of satisfaction was available to the Zamorin, since his arrangement for satisfying it had failed and he could not be expected to adopt the transfer to the Bank as made *benami* for his benefit, when it was not taken with his authority, cases such as *Annabattula Venkataratnam* v. *Annabattula Nayudu* (1) being distinguished on that ground. *Secondly*, if it could be held that a satisfaction, which the Zamorin was bound to adopt, had taken place, there was still, owing to the decree-holder's and the Bank's failure in their duty under Order XXI, rule 2, to have that satisfaction recorded, no satisfaction which could be proved; and authority is clear that a suit will lie in those circumstances. *Iswar Chandra Dutt* v. *Haris Chandra Dutt* (2), *Krishnasami Ayyangar* v. *Ranga Ayyangar* (3), *Raghava Iyengar* v. *Athanambalam* (4). No doubt in these cases, the proceedings, in which the plea of satisfaction should, it was contended, have been adjudicated on, were directly for execution, not for recognition of an assignment and for execution under Order XXI, rule 16. But the principle involved is not affected by that or by the fact that the petition, on which recognition of the assignment was granted, irregularly contained no prayer for execution by the assignee. In these circumstances, the conclusion of the lower Appellate Court, that the suit as framed is sustainable against the Bank, must be sustained.

The remaining question argued arose because the Bank's defence, as disclosed in its written statement, was to some extent that responsibility for what had occurred lay with the Manager already referred to, who had acted outside the scope of his authority and as the agent of the Zamorin, his uncle. Plaintiff, who had brought his suit against "the Bank by its Manager," then applied, not for the addition of the latter personally as a party, but only for the amendment of the plaint by insertion of a prayer for relief against him in the alternative. The Subordinate Judge refused this on the ground that the application was unduly delayed, and I should agree that it was so. But the lower Appellate Court allowed it, because paragraph 19 of the plaint already asked for relief against the Manager personally, and no real change was involved. The question is whether this part of its judgment is right. Now the Bank alone is before us, and I have felt some doubt as to whether it can be permitted to take objection to a decision, which cannot affect the merits of its defence and which the Manager will be able to attack, when and if it operates to his personal prejudice. But the prevailing consideration, in consequence of which I proceed, is that this decision is based on a fallacy, which will probably cause confusion during the trial and involves misconception as to the Bank's position. The Bank is a limited company; and it has not been suggested that it can sue or be sued in the name of its Manager under any special enactment. It then can be sued only in its own corporate personality; and the statement in the plaint that it is sued by its Manager is, if it amounts to more than that it is proposed to serve him, meaningless. *Campbell* v. *Jackson* (5). It was, therefore, not open to the lower Appellate Court to treat the Manager as a party already on the record, who could be made personally liable, as though the case were similar to that of a minor sued by his guardian. The amendment asked for, insertion of a prayer for relief against a person, who was not a party, could in the circumstances have had no legal result and should have been refused on that ground. It is of course still open to plaintiff to apply for it again, applying also to have the Manager impleaded personally. As to the prospects of such an application at this stage, it is unnecessary to express an opinion.

The result is that the appeal fails and is dismissed, except as to the direction in the Lower Appellate Court's decree relating to amendment. The appeal is allowed in respect of this direction, which must

(1) 28 Ind. Cas. 906.
(2) 25 C. 718; 2 C. W. N. 247; 13 Ind. Dec. (N. S.) 470.
(3) 20 M. 369; 7 M. L. J. 71; 7 Ind. Dec. (N. S.) 262.
(4) 23 Ind. Cas. 405; (1914) M. W. N. 174.
(5) 12 C. 41; 6 Ind. Dec. (N. S.) 28.

be expunged from the decree. In the circumstances and in view of the extent to which the appeal succeeds, respondent will pay appellant's costs in this Court, costs in the lower Courts will be costs in the cause.

In passing this decision and with reference to the lower Court's mistaken view of the Manager's position, I observe that the trial to be held will be concerned only with the Bank's liability and that the conduct of the Manager can affect it, only in so far as he may be found to have acted within the scope of his authority. This observation is necessary owing to the attempt made in the plaint to use language reconcilable with the claim to relief being against him and the Bank in the alternative. As this claim is unsustainable, so long as he is not a party, it may be advisable for the Subordinate Judge to insist on that language being made unambiguous by insertion of an amendment distinctly alleging that only such conduct of the Manager, as was within the scope of his authority, is in question.

BAKEWELL, J.—I agree.

*Appeal partly allowed; Case sent back.*

V. R. P.

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PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 36, 264 OF 1916.

March 21, 1917.

*Present*:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

KASI PATY MUKHERJEE—PLAINTIFF APPELLANT

*versus*

THE CHAIRMAN OF THE PURI MUNICIPALITY—DEFENDANT—RESPONDENT.

*Bengal Municipal Act (III B.C. of 1884), s. 224—"Cesspool", what is—Cisterns for collection of rice water, and rainwater, whether "cesspools"—"Drain," meaning of.*

The common meaning of the word "cesspool" is a pit into which a drain discharges its contents. The word "drain" means not merely a water channel but a channel used for the flow of offensive matter. Before a channel can be called a drain within the terms of the Municipal Act, it must be shown that offensive matter is carried by it and before a pit at the end of such a channel can be called a "cesspool" it must be shown that offensive matter is discharged into it. [p. 552, col. 2.]

Where a gentleman constructed two masonry reservoirs, $2\frac{1}{2}$ feet by $2\frac{3}{4}$ feet, near his house (without the permission of the Municipality within which it was situate), one to collect surplus rainwater from the roof of his house and the other to receive rice water from his kitchen, and no offensive matter was allowed or was intended to be carried into these two reservoirs:

*Held*, that the cisterns were not cesspools and as such were not liable to be removed or closed under section 224, Bengal Municipal Act, and that unless it was definitely proved that they were used for collection of obnoxious matter no action under the section could be taken. [p. 553, col. 1.]

Rice water is in itself not an offensive thing, although if allowed to stagnate it becomes offensive in time. [p. 553, col. 1.]

Second appeal against a decision of the District Judge, Cuttack, reversing that of a Munsif of Puri.

Messrs. *Sarat Chandra Chakravarty*, *S. M. Bose* and *Priyanath Chatterjee*, for the Appellant.

Mr. *Biswanath Sinha*, for the Respondent.

JUDGMENT.—The plaintiff in this case is a well-to do gentleman who built a house some three years ago in the town of Puri. Without the permission of the Municipality he constructed two masonry reservoirs, $2\frac{1}{2}$ feet by $2\frac{3}{4}$ feet, near his house, one to collect surplus rain water from the roof of his house and the other to receive rice water from his kitchen. The Puri Municipality have issued a notice upon him to close these reservoirs as cesspools, and against this notice he files the present suit for a permanent injunction restraining the Municipality from carrying into effect the notice issued upon him.

The sole question for decision in the appeal is whether these reservoirs are cesspools or not. If they are cesspools the Municipality has jurisdiction to order them to be closed under section 224 of Act III of 1884 and no suit would lie to contest the decision of the Municipality that they should be closed.

The Courts below have entered into a discussion as to what the word cesspool means. The common meaning of the word, as I understand it, is a pit into which a drain discharges its contents. The word drain means not merely a water channel but a channel used for the flow of offensive matter. Before a channel can be called a drain within the terms of the Municipal Act, it must be shown that offensive matter is carried by it and before a pit at the end of such a channel can be called a cesspool it must be shown that offensive matter is discharged into it.

The plaintiff has given definite evidence that no offensive matter is allowed to be carried into these two reservoirs, and before it can be said that the reservoirs are cesspools there must be definite evidence by the Municipality that offensive matter has been carried into the reservoirs. There is no such evidence on the record. Two Municipal servants were called to give evidence. Both say that there was no offensive matter in the reservoirs at the time of their inspection. One of them no doubt says that they gave out a bad smell, but we fail to understand how the reservoirs themselves could give out a bad smell if there was nothing offensive in them. The learned District Judge gives as his reason for holding that these reservoirs are cesspools that they were designed to collect the drainings of the kitchen and anybody who has had any experience at all of the drainings of a kitchen knows perfectly that such refuse is a nuisance and menace to public health, unless it is removed without delay or disinfectants used. This is obviously true of a kitchen in which fish or fowl is cooked. The cleaning of fish and the cleansing of fowl are matters extraordinarily offensive, and it is impossible to keep such a kitchen so clean as to prevent offensive matter being carried out with the washings of the kitchen. But we are not aware that in the household of a Hindu of good caste the kitchen necessarily contains offensive matter. Indeed seeing that the usual practice of the family is to eat its meals on the floor of the kitchen it seems to be reasonable to suppose that a well-to-do house-holder would be peculiarly careful to see that the kitchen floor is not full. The plaintiff has given definite evidence that nothing but rice water is allowed to run into this reservoir. Rice water is in itself not an offensive thing; no doubt if allowed to stagnate it becomes offensive in time. We are not prepared to say that a cistern for the collection of rice water from a kitchen is a cesspool, and indeed the Municipality themselves concede that a similar cistern of somewhat larger dimensions near the Jagannath Temple is not a cesspool.

We are, therefore, of opinion that the present suit should be decreed in part, and that the decree should take this form:—

That inasmuch as it has not yet been proved that the reservoirs in question were intended to be or have been used as receptacles for obnoxious matter, it cannot be said that they are cesspools within the meaning of the Act. That until definite evidence has been taken by the Municipality that they are in fact used for the collection of obnoxious matter no action under section 224 can be taken. That the decree made will not prevent the Municipality from taking such action if in future on inspection by a person having authority it be found that obnoxious matter has been allowed to collect in these reservoirs. That the suit for a permanent injunction restraining the Municipality from interfering with these reservoirs must be dismissed. That the suit for the setting aside of the notice issued by the Municipality upon the plaintiff must be decreed. The Municipality is restrained from taking any further action upon the notice issued in this particular case.

We direct that each side pay its own costs throughout this litigation.

*Appeal partly allowed.*

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 99 OF 1916.

February 21, 1917.

*Present*:—Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

*Kumar* PRASANNA DEB RAIKAT,

LATE A MINOR, BY HIS GUARDIAN

SATIS CHANDRA ROY CHOWDHURY

—PLAINTIFF—APPELLANT

*versus*

MOHANANDA DAS—DEFENDANT—

RESPONDENT.

*Bengal Tenancy Act (VIII B. C. of* 1885), *s.* 50—*Presumption—Slight variation of rent—Appeal—Admissibility of document admitted without objection, whether can be questioned—Pleadings.*

A slight variation in the rents paid in the preceding years, unless explained as having been due to an increase of area or any other cause than that of enhancement of rent, is sufficient to rebut the pre-

sumption arising under section 50 of the Bengal Tenancy Act. [p. 555, col. 1.]

Documentary evidence which is not altogether irrelevant and which has been admitted without objection, cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used [p. 555, col. 1.]

Appeal under section 15 of the Letters Patent, against the judgment of Mr. Justice Newbould, dated the 5th April 1916, in Appeal from Appellate Decree No. 2702 of 1914.

FACTS material to this report are briefly as follows:—

The plaintiff landlord brought this suit under section 106 of the Bengal Tenancy Act for the correction of an entry in the Record of Rights, *viz.*, that the rent of the *jama* in question is not liable to variation. It was proved on behalf of the landlord that the rent previously payable for the *jama* was Rs. 25-12 *karas* 12 *krants* but it was afterwards raised to Rs. 25-3-0. The Settlement Officer decreed the plaintiff's suit and relying on the *jama wasilbaki* papers found as a matter of fact that the rent did vary and that variation was due to enhancement of rent. On appeal, the decision of the Settlement Officer was affirmed. On second appeal to the High Court Mr. Justice Newbould reversed the decision of the lower Courts on the ground that the variation was very slight and such nominal variation was not sufficient to prove any enhancement of the rent of the *jama*.

Babu *Dwarka Nath Chakraburty* (with him Babus *Upendra Nath Roy* and *Sisir Kumar Ghose*), for the Appellant.—I submit that Mr. Justice Newbould was wrong in interfering with the decision of the lower Courts, on the ground that the variation of rent was very slight and that such variation is not sufficient under the rulings of this Hon'ble Court to prove alteration of rent. It is not a case in which the lower Courts found a slight variation in the payment of rent and the High Court on appeal held that the variation being very slight might be neglected. It is a case in which the lower Courts found as a fact that the rent or *jama* did vary, and the High Court interfered with this finding of fact which it is not entitled to do in second appeal. However slight the variation of rent paid might be, the finding of fact that there was variation of the rent or *jama* arrived at by the final Court of fact should not have been reversed by the High Court.

Babu *Ram Chandra Majumdar* (with him Babus *Ramesh Chandra Mazumdar* and *Nagendra Nath Ghose*), for the Respondent.—The defendant has proved rent receipts showing uniform payment of rent for more than twenty years.

Moreover, the *jama wasilbaki* papers by which the plaintiff wants to prove variation of rent are by themselves not sufficient to saddle the defendant with any liability. These papers can only be taken into consideration as corroborative evidence. Both the lower Courts treated this corroborative evidence as independent evidence. But they have erred in so doing. See section 34, Evidence Act.

Then even if these *jama wasil baki* papers raise a presumption under section 90, Evidence Act, other things are necessary to be proved to make the papers admissible in evidence under section 32 (2), Evidence Act. If these papers are sought to be made use of against the tenant under section 32 (2) then it must be clearly shown that they were made in the ordinary course of business by the person by whom they are alleged to have been made.

The next point is that the alleged variation being very slight, the presumption arising under section 50 (2) of the Bengal Tenancy Act should not be taken away. See *Grant* v. *Har Sahay Singh* (1). The entry in the Record of Rights is in favour of the tenant. The landlord must prove that there was variation and must explain the variation. Unless the increase is explained, the law will surely ignore such a nominal and very insignificant variation. The landlord should prove that the variation has been on account of something other than the alteration of area. The onus lay heavily upon him, and he has failed to discharge that onus.

JUDGMENT.—Mr. Justice Newbould has held that the variation which has been proved is so small that it does not rebut the presumption arising under section 50 of the Bengal Tenancy Act. The cases referred to deal with those in which there has been an unexplained variation. In the present

(1) 20 Ind. Cas. 53; 18 C. L. J. 76.

case it has been proved that there has been variation of rent; and there is no suggestion or evidence in the case to show that such variation was due to increase of area or any other cause than that of enhancement of rent. This ground, therefore, fails.

The other ground taken is that the learned District Judge was wrong in relying upon the evidence afforded by the *jama wasil-baki* papers. It is not and cannot be disputed that those papers are relevant evidence in the case. What has been contended is that the evidence which has been given in support of these documents is not sufficient to make them admissible for the purposes for which they have been used. The simple answer to this argument is that these documents were admitted without objection in the First Court, and, therefore, such an objection will not now lie.

We think that sufficient cause has been shown for this increase, and that the judgment and decree of Mr. Justice Newbould must be reversed and the decree of the District Judge restored with costs of the hearing in this Court and also of the hearing before Mr. Justice Newbould.

*Appeal allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 30 OF 1915.

January 2, 1917.

*Present*:—Pandit Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

*Babu* BADRI NARAIN SINGH—PLAINTIFF—APPELLANT

*versus*

*Thakurain* HARNAM KUAR AND OTHERS—DEFENDANTS - RESPONDENTS.

*Oudh Estates Act (I of 1869), ss. 3, 8, 22, 23—Crown Grants Act (XV of 1895), ss. 2, 3—Primogeniture* sanad, *effect of grant of, in cases of estates entered in lists IV and VI*—Sanad, *supersession of, under Oudh Estates Act—Ordinary law, whether includes* sanad *under s. 23—Revival under Crown Grants Act of* sanad *already superseded—Custom—Primogeniture—Proof—Exclusion of females—Single heir succession.*

One *A.* was the owner of *Taluka* Kundrajit before the annexation of the Province of Oudh. He had four sons, whose heirs subsequently under the British Rule divided the entire *taluka* among themselves giving four distinct names to the four portions so divided. One of the portions was the portion in dispute and was called *Taluka* Tajpur. It was allotted to *C.*, the eldest male in the line of the second son of *A.* The *sanad* granted by the British Government was a primogeniture *sanad*, with respect to the whole *Taluka* Kundrajit issued jointly in the names of the four descendants of *A.*, but their names were entered in lists I and IV prepared under the provisions of the Oudh Estates Act. *C.* died in 1899 and on his death the *taluka* came into the possession of his only son *K.* On the death of *K.* his widow *H.*, the defendant, succeeded to the possession of the estate. The plaintiff alleged the *taluka* to be impartible and as the only son of one of the brothers of *C.*, claimed the estate from the widow on the ground that he was the nearest male heir according to the rule of lineal primogeniture laid down in the *sanad* which governed the succession to the estate, as being part of the personal law under section 23 of the Oudh Estates Act and also according to an ancient custom of lineal primogeniture prevailing in the family to the same effect. He also impleaded in the suit the descendants of *B.* a brother of *C.*, who according to the plaintiff were interested in denying his title to the property in dispute. The defendants denied that the estate was an impartible *taluka*, also denied the alleged family custom and contended that the estate having been entered in list IV, the succession to it was governed by section 23 of the Oudh Estates Act which prescribed the ordinary personal law as the rule of succession applicable to the case, and that the rule of succession laid down in the *sanad* was not applicable nor was the *sanad*, as contended for by the plaintiff, part of the personal law under section 23 of the Act. The descendants of *B.* also alleged that on the death of the widow the nearest reversioners of *K.*, the husband of the widow, at that time would be entitled to the estate. The questions for determination in the case were whether the *sanad* still governed the succession to the estate both as part of the personal law and also in view of the Crown Grants Act XV of 1895, or whether it was superseded by Act I of 1869 and whether the family custom relied upon by the plaintiff had been established. It was agreed that if the rule of succession by male lineal primogeniture was established as applicable to the estate, the defendant being a female would necessarily be excluded from succession:

*Held*, per *Kendall, A. J. C.*, (1) that under section 23 of Act I of 1869, succession to the estate was governed by the ordinary law and not by the *sanad*, the *sanad* being part of the ordinary law only in cases of estates entered in lists III and V and not in the case of estates entered in lists II, IV and VI; [p. 560, cols. 1 & 2.]

(2) that the operation of the *sanad* was superseded by Act I of 1869 and that the Crown Grants Act XV of 1895 did not affect the provisions of Act I of 1869 and consequently had not the effect of reviving the *sanad* already declared inoperative under Act I of 1869. [p. 558, col. 1.]

*Brij Indar Bahadur Singh* v. *Ranee Janki Koer*, 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 762; Bald. 148; Rafique and Jackson's P. C. No. 48; 3 Suth. P. C. J. 474 (P. C.); and *Parbati Kunwar* v. *Chandarpal Kunwar*, 4 Ind. Cas. 25; 31 A. 457; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 890; 12 O. C. 394; 19 M. L. J. 605 (P. C.), followed,

BADRI NARAIN SINGH *v.* THAKURAIN HARNAM KUAR.

*Debi Bakhsh Singh* v. *Chandrabhan Singh*, 7 Ind. Cas. 724; 32 A. 599; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom L. R. 1015; 13 O. C. 316; 20 M. L. J. 917; 37 I. A. 168 (P. C.), explained.

(3) that on the evidence on the record the plaintiff had failed to establish the family custom of male lineal primogeniture by which females would be necessarily excluded [p. 563, col. 1.]

Per *Kanhaiya Lal, A. J. C.*—(1) The *sanad* was not wholly superseded by Act I of 1869 and the *sanad* like custom must be considered as part of the personal law referred to in section 22, clause 2, and section 23 of the Act; [p. 575, col. 1.]

*Secretary of State* v. *Moment*, 18 Ind. Cas. 22; 11 A. L. J. 49; 6 Bur. L. T. 1; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 17 C. L. J. 194; 24 M. L. J. 459; 40 C. 391; 7 L. B. R. 10; 40 I. A. 48 (P. C.); *Debi Bakhsh Singh* v. *Chandrabhan Singh*, 7 Ind. Cas. 724; 32 A. 599; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 13 O. C. 316; 20 M. L. J. 917; 37 I. A. 168 (P. C.); *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan*, 36 Ind. Cas. 299; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8 (P. C.) and *Sheo Singh* v. *Raghubans Kunwar*, 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194; 32 I. A 203 (P. C.), followed.

*Bhai Narindar Bahadur Singh* v. *Achal Ram*, 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique and Jackson's P. C. No. 128; 10 Ind Dec. (N. S.) 438 (P. C.) and *Parbati Kunwar* v. *Chandarpal Kunwar*, 4 Ind. Cas. 25; 31 A. 457; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A L. J. 767; 11 Bom. L. R. 890; 12 O. C. 304; 19 M. L. J. 605 (P. C.), distinguished from.

(2) the only family custom proved in the case was the custom of a single heir descent, which did not exclude the females from succession. [p. 576, col. 1.]

Appeal from the decree of the Subordinate Judge, Partabgarh, dated the 25th February 1915.

The Hon'ble Pandit *Moti Lal Nehru*, Pandit *Jawahir Lal Nehru* and Pandit *Jagmohan Nath Chak*, for the Appellant.

Mr. *Muhammad Nasim* and Babu *Shankar Dayal*, for Respondent No. 1.

Babu *Ram Chandra*, for Respondents Nos. 2 to 7.

JUDGMENT.

KENDALL, A. J. C.—The suit out of which this appeal has arisen has been brought for the possession of the Tajpur *Taluka*, which is an estate carved out of the Kundrajit *Taluka*, in respect of which a primogeniture *sanad* was allotted to Thakurain Baij Nath Kuar, Chhatarpal Singh, Surajpal Singh and Chandarpal Singh. The Kundrajit *Taluka* was eventually entered in lists I and IV prepared under the provisions of section 8 of the Oudh Estates Act; and in accordance, therefore, with the latter section the succession to the estate will be governed, under section 23 of that Act, by the ordinary law applicable to members of the intestate's tribe and religion. The Tajpur *Taluka* is in the possession of Thakurain Harnam Kuar, widow of Lal Ram Kinkar Singh son of Lal Chhatarpal Singh, who is said to be the last *talukdar*. *Taluka* Kundrajit was the property, before the annexation of Oudh, of Lal Ajudhia Bakhsh Singh, Lal Ajudhia Bakhsh Singh left four sons. Thakurain Baij Nath Kuar was the widow of Lal Bisheshar Bakhsh Singh the son of Lal Mahpal Singh, the eldest son of Ajudhia Bakhsh Singh, Lal Chhatarpal Singh was the eldest male in the line of his second son, Lal Surajpal Singh was the eldest male in the line of his third son, and Lal Chandarpal Singh was the elder male in the line of his fourth and youngest son.

The *taluka* at the time the lists were prepared was known as Kundrajit *Taluka*. Partition ensued in 1872, when the four following *talukas* were created:—

*Taluka* Bargaon allotted to Thakurain Baij Nath Kuar,

*Taluka* Tajpur allotted to Lal Chhatarpal Singh,

*Taluka* Shamspur allotted to Lal Surajpal Singh,

*Taluka* Kanti allotted to Lal Chandarpal Singh.

Lal Chhatarpal Singh died on the 6th September 1899. He left a Will on which reliance was sought to be placed in the Court below, but that Will was not prepared in due form according to the provisions of the Oudh Estates Act; and the plaintiff, who is appellant in this Court, no longer seeks to found upon it. On the death of Lal Chhatarpal Singh the *taluka* came into possession of Lal Ram Kinkar Singh his only son. At that time two of the brothers of Lal Chhatarpal Singh were dead; a third Lal Balbhaddar Singh was alive. Lal Ram Kinkar Singh died on the 6th of October 1907, leaving his widow *Musammat* Harnam Kuar who succeeded to the possession of the estate. The plaintiff Babu Badri Narain Singh is the only son of Babu Sripat Singh, one of the brothers of Chha-

tarpal Singh. He has brought this suit for possession of the *taluka*; and he impleaded as defendants *Musammat* Harnam Kuar, Har Shankar Partab Singh the elder son of Balbhaddar Singh, who had died in 1904, and the son of Babu Sheo Shankar Partab Singh the second son of Babu Balbhaddar Singh. Babu Har Shankar Partab Singh died, and in his place his five sons were then impleaded. The properties to which the suit relates were set out in schedules (*a*), (*b*) and (*d*) attached to the plaint, and the plaintiff also claimed mesne profits as set out in schedule (*c*). He claimed to be entitled by right of inheritance under (*a*) the terms of the primogeniture *sanad* granted by the Government, and (*b*) an ancient family custom of lineal primogeniture and he impleaded the defendants, other than Thakur Harnam Kuar, as persons interested to deny his title. At an early stage of the case it was stated by the learned Counsel who appeared for him that in setting out a custom of lineal primogeniture (paragraph 3 of the plaint) the plaintiff meant male lineal primogeniture, and that the custom which he alleged to exist, was identical with the rule of succession as laid down in the *sanad*. The defendants admitted that Kundrajit was a *taluka* which came into possession of the descendants of Babu Ajudhia Bakhsh Singh. They denied that it was impartible *taluka*, and they denied that there was any immemorial family custom, such as the law of primogeniture, by which the estate descended to the eldest member of the eldest branch of the family. They alleged that Thakurain Baij Nath Kuar had succeeded to the *taluka* in her own right on the death of her son. They further pleaded that the Kundrajit *taluka* having been brought in list IV of the lists prepared under section 8, the succession thereto was governed entirely by the ordinary law, and that the line of succession laid down in the *sanad* no longer applied, nor was the *sanad* preserved as a part of the personal law. They alleged that on the death of Thakurain Harnam Kuar the nearest reversioners of Lal Ram Kinkar Singh would be entitled to hold the property. As to part of the property claimed Thakurain Harnam Kuar objected that it was the self-acquired property of Lal Chhatarpal Singh or Lal Ram Kinkar Singh or Thakurain Harnam Kuar herself, and that if the *sanad* did apply to the *talukdari* property, it would not in any case apply to property so acquired; while respondents Nos. 2 to 7 took exception to a house, certain groves and certain lands as being the private property of Babu Balbhaddar Singh. They challenged the claim for mesne profits; and they denied that certain moveables mentioned in the schedules attached to the plaint were the property of Lal Ram Kinkar Singh. The learned Subordinate Judge found that the estate having come in list IV the conditions of the *sanad* no longer applied. He found that there was no family custom under which the estate descended to the nearest male heir. On the question of moveable properties he noted, and this is not denied, that the claim thereto was given up by the plaintiff's Counsel. As to the accretions to the estate and the private property of Babu Balbhaddar Singh he found that the issues relating thereto did not call for determination as the suit failed on the main grounds. He, therefore, dismissed the suit and allowed costs to the defendants. In the decree, which followed upon this judgment, two sets of Pleaders' fee were allowed.

The plaintiff has appealed. The memorandum of appeal is discussive and argumentative and may be condensed into the following grounds:—

*Firstly*, that the conditions of the *sanad* applied to this estate,

*secondly*, that even if the *sanad* was superseded by Act I of 1869 it takes effect by the Crown Grants Act, in spite of Act I of 1869 or any other Act,

*thirdly*, that the plaint definitely set out a custom of male lineal primogeniture,

*fourthly*, that the appellant has proved by unrebutable presumptions and unimpeachable documentary evidence that a custom of male lineal primogeniture, to the total exclusion of females, does obtain in the family.

*fifthly*, that in any event the costs payable by him in the first Court should be reduced by Rs. 3,000 as two sets of Pleaders' fee ought not to have been allowed against him.

As to the effects of the Crown Grants Act, this question may be disposed of at once. On the appeal coming on for hear-

ing it was admitted by the learned Counsel who appeared for the appellant that he did not at all desire to argue that the Crown Grants Act operated to revive a *sanad*. That Act had the retrospective effect of giving statutory recognition to what might otherwise be considered an arbitrary act of the executive authorities; and, by its operation, the title created by the *sanad* became an unimpeachable title from the time of its creation. The Act would not have the effect of reviving a *sanad* which, having been granted, had lapsed or otherwise become inoperative before the said Act was passed. The sole effect which the Crown Grants Act can have upon this present case is that, in case we find that succession to the *taluka* is controlled by the *sanad*, the validity of the title thereby conferred will be unimpeachable.

The next and the main question which arises for decision is whether in interpreting the expression "ordinary law" as used in section 23 of the Act provisions of the *sanad* can be considered.

In the only reported case under list IV recourse was sought to be had to the *sanad* in the first Court but the plea was not pressed any further. That case, *Parbati Kunwar* v. *Chandarpal Kunwar* (1), is reported in its last stages. The decision of this Court will be found in *Musammat Parbati Kuar* v. *Rani Chandrapal Kuar* (2), while a copy of the judgment of the first Court is on this record. In that case the daughter of the last undisputed owners sued for possession of the Majhgain Shahpur Estate in the Kheri District. In that case a primogeniture *sanad* had been given and in that case also the names of four persons had been bracketed together under one serial number in list IV. For the defence reliance was *imprimis* placed upon the primogeniture *sanad*; there were alternative pleas of adoption of the defendant, and of the exclusion of the plaintiff by custom. The first Court, reading section 3 and following the decision of the Judicial Committee in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3), to which I shall presently refer, ruled that the limitations in the *sanad* had been wholly superseded by the Act; it found adoption not proved, but it found the plaintiff to be excluded by custom. The finding of the first Court as to the supersession of the *sanad* by the Act for purposes of succession was acquiesced in on appeal, but the appellant faintly contended that the effect of the Crown Grants Act was to revive the *sanad*. This argument was not successful. The appeal failed. Before their Lordships of the Privy Council the word *sanad* was not even mentioned, as appears from the full report to be found in *Parbati Kunwar* v. *Chandarpal Kunwar* (1). It is not that the appeal failed on findings of fact, and that the question of the *sanad* could not have come up for discussion.

The *sanad* was undoubtedly the first barrier which the plaintiff had to pass on her way to victory, and the other questions only confronted her when that barrier was safely passed.

Section 3 of the Act I of 1869 provides that recourse on a question of succession will be had to the Act, and not to the *sanad*. Section 3 first came up for interpretation in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3), and their Lordships laid it down, following section 3, that the limitations in the *sanad* were wholly superseded by the Act. Their Lordships, in setting out their judicial opinion as to the effect of section 3, interpreted the word "condition" in the 4th paragraph of that section. And the amending Act III of 1910 added to the word "condition" in this section the words "other than those relating to succession" not in order to alter or amend the existing law, but to remove the misunderstanding which their Lordships had pointed out in *Ranee Janki Koer's* case (3). It would have seemed that section 3, as amended to make the position clear, removed any doubt as to whether recourse could be had to the *sanad* on a question of succession. But reliance is had upon the explanation to section 3, which was also added by the same amending Act. It is said that the *sanad* should be considered under section 23, because its conditions

(1) 4 Ind. Cas. 25; 31 A. 457; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 899; 12 O. C. 304; 19 M. L. J. 605 (P. C.)
(2) 8 O. C. 94.
(3) 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 148; Ratique and Jackson's P. C. No. 48; 3 Suth. P. C J. 474 (P. C.).

are not inconsistent with the provisions of the Act; such an argument is surely begging the question. This Explanation seems to me to be an unfortunately worded and superfluous addition to the section. A reference to the history of the amending Act shows that in the Bill as proposed, this Explanation was not to be found; it was added *on the day the Bill was passed into law*, and was intended to make the position even more clear and not to qualify what had gone before. The mover of the Bill said that it was intended simply to make it quite clear what rule of succession it was desired to establish, namely, the rule provided in the Act. The provisions of the *sanad* are not inconsistent with the provisions of the Act in those cases where by the direction of some provisions of the Act, reference has to be made to the *sanad* to discover the heir.

The appellant, however, seeks to rely upon the provisions of the *sanad* by reason of the decision of the Judicial Committee in the case of *Debi Bakhsh Singh* v. *Chandrabhan Singh* (4), which was a case under list V. List V is defined as a list of grantees to whom a primogeniture *sanad* has been granted. In that case sub-section 11 of section 22 was under consideration. The rule set out in that sub-section is that in default of anyone taking under the previous sub-section, there should be preferred such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such *talukdar* or grantee are subject. This their Lordships of the Privy Council held to be nothing else than a general relegation of parties to the situation in which they had been found apart from the Statute. But, say their Lordships, "that situation is found in the *sanad* itself," and in a later place in the judgment it is said, "the general reference to what is not covered by those specific rules must include a reference to the rights of parties as contained in the *sanad*, which was the original title to the property." Persons whose names appear in list IV and list VI (grantees to whom section 23 applies) stand on practically the same footing as regards succession to the estate as those in lists II, III, and V for whom no heir has been found in sub-sections 1 to 10 of section 22, that is to say, in both cases succession is regulated by the ordinary law of the religion and tribe. It is, therefore, manifest that a pronouncement as to the interpretation of the words "ordinary law" in sub-section 11 ought to be considered, unless a contrary intention appears, where the question for decision is as to the succession to an intestate's estate under section 23. The respondents rely upon the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3). That was a case decided in 1877 which dealt with succession in list II. List II is defined as a list of those whose estates according to the custom of the family.....ordinarily devolve upon a single heir. In their ruling their Lordships pointed out that as to succession the limitations in the *sanads* were wholly superseded by Act I of 1869, and that the rights of parties claiming by descent must be governed by the provisions of section 22 of the Act. The appellant seeks to remove the apparent inconsistency between those two judgments by arguing that in the latter case their Lordships in using the word "wholly" only referred to sub-sections 1 to 10 of section 22. There can be no doubt that the *dictum* in *Ranee Janki Koer's* case (3) has formed the basis of numerous subsequent decisions; and it is a startling proposition to make that their Lordships had in that case expressed themselves without sufficient accuracy, and that the inaccuracy had not been discovered from 1877 up to the time when the decision in *Debi Bakhsh Singh's* case (4) was promulgated in 1910. It has been taken as good law ever since 1877 that for purposes of succession reference must be made to the Act and not to the *sanad*, and this is also the interpretation which has been put upon section 3 and upon this ruling by Messrs. Sykes and Jacob, the two gentlemen whose commentaries on the Oudh Estates Act are in more general use. No doubt the case of *Debi Bakhsh Singh* v. *Chandrabhan Singh* (4) might seem *prima facie* to have raised an inconsistency which the appellant has sought to explain as above. But a careful examination shows that there is no inconsistency whatever between the two judgments and that in deciding *Debi Bakhsh Singh's* case (4) their Lordships continued to follow and did not

(4) 7 Ind. Cas. 724; 32 A. 599; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 13 O. C. 316; 20 M. L. J. 917; 37 I. A. 168 (P. C.).

attempt to confine or qualify the *dictum* as to the wholesale supersession of the *sanad* for purposes of succession which was laid down in *Ranee Janki Koer's* case (3). In this latter case their Lordships laid down, as a general proposition that for purposes of succession limitation in the *sanad* was superseded by the Act. They then proceeded, having found that sub-sections 1 to 10 of section 22 did not apply, to consider the ordinary law of the persons with whom they were in that case concerned, that is to say, persons in list II: persons whose estates according to the custom of the family.....ordinarily devolved upon a single heir. They, therefore, looked for the single heir according to the law of the religion and tribe. In an exactly similar fashion their Lordships in *Debi Bakhsh Singh's* case (4), recognising the supersession, for the purposes of succession of the *sanad* by the Act, and finding that sub-sections 1 to 10 of section 22 did not apply, proceeded to take up the question of succession under the ordinary law of the persons with whom they were in that case concerned, namely, persons in list V, persons to whom *sanads* have been or may be granted by the British Government.....declaring that the succession to the estates comprised in such *sanads* shall be regulated by the rule of primogeniture. They thereby found that they had to look to the *sanad*. That was a case where the provisions of the *sanad* are not inconsistent with the Act. In the same fashion, if list V had been a list of those the succession to whose estate was to be controlled by the Muhammadan Law, they would have had to look at the Muhammadan Law. Similarly in this present case this Bench recognising supersession, for the purposes of succession, of the *sanad* by the Act, has to look to the heading of list IV to see who the person is whose succession it has to consider; he is a person to whom the provisions of section 23 apply, that is to say, a person the succession to whose estate is governed by the ordinary law. Or, to put it more simply, every estate is labelled as belonging to such and such a list; and the Court, applying section 22 (11) or section 23, as the case may be, looks at the label. If the label contains a reference to a *sanad* as list III and list V labels do, then that *sanad* will be referred to as part of the ordinary law. If the label contains no such reference, as would be the case in list II, list IV and list VI labels, then the Court will not refer to the *sanad*. I have no doubt, therefore, that, arguing as above, succession to the present estate is controlled by the ordinary law and not by the *sanad*.

The ordinary law is the law as set out in section 3 of the Oudh Laws Act (XVIII of 1876), namely:—

1. any custom which has not been by any enactment altered or abolished, or declared void by a competent authority,

2 the Hindu, Law in cases where the parties are Hindus, except in so far as such law has been modified or abolished by any enactment and has been modified by any such custom as is above referred to.

The custom which has been set up in this present case as governing the succession in default of the *sanad*, is a custom of lineal primogeniture. I may here dispose of the third point which has been argued in this appeal. In the plaint itself the words "lineal primogeniture" written in Urdu and English characters were set out as being the custom on which the plaintiff relied. The learned Subordinate Judge was of opinion that the plaintiff in his plaint did not set forth in clear terms that females were excluded from inheritance.

It was and is still argued for the respondents that the custom as set up in the plaint was one of lineal primogeniture which did not import the exclusion of females, and that the statement of the learned Counsel for the plaintiff that the family custom his client was alleging was the same as that set out in the *sanad*, was an afterthought and that the plaintiff should not be allowed to set up a new case different from his case in the plaint. Having regard to the fact that the plaintiff was setting up a custom in order to exclude a female, Thakurain Harnam Kuar, and having regard to the contents of the plaint generally and also to the undoubted probity and experience of the learned Counsel who was conducting the case and made the above statement for the appellant in the lower Court, I have no doubt that the plaintiff was not changing his ground and that the custom which was intended to be alleged in the plaint was a custom of male lineal primogeniture.

It is objected for the respondents that a custom of male lineal primogeniture, excluding females, a custom which results in an impartible estate, is a custom inconsistent with list IV, and is, therefore, even had it existed, a custom which has been altered or abolished by enactment and, therefore, it would be no part of the ordinary law. It is said that impartible estates are provided for in list II, list III and list V. It is pointed out that under section 10 of the Act the Court will regard those lists as conclusive evidence that the persons named therein are such *talukdars* or grantees. Therefore, while we are to take it as conclusive that a person in list IV is a person succession to whose estate is governed by the ordinary law, we are invited to make the further conclusive presumption that, because his name is not in list II, he is, therefore, not a person succession to whose estate ordinarily devolved upon a single heir. Reference is made to the Deogaon case, *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (5). But I can find nothing in the words of their Lordships in that case, which dealt with succession to non-*talukdari* property, which lays down any such a dictum. The respondents would divide *talukdars* and grantees into three classes :—

(*a*) those who have a family custom of single heir succession;

(*b*) those who have had a rule of primogeniture statutorily conferred upon them by a *sanad* confirmed by the Crown Grants Act; and

(*c*) those who neither have a family custom of single heir succession nor a statutory rule of succession by primogeniture.

But to my mind the three classes are rather:—

(*a*) those who have elected to declare for a specified custom, *viz.*, that of single heir succession;

(*b*) those who have a statutory rule of succession by primogeniture; and

(*c*) those who have elected to declare for no specified custom.

It is possible to hold of these last, that in not declaring for recording of a custom, they have thereby declared that there is no custom in their family and, therefore, I cannot agree that it is to be taken as conclusive that no estate in list IV can be an impartible estate. No doubt all partible estates will be found in list IV but because every hen is a bird, it does not follow that every bird is a hen. I have no doubt that a person whose name is in list IV, can set up a custom that this is an impartible estate.

If there did exist, in the Bisen Thakur family which owned the Kundrajit *Taluka*, a family custom of impartibility with or without female exclusion, the fact that there was a partition of that *taluka* into 4 separate *talukas* in 1871 will not prove, in the circumstances of the case, that the custom is abrogated. The Government was suspicious perhaps of Ishri Bakhsh Singh, father of Chhatarpal Singh, suspicious at one time of Lal Chhatarpal Singh also, and viewing with a favourable eye the capacity and loyalty of Thakurain Baij Nath Kuar, who had received the recognition of the authorities in *Nawabi* time, elected, when a re-grant was made after confiscation, to make a settlement with representatives of all four branches of the family of Babu Ajudhia Bakhsh Singh. But it was not the intention of the Government in restoring the property in a particular fashion, suitable to the exigencies of the time, to the family from whom it had been very recently confiscated, to break through the established customs of that family, if any existed. We have been referred to the Nuzvid case, *Raja Venkata Rao* v. *Court of Wards* (6). But there the circumstances were very different, as pointed out in the *Ramnad* case (7). The Hansapur case, *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (8), was a case where circumstances were much more plentiful than in this present case, consistent with an intention to create a new estate to which family customs were not meant to apply but family custom was there held to apply. The estate was in this present case granted almost at once to the family from whose possession it had been confiscated, and there is nothing which can show that it was the direct

(5) 36 Ind. Cas. 299; 20 M. L. J. 362; 14 A. L. J. 1033; 18 Bom. L R. 884; 31 M. L. J. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8.

(6) 2 M. 128; 3 Suth. P. C. J. 725; 6 C. L. R. 153; 4 Ind. Jur. 133; 3 Shome L R. 175; 7 I. A. 38; 4 Sar. P. C. J. 81; 1 Ind. Dec. (N. S.) 361 (P. C.).

(7) 24 M. 613*n*.

(8) 12 M. I A. 1; 9 W. R. (P. C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

intention of the Government to supersede family customs of that family. The partition which followed in 1871 was a necessary incident of the joint title created by the Government; it was not the spontaneous act of the parties with a mutual recognition of co-parcenary rights but it arose out of the act of the paramount power, and as was said in the *Ramnad* case (7), when impartibility is impressed upon an estate by antecedent family custom, the presumption is that the grant was given with the customary incidents. I am of opinion, therefore, that the appellant is able to set up a custom of impartibility.

It is sought to establish the custom by oral evidence, by documentary evidence, and by presumptions which are argued to arise out of the conduct of the members of this family, the custom of allied families and the history of this family from a time shortly before the annexation of the Province of Oudh. The learned Counsel passed over the oral evidence with the remark that it cannot be said to be of any value on the question of custom. To that oral evidence I shall return later.

It will be convenient to consider briefly the occurrences which preceded and led up to and which followed the granting of the primogeniture *sanad*.

[After considering the history of the Estate and the documentary evidence in the case, the learned Additional Judicial Commissioner proceeded as follows:—]

Before I close this review of the conduct of members of this family it would be interesting to return for a moment to the suit which Balbhaddar Singh brought against Lal Raghuraj Singh for a one-fourth share in the Shamspur *Taluka*, which had been held by Surajpal Singh's widow from 1892 till her death in 1901. That suit was brought in December 1903. I have already shown that he treated the estate as one subject to the ordinary Mitakshara Law, and claimed a one-fourth share on the allegation that Raghuraj Singh had been adopted out of the family. Balbhaddar Singh, therefore, was clearly not recognising the rule of primogeniture or *gaddinashini* in the family. Lord Collins, in delivering the judgment of their Lordships of the Privy Council [*Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (9)], set out among the facts of this case "Surajpal Singh died childless and intestate on the 21st February 1892 and was succeeded by his widow Thakurain Raghubans Kuar *who took a widow's estate.*" This shows that any custom of the exclusion of females or of primogeniture was not agitated by any party to that suit. It will be remembered that Raghuraj Singh had taken possession of the Bargaon Estate on the allegation that he was adopted by Thakurain Baij Nath Kuar. The line he took in his defence in Balbhaddar Singh's suit, as I have already noticed, was that he was not adopted by Lal Bisheshar Bakhsh Singh, the husband of Baij Nath Kuar; and he challenged the authority of Baij Nath Kuar herself to adopt and claimed to remain the son of his natural father. It is obvious that it was a very unpleasant plea that he had set out to sustain. Now if Raghuraj Singh had any idea that a custom of primogeniture, with or without exclusion of females, prevailed in the family, he would have been able to plead that custom as a complete answer to Balbhaddar Singh's suit without, in any way, going back on the position he had already set up as the adopted son in Baij Nath Kuar's line. For a reference to the pedigree shows that, at the time Balbhaddar Singh's suit was brought, the next heir, according to the rule of primogeniture, would be the male owner in the line of the elder son of Ajudhia Bakhsh Singh, the owner, that is to say, of the Bargaon *Taluka*, but Lal Raghuraj Singh had constituted himself the owner of the Bargano *Taluka* on an allegation of adoption, and had successfully maintained that position up to the Privy Council, Chhatarpal Singh's appeal in fact having only been dismissed in the Privy Council in the previous year, *viz.*, on 10th December 1901. Lal Raghuraj Singh's action, therefore, in falling back upon a very unsafe, and apparently contradictory plea, instead of standing to the position which he had been successfully maintaining, is a very strong indication that no such custom existed. It seems to me clear, therefore, from a

(9) 29 A. 519 at p. 520; 11 C. W. N. 841; 6 C. L. J. 13; 9 Bom. L. R. 757; 4 A. L. J. 497; 17 M. L. J. 354; 2 M. L. T. 391.

review of the documentary evidence and of the conduct of the members of this family that no such custom as that set out by the appellant is indicated.

The appellant points out that out of seven estates belonging to the Bisen Thakur clan in the Partabgarh district five estates appear in list II. The succession to those estates, therefore, ordinarily devolves by custom upon a single heir. It is argued that this Court ought to presume, therefore, that the same is the custom with reference to the other two estates, namely the estate of Dhangarh and the present estate, although they are entered in list IV. List IV and list II are not the same thing. I am of opinion that no such presumption ought to be made. Even if it could be made it would not support the presumption of male lineal primogeniture to the exclusion of females. All that can be gathered, as I have noted above as to the desires of these persons, is that Baij Nath Kuar was standing out for the inclusion of her name alone in list I of the lists which were prepared under section 8. It appears to me that the reason why this estate appeared in list IV is to be found in the Chief Commissioner's letter of 1860, and in Exhibit A 15, the reply forwarded by the Deputy Commissioner in accordance with that letter. With this letter, as I noted before, a list was submitted in which this estate was not shown. Turning to the tentative list of those whose names might appear in list II (Exhibit 7) to which also reference has been made, it will appear, as I have already shown, that in both the estates in that list which subsequently did appear in list IV, partition was in contemplation or had been accomplished. The Dhangarh Estate had already been divided by private partition, while in the letter with which the *sanad* for the present estate was forwarded it was definitely recognised that any of the shareholders could claim separation of their shares. It appears that the authorities looked upon this as an estate which was not still intact.

The appellant, therefore, has failed to show that females are necessarily excluded by any custom prevailing in the family. The respondents have quoted several instances where females did as a matter of fact succeed to the estate in the absence of a direct descendant. The first example they give is that of Thakurain Kablas Kuar of the Panwansi or Dhingwas Estate, and of her co-wife Thakurain Subhag Kuar. The case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3) arose out of this estate. A *sanad* was granted to Kablas Kuar, but it was found (and the matter is deposed to by Lal Sheopartab Bahadur Singh, aged 70 years, the present *talukdar* of Dhingwas, giving evidence for the respondents) that on the death of the last male owner Lal Mahpal Singh without issue, in about 1852 A. D., his elder widow Thakurain Subhag Kuar succeeded to the estate till her death. On her death, Thakurain Kablas Kuar came into possession of the estate and it was on her death that the dispute arose which was eventually taken to the Privy Council. As the result of that case the title of the daughter of Kablas Kuar was established, no custom of exclusion being proved. This is an unimpeachable instance of the succession of two widows, and a daughter, in this particular estate, which was one of the estates held by Bisen Thakurs in this district. The example of the daughter succeeding the appellant explains by saying that that was a "tribal" not a family custom, and that he has been careful to avoid setting up a *tribal* custom. He set up, however, a custom which he alleged to be the custom of Bisen Thakurs: and he quoted the seven families in the district: and he alleged total exclusion of *females*. He alleged something more than a custom confined to his family, at least a local custom. We are indeed particularly concerned with the exclusion of widows: but the importance of this instance in one of the allied families cannot be entirely brushed aside. Another example is that of Thakurain Raghubans Kuar, widow of Surajpal Singh who left no direct heir. She held the estate from the time of Surajpal's death in 1892 until her death in 1901. It is argued for the appellant that Surajpal Singh's brother Raghuraj Singh was unable to claim that estate as he had already taken possession of the Bargaon Estate as the adopted son of Baij Nath

Kuar. This explanation does not suffice. Partab Singh brother of Surajpal Singh's father was alive at that time, and could have sued. In default of him, if Surajpal Singh left no brother because of Raghuraj Singh's adoption, the next person entitled to claim would have been, as I have shown above, the male heir in the line of Mahpal Singh, the eldest son of Ajudhia Bakhsh Singh; and that would have been, according to his allegation, Raghuraj Singh, who had said he was adopted into that line. This Partab Singh was admittedly dead when Balbhaddar Singh's suit was brought. There is no doubt that Raghubans Kuar was left in undisturbed possession because her right to remain so was recognised. On the death of Surajpal Singh she claimed mutation of names. Exhibit A 28 is a copy of the order of the Deputy Commissioner in that case. Chhatarpal Singh and Partab Singh, Surajpal Singh, uncle, opposed that application. The order is most instructive. "In accordance with the Mitakshara Law by which the right of succession to this estate is governed she should succeed to it, but it has been somewhat ingeniously urged in opposition that her deceased husband, by granting her during his life a full proprietary right in certain villages, thereby willed that she should not succeed to his estate." This order clearly shows that her title to succeed was not assailed on the grounds that by family custom she was excluded. The next instance is that of Thakurain Baij Nath Kuar. She undoubtedly held the estate, and was recognised as its owner after the death of Lal Lachhman Singh without issue in 1843. Indeed, though this is not certain, it would appear that Thakurain Behans Kuar, widow of Mahpal Singh, held it for 2 or 4 years till her death, and Thakurain Baij Nath Kuar after her and that Thakurain Behans Kuar is herself an instance of female succession. But, the facts not being clear, the respondents do not rely upon her case as constituting an instance. Another instance upon which the respondents rely is that of Thakurain Sanath Kuar of Bhadri, another of the Bisen Thakur families in this district. She was not in possession up to the time of her death, but was superseded by Raja Jagat Bahadur Singh. The *talukdar* before her was Gopal Singh her husband, and on his death he was succeeded by his son Amarnath Singh who was a minor. Thakurain Sanath Kuar managed the estate, the boy died young, and Thakurain Sanath Kuar continued to hold the estate as owner. Raja Jagat Bahadur Singh, in his history Exhibit 49, which is of little general value as a controversy had arisen as to Chhatarpal Singh's rights to succeed, but is of interest when he tells his own immediate history, says that Thakurain Sanath Kuar became owner of the estate after the death of Amarnath Singh, and that he himself was afterwards adopted and took over ther ownership of the estate after that adoption. Chhatarpal Singh himself on several occasions refers to this lady as *talukdaria* of Bhadri. He refers to her in his protest of 9th January 1862 (Exhibit 65), and he refers to her in his "history" (Exhibit 41), in both cases as a well-wisher who joined with other *talukdars* in persuading Thakurain Baij Nath Kuar to adopt him.

I have no doubt that Thakurain Baij Nath Kuar, Thakurain Raghubans Kuar, Thakurain Subhag Kuar, Thakurain Kablas Kuar and Thakurain Sanath Kuar are all quite recent instances, which cannot be ignored, of succession of a female other than a daughter to an estate in this family, where there was no direct heir.

It has been pointed out that, on the death of Chandarpal Singh, his widow did not succeed to the estate. The explanation is to be found in the first words of the Deputy Commissioner's order. She was a claimant, so were Chandarpal Singh's 1st son, 2nd son and grandson, the latter relying upon an oral Will. The Deputy Commissioner says, "None of these allege possession, for the good reason that I took steps to prevent them." It often occurs that on the death of a *talukdar* there is a danger of a breach of the peace, if there be more than one claimant with a following. It is no doubt to such a danger that the Deputy Commissioner refers: he took steps to prevent a breach of the peace by ensuring that no one should be able to take forcible possession. It is further noticeable that there was a son to succeed. The case of this lady cannot, therefore, be quoted as a case to the contrary.

It has, however, been argued with much skill in this Court that it is not for the

appellant to prove actual exclusion of females. It is argued that by the ordinary law as found in the Mitakshara no female has anything but a right of maintenance in joint family property, therefore, when there is joint family property which is impartible, it will go by survivorship to a single heir. Therefore, by that law the estate would survive to the appellant on the death of Lal Ram Kinkar Singh: and, therefore, it would be for the respondents to show, by complete evidence and not a few cdd instances, a custom at variance with this ordinary law, by which females were admitted to a right in joint family impartible property. We have been referred to two Madras cases, *The Udayar Palayam* case, *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar* (10) and *The Udayar Palayam* case, *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (11). Now this is quite a new line of attack. The appellant definitely set out to prove a custom, totally excluding females, *Cf.* paragraph 14 of the grounds of appeal. He did not allege that all the members of the family of Ajudhia Bakhsh Singh constituted a joint Hindu family, nor even all the members of the family of Ishri Bakhsh Singh. There is no suggestion of such a position in either his pleadings or the evidence which was led on his behalf. It has been held, and it is admitted to be the law, that there is no inconsistency between a custom of descent by lineal primogeniture and the right of females to inherit. A rule excluding females must be proved by those who allege it. In Mayne's Hindu Law, 7th edition, at page 752, the learned author referring to a number of authorities writes: "when the property is impartible, as being a *raj* or ancient *zemindari*, of course it can only be held by one, and then the senior widow is entitled to hold it, subject to the rights of others to maintenance." It is evidently this that the appellant had in his mind when he pleaded that in his family they had the custom of lineal primogeniture, but a custom which also excluded females. Had he the least intention of claiming on the ground that this was joint family property, it is beyond doubt that such a position, easy, if true, to establish, and hard to disprove, would have been prominently and unequivocally set up.

Considering how the appellant has failed to prove, not only the total exclusion of females, but in particular the exclusion of widows in default of direct heirs, and how the respondents have established certain undoubted instances to the contrary it is unnecessary to discuss the oral evidence produced by the respondents, which chiefly denied the existence of such a custom, by a reference to the instances the respondents indicated.

If, therefore, it even be presumed, for argument's sake, that the appellant has established the impartibility of this estate, I have no hesitation in finding that he has not established the existence of any custom by which widows are excluded: not only has he failed to do so, but the respondents have, to my mind, succeeded in establishing the contrary. And this is sufficient for our purposes: it is not necessary for us to come to a definite finding as to the nature of this estate, whether it be a partible or an impartible estate.

The appellant objected in his grounds of appeal that no finding had been had on the question of accretions, or of the personal property of Balbhaddar Singh.

That question need not delay us long. It has been admitted for the respondents before us that any acquisitions made to this estate were made out of the income of the *taluka*, and that neither Lal Ram Kinkar Singh nor Thakurain Harnam Kuar had any private means or property, other than the property they received as *talukdar*. Section 23 deals with all the property and not only with the "estate" of the *talukdar* who dies intestate. This law will control all the property, unless perhaps there has been a distinct intention shown that the succession to some or all of the recent acquisitions should be regulated in some other legitimate manner. It is not at all pretended that there was any intention to hold any of these subsequent acquisitions, whatever they be, separate from the parent property; and, therefore, there would be a presumption, as was held in *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (12), and more recently in *Janki*

(10) 24 M. 562; 11 M. L. J. 191.

(11) 28 M. 508; 2 C. L. J. 231; 10 C. W. N. 95; 15 M. L. J. 3 2; 2 A. L. J. 845; 7 Bom. L. R 907; 1 M. L. T. 12; 32 I. A. 261; 8 Sar. P. C. J. 855 (P. C.).

(12) 10 C. 792; 11 I. A. 135; 8 Ind. Jur. 331; 4 Sar. P. C. J. 528; Rafique and Jackson's P. C. No. 79; 5 Ind, Dec, (N. S.) 531,

*Pershad Singh* v. *Dwarka Pershad Singh* (13), that the family property followed the law relating to the *taluka*. It had become, that is to say, properly parcel of the *talukdari* estate, and, therefore, the decision of the Judicial Committee in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (14) has no application.

I would hold, therefore, that, if any properties in schedules 2 to 5 are subsequent accretions, they would be controlled by the family custom and the law of the *taluka*. There is not evidence upon which this Court could determine whether the specific properties, attacked by respondents Nos. 2 to 7 as being the private properties of Babu Balbhaddar Singh, are such properties, or are held under the *talukdar*; nor in view of the decision of this Bench, is it necessary to call for a finding on the point.

There remains the question of the two sets of Pleaders' fee allowed against the appellant. This ground of appeal was not argued before us in the opening speech for the appellant. The respondents Nos. 2 to 7 were interested to deny, and did deny, the appellant's title. They alleged in common with respondent No. 1 that the estate on her death would go to the reversioners, but they only were interested in the ultimate destination of the estate, respondent No. 1 being only interested in its retention in her hands. They could not risk, being defendants, having a finding as to primogeniture passed against them: and it was necessary for them to instruct Counsel independent of respondent No. 1. In the circumstances I think the Court was right in allowing two sets of Pleaders' fee to be shown in the decree.

For the reasons set out above I find that succession to this estate is not governed by the *sanad*, and that no custom has been established by the appellant by which a widow is excluded from inheritance where there is no direct heir. Such a finding suffices for the disposal of the appeal. The appeal, therefore, should be dismissed and the decree of the lower Court maintained. The respondents should have their costs.

KANHAIYA LAL, A. J. C.—The facts of this case are sufficiently stated in the judgment of my learned colleague and need not be repeated here. The parties are Bisen Thakurs, whose ancestor Rae Hom originally came from Majholi in the district of Gorakhpur. He succeeded to the Manakpur Estate by inheritance from the maternal grandfather, Raja Manik Chand, who is stated to have adopted him sometime in 1871 A. D. Raja Ragho Singh was the great grandson of Rae Hom. He had three sons Rae Askaran Singh, Rae Kashi Singh and Rae Khem Karan Singh. Rae Askaran Singh was the founder of the Kalakankar branch, whose descendant, Raja Hanwant Singh, was entered at No. 247 in list I and No. 111 in list II, appended to Act I of 1869. Rae Kashi Singh was the founder of the Panwansi or Dhingwas branch. One of his successors was Thakurain Kablas Kuar, whose name was entered at No. 257 in list I and No. 119 in list II of the said Act. Her estate formed on her death the subject of contest between her daughter, Ranee Janki Koer, and a son by another daughter of hers, Brij Indar Bahadur Singh, and two paternal kinsmen of her husband, the decision of which will be found reported as *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3). Another successor of Rae Kashi Singh founded a separate *taluka* known as Dhangarh, which was entered in the name of his descendants, Sitla Bakhsh Singh and Shankar Singh, at No. 275 in list I and No. 24 in list IV of the said Act, and was subsequently divided between them in the proportion of nine annas and seven annas respectively. Rae Khem Karan Singh was the founder of the Bhadri, Dahiawan, Sheikhpur Chauras and Kundrajit branches. The Bhadri Estate was entered in the name of Rae Jagat Bahadur Singh at No. 254 of list I and No. 118 of list II; the Dahiawan Estate was entered in the name of Sheodat Singh at No. 263 of list I and No. 122 of list II; the Sheikhpur Chauras Estate was entered in the name of Dhaunkal Singh at No. 264 of list I and No. 123 of list II; and the Kundrajit Estate was entered in the names of Thakurain Baij Nath Kuar, Chhatarpal Singh, Surajpal Singh and Chandarpal Singh at No. 259 of list I and No. 22 of list IV of the said Act.

(13) 20 Ind. Cas. 73; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M. W. N. 630; 18 C. L. J. 200; 11 A. L. J. 818; 15 Bom. L. R. 853; 16 O. C. 216; 35 A. 391; 40 I. A. 170 (P. C.)

(14) 3 C. 626; 4 I. A. 228; 1 C. L. R. 113; 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; Rafique and Jackson's P. C. No. 46; 1 Ind. Jur. 679; 1 Ind. Dec. (N. S.) 983 (P. C.).

The *sanad* granted in respect of the Kundrajit Estate to the four persons aforesaid was a primogeniture *sanad*. By a partition subsequently effected between them in 1280 *Fasli*, the Kundrajit Estate was split up into 4 *mahals*. The dispute in the present case relates mainly to the *mahal* known as *Taluka* Tajpur, allotted to the share of Chhatarpal Singh, who died on the 19th October 1899, leaving a son, Lal Ram Kinkar Singh, who succeeded to his estate. In his lifetime Chhatarpal Singh executed a Will (Exhibit 2), in which he declared that according to the custom of his family the succession to his estate was governed by the rule of primogeniture, and that he desired that his son Lal Ram Kinkar Singh should succeed to his estate and maintain the remaining members of the family. The Will was executed on the 6th September 1899 and was registered, but as Chhatarpal Singh died on the 19th October 1899 within three months of the execution of the Will, it was ineffectual, except as a declaration of custom, by reason of section 13 of Act I of 1869.

Lal Ram Kinkar Singh died on the 6th October 1907, leaving a widow *Musammat* Harnam Kuar, and a first cousin Badri Narain Singh, in the senior line; and the main question for consideration in this case is whether by virtue of section 23 of Act I of 1869, read with the primogeniture *sanad* granted to Chhatarpal Singh, or the custom of the family to which a reference was made by Chhatarpal Singh in his Will, Badri Narain Singh was entitled to the estate in preference to *Musammat* Harnam Kuar. The learned Subordinate Judge found in favour of the widow and dismissed the claim. It is not disputed that Lal Lachhman Singh was the owner of the Kundrajit Estate, and that Chhatarpal Singh, Surajpal Singh and Chandarpal Singh represented the heads of the junior branches of the family of Lal Ajudhia Bakhsh Singh, their common ancestor. On the death of Lal Ajudhia Bakhsh Singh, Thakurain Baij Nath Kuar claimed to have succeeded to his estate as his mother and managed to get her name entered in the *sanad* in respect of the Kundrajit Estate jointly with those of Chhatarpal Singh, Surajpal Singh and Chandarpal Singh. It is not also disputed that a primogeniture *sanad* was granted to them in the form given at page 336 of Sykes' Talukdari Law of Oudh, and that if section 23 of Act I of 1869 is controlled or regulated in this instance by the rule of succession laid down in the *sanad*, the plaintiff Badri Narain Singh is the person who would be entitled to the estate of Lal Ram Kinkar Singh in preference to *Musammat* Harnam Kuar. It is further conceded that the same would be the result, irrespective of the *sanad*, if a family custom of lineal primogeniture, excluding widows from inheritance, was established to prevail in the family to which Chhatarpal Singh belonged.

As a primogeniture *sanad* was granted in this instance to Thakurain Baij Nath Kuar, Chhatarpal Singh and Chandrapal Singh, one would ordinarily have expected to find these persons entered in list II or list III of Act I of 1869, according as a custom of a single heir descent may have been found to prevail in their family or the rule of primogeniture was accepted by them. In a report submitted by the Tahsil officials on the 28th November 1858 (Exhibit 50) during the progress of the second Summary Settlement, it was stated that *Taluka* Kundrajit had never been divided, and in a list prepared on the 22nd December 1859 (Exhibit 51), showing the custom followed in the family of *talukdars*, the Kundrajit Estate was similarly described as governed by the rule of primogeniture. The Settlement Officer, however, adopted the course followed at the first Summary Settlement, to which I shall presently refer, and directed the settlement to be made with Thakurain Baij Nath Kuar and the heads of three remaining branches of the family of Ajudhia Bakhsh Singh. When a list was subsequently prepared on the 13th March 1860 (Exhibit A 15) under the order of the Chief Commissioner of Oudh, No. 7/217, dated the 18th January 1860, showing the persons who are willing to secure their landed property from being broken up by sub-division, their names were consequently omitted, though Chhatarpal Singh was till then protesting against the division of the estate.

The primogeniture *sanad* signed by Sir Charles Wingfield, the then Chief Commissioner of Oudh, bears no date, but was delivered sometime in April 1869 (Exhibits

1, 5 and 6). On the passing of Act I of 1869, the preparation of new lists or the revision of pre-existing lists was started, and it is significant that in the list prepared at or about that time by three Tahsil officials of the Partabgarh District (Exhibit 7), showing the names of the persons in Tahsil Behar, whose estates according to the custom and usage prevailing in their families before the 13th February 1856 devolved upon a single heir, the Kundrajit Estate along with the other estates belonging to the descendants of Rae Hom was shown as an estate, the devolution of which was governed by the said custom. This list too bears no date but was obviously prepared after the *sanad* was granted, for against the Kundrajit Estate, it contains a note to the effect that the *sanad* relating to it had been granted by the Government to the four co-sharers mentioned therein, and against the Dhangarh Estate there was a similar note stating that a *talukdari patta* was granted by the Government but on account of mutual disputes the *sanad* was returned and a private partition was effected, by which 9 annas were allotted to Sitla Bakhsh Singh and 7 annas to Shankar Singh.

Both these estates were eventually removed from the proposed list II and entered in list IV as appended to Act I of 1869, but for what reasons it is difficult to say. Paragraph 2 of Circular No. 15-643, issued by the Financial Commissioner of Oudh on the 27th January 1869, required that every *sanad talukdar* should be required *to state in writing* whether he desired to enter list III or IV and every grantee should similarly declare whether he elected for list V or VI. The instructions issued by the Chief Commissioner of Oudh to the Financial Commissioner, No. 158, dated the 19th January 1869, accompanying that circular emphasised that great care must be taken in ascertaining the wishes of the persons whose names were entered in the lists in regard to the list in which they desired their names should be entered, as names could only be changed from one to the other to correct a *bona fide* error, and the election was final. It was also pointed out that if an estate, for which a *sanad* was granted, was held in shares, the name of each sharer was to be entered in the list, and joined by a bracket, and that the rest of the entry was to be one. It does not appear whether any application was made by Thakurain Baij Nath Kuar or any of her co-sharers *in writing*, as required by the above circular, desiring that their names may be entered in list IV, or whether the Deputy Commissioner or any of his superior officers removed their names from the proposed list II of their own sweet will. It is possible that they may have considered that the estate had degenerated into a *pattidar* tenure within the meaning of the Circular of the Chief Commissioner, No. $\frac{7}{1217}$ dated the 18th January 1860, to which a reference is made in the letter of the Deputy Commissioner of Partabgarh, No. 207, dated the 13th March 1860 (Exhibit A 15). It is equally possible that the failure of Thakurain Baij Nath Kuar and her co-sharers to intimate their choice of the list may have led to the entry of their names, in the only list possible, namely list IV. One application, purporting to have been made by Thakurain Baij Nath Kuar on the 24th September 1863 has been produced, wherein the said lady is described as having stated that the custom of her family was that the eldest son succeeded to the estate, and the younger brother got maintenance, and the *taluka* remained undivided. But the original, of which a copy has been filed, was summoned and examined, and it was found that it was not signed by the lady or by any of her authorised agents. The lady was literate, and the application bears no order on it, and the possibility of somebody else having put in that application in the name of the lady cannot be lightly disregarded. No other application made by the other *sanad*-holders, asking for the entry of their names in list IV, is forthcoming. The only application which Thakurain Baij Nath Kuar is shown to have really made was one on the 15th May 1869, in which she objected to the association of the names of Chhatarpal Singh, Surajpal Singh and Chandarpal Singh in the list of *talukdars* along with her on the ground that they were not her co-sharers and were only entitled to maintenance. If no application was made in *writing* by any of the *sanad*-holders, expressing their selection of the list, the only list to which they could be assigned was, as I have said, the residuary list, and

the entry in list IV has, therefore, no greater bearing on the question of partibility than section 23 itself.

The explanation given by the learned Counsel for the plaintiff-appellant is that the choice of list IV was deliberately made, inasmuch as the *sanad*-holders did not desire that their estates should be governed by the special rule laid down in section 22 of Act I of 1869, which differed in many respects from the custom which Chhatarpal Singh said had prevailed in his family. The explanation is ingenious but hardly probable, for no application purporting to have been made by the *sanad*-holders is either available or forthcoming. Whatever the true reason may have been, a seeming inconsistency would thus be created between the rule of succession laid down in the *sanad* and the effect of the entry of the names of the said persons in list IV, if the interpretation suggested by the Counsel for the defendants-respondents be accepted.

That a family custom of impartibility can be established in respect of an estate entered in list IV, is a matter which hardly requires any argument, for a custom of impartibility is not outside the scope of the ordinary law. And if a custom of impartibility can be established in respect of an estate in list IV, a rule of impartibility or primogeniture, imposed by the *sanad*, cannot similarly be deemed to be outside the scope of the ordinary law.

The Kundrajit Estate was managed on behalf of Lal Lachhman Singh prior to the annexation of Oudh by his mother Thakurain Baij Nath Kuar in consequence of his minority. On the death of Lal Lachhman Singh, Thakurain Baij Nath Kuar continued in possession of the estate till 1263 *Fasli*, when Chhatarpal Singh managed to secure a *qabuliyat* for himself. His right to execute a *qabuliyat* was, however, contested at the first Summary Settlement, and by an order of Mr. Goldney, the Settlement Commissioner, it was directed that settlement shall be made with Thakurain Baij Nath Kuar to the extent of 4 annas and with Chhatarpal Singh, Surajpal Singh and Chandarpal Singh, representing the other three branches of Ajudhia Bakhsh Singh, to the extent of 12 annas. Chhatarpal Singh at that time undertook to arrange for the maintenance of Surajpal Singh and Chandarpal Singh, and he apparently continued in possession of the 12 annas share. After the Mutiny at the second Summary Settlement, Chhatarpal Singh managed to get an order passed in his favour, directing that the settlement should be made with him (Exhibit 28); but before that order was carried out, Thakurain Baij Nath Kuar effectively raised an objection to that proceeding and succeeded in getting the settlement made in favour of her and Chhatarpal Singh, Surajpal Singh and Chandarpal Singh jointly (Exhibits 26 and 31). Chhatarpal Singh made various efforts to get the settlement made exclusively with him, asserting that according to the custom of the family he was exclusively entitled to the estate (Exhibits 19 and 32), but his objections were overruled.

Captain McAndrew, the Officiating Deputy Commissioner of Partabgarh, subsequently tried to re-open the matter on the strength of a statement, prepared by the officials of Tahsil Behar in accordance with the Circular Letter of the Chief Commissioner No. $\frac{143}{2281}$ of the 11th October 1859, in which the custom of impartibility of the Kundrajit Estate and the adoption of Chhatarpal Singh by Thakurain Baij Nath Kuar were recognised (Exhibit 51), and sent a letter to the Superintendent and Commissioner, Baiswara Division, on the 25th September 1860 (Exhibit 23), recommending that the settlement, directed in the letter of the Special Commissioner, should be re-considered, as its effect was virtually to make a co-parcenary *zemindari* of the estate. The result of the correspondence which ensued, however, was that the Chief Commissioner refused to re-open the matter or to declare that the Thakurain was the sole owner of the *taluka* for her life; and *sanads* were accordingly directed to be issued in the names of all the four persons jointly (Exhibit D 222.)

The grant of the *sanad* to four persons did not, however, necessarily make the estate partible, except as between the persons to whom the grant was made; for the *sanad* provided that it was a condition of the grant that in the event of *sanad*-holders dying intestate, or of any of their

successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture. The intention of the Government in granting the *sanad* obviously was that the estate in the hands of each of the *sanad*-holders would be an impartible estate, descending by primogeniture on the nearest male heir. The entry of the estate in list IV would not similarly make the estate partible, because lists II and III did not necessarily exhaust the estates which were impartible either by custom or grant. List II contained the names of persons, in whose family a custom of a single heir descent was then ascertained to exist, but did not necessarily exhaust them. List III similarly contained the names of persons the succession to whose estates was by choice governed by the rule of primogeniture, but did not exhaust estates which were impartible otherwise.

Section 10 of the Oudh Estates Act I of 1869 raises a conclusive presumption that the persons, entered in the lists, were *talukdars* or grantees of the kind described in those lists, but it raises no presumption as to what the ordinary law includes or excludes. Had the names of Thakurain Baij Nath Kuar, Chhatarpal Singh, Surajpal Singh and Chandarpal Singh, who had accepted a primogeniture *sanad* (Exhibit 1), been entered in list III, as they should have been, a conclusive presumption would have attached to their estate, showing that its devolution was governed by the rule of primogeniture. But the omission or failure to enter them in list III did not imply that their estate was partible, for list IV was only a residuary list of the *talukdars* not entered in the preceding lists II and III, and the effect of their relegation to the general list IV was that they were deprived of the benefit of the conclusive presumption which would have otherwise attached to their estate, and were liable to be placed on their proof, in case they wanted to establish impartibility either by a family custom or by a condition of the grant.

For the purposes of succession, the *talukdars* were divided into two main sub divisions, namely, those whose succession was governed by section 22 and those whose succession was governed by the ordinary law of the tribe or religion to which they belonged. The object of the lists was not to lay down any rule of succession, but merely to classify the *talukdars* and grantees for purposes of succession according to the information which was then available to the Government or brought to its notice. The difference between lists II and III and list IV is represented by the difference between the special rule of succession laid down in section 22, and the protection of the ordinary law, prescribed by section 23, or the difference between a conclusive presumption and the necessity of positive proof, where the question of impartibility is at issue.

The meaning of the words "*ordinary law*" has been the subject of much discussion in this case. It could not merely imply the personal law of the intestate's tribe and religion, because the personal law applicable to Hindus and Muhammadans has, in many instances, been modified and is controlled by the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows' Remarriage Act (XV of 1856), the Hindu Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans the provisions of the Muhammadan Law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the "ordinary law" in section 23 is merely meant to imply the personal law, uncontrolled by custom or acts of the Indian Legislature. As pointed out by Lord Hobhouse in a case of list II, the effect of the 11th sub-section of section 22 is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted, and such ordinary law would include custom [*Bhai Narindar Bahadur Singh* v. *Achal Ram* (15)]. In *Parbati Kunwar* v. *Chandarpal Kunwar* (1), Lord Collins applied the same rule to a case of list IV, governed by section 23. In other

(15) 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique and Jackson's P. C. No. 128 10 Ind. Dec. (N. S.) 438 (P. C.).

words, when the special rules of succession laid down in section 22 are exhausted, and section 22, clause (11), is reached, or when section 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is in the ordinary law applicable, as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a *sanad*, where the *sanad* contains a rule of succession, which is enforceable by Statute. In *Debi Bakhsh Singh* v. *Chandrabhan Singh* (4), where a question arose as to the right of certain persons to succeed to an estate entered in list V under section 22, clause (11), of Act I of 1869, their Lordships of the Privy Council, after pointing out that section 22, in so far as it described, in the first ten of its sub-sections, the specific order of heirs, preferred to the succession, must have force given to it to the effect of standing as a statutory substitute for any line of succession, which might have been set forth in the *sanad*, observed:—"When sub-section 11—a sub-section which comes at the close of the long list of specific stages of prescribed succession—sets up the rule that in default of any one taking under the previous sub-sections, there should be preferred 'such persons as would have been entitled to succeed to the estate under the ordinary law, to which persons of the religion and tribe of such *talukdar* or grantee, heir or legatee are subject'. Their Lordships do not see their way to hold that this is anything less than a general relegation of parties to the situation in which they would have been found apart from the Statute." They then went on to say that the situation was found in the *sanad* itself, and that while, as had been said, the specific rule of succession in Act I of 1869 must be held to displace it, the general reference to what was not covered by those specific rules must include a reference to the rights of the parties, as contained in the *sanad*, which was the original title to the property. They adverted also to the reference to the *sanad* in lists II and V of section 8 of Act I of 1869, but were content to treat it either as an affirmance or by way of narrative of the *sanad* itself. Their Lordships further emphasised that observation by referring to section 23 and pointed out that the result reached was the same, and that the declaration contained in list V of section 8 and the condition of the *sanad*, being part of the original title to the property, formed an essential part of that regulation of the ordinary law of the religion and tribe, and would have been respected accordingly. Section 23 does not, it is true, refer to the *sanad*, but refers to the ordinary law, which would, however, include the family custom, if any, and the *sanad*, where the *sanad* contains a rule of succession, enforceable by Statute. In any event, the entry in list IV does not involve any variation of or statutory substitute for the line of succession laid down in the *sanad*, and if it involves no variation, the ordinary law applies, and the *sanad* would have as much force, as if the special rule of succession laid down in Act I of 1869 had not been enacted.

Act XV of 1895 was enacted to remove doubts as to the power of the Crown to impose limitations and restrictions upon the grants and other transfers of land, made by it or under its authority, and section 3 of that Act declared that all previous restrictions, conditions and limitations, contained in any such grant or transfer as aforesaid, shall be valid and take effect according to their tenor, any rule of law, Statute or enactment of the Legislature to the contrary notwithstanding. In *Sheo Singh* v. *Raghubans Kunwar* (16) effect was given to the rule of succession, laid down in the *sanad*, in respect of an estate entered in list II; and except where the rule of succession, laid down therein, is definitely superseded by a family custom or a later Act of the Legislature, effect must still be given to it in regard to the estate comprised therein.

It is contended, however, on behalf of the defendants-respondents that Act I of 1869 wholly superseded the *sanad*; and reliance is placed in support of that proposition on the decision in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3). In that case the estate of a female, entered in list II, was the subject of contest between her daughter on the one hand and a grandson by another daughter and certain paternal kinsmen of her husband on the other, and the contention urged on behalf of the persons who denied the right of the daughter was that the estate intended to be conferred on Thakurain Kablas Kuar was a life-estate, and that in any

(16) 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194; 32 I. A. 203 (P. C.).

event, even if it was her *stridhan*, her daughter was excluded from it by virtue of her sex and under the terms of the *sanad*. A custom, excluding females from succession, was also set up but was not established. Their Lordships found that the *sanad* conferred and intended to confer a full proprietary and transferable right in the estate upon Thakurain Kablas Kuar and her male heirs according to the law of primogeniture, but "as regards the succession, the limitation in the *sanad* was wholly superseded by Act I of 1869 and that the rights of the parties, claiming by descent, must, therefore, be governed by the provisions of section 22 of that Act." As the contending parties were claiming in that case a right to succeed to the estate under section 22, clause (11), the interpretation of section 23 of Act I of 1869 was not then in issue. In the *Secretary of State* v. *Moment* (17) and *Debi Bakhsh Singh* v. *Chandrabhan Singh* (4) and in the more recent case of *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (5), their Lordships of the Privy Council pointed out the desirability of not treating the decision in a case as an authority for what, apart from the particular facts of that case, was not raised or discussed therein. In none of the cases, in which the decision in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3) was followed excepting that of *Musammat Parbati Kuar* v. *Rani Chandrapal Kuar* (2), in which the question raised was one of revival, not of survival, and the supersession of the *sanad* by list IV was taken for granted, any question under section 23 was raised, involved or discussed; and while it is true that the special rule of succession laid down in section 22 supersedes the rule of succession, laid down in the *sanad*, so far as it goes, there does not appear to be any warrant for the assertion that section 23 serves the same purpose, because no positive rule of succession, destructive of the *sanad*, is laid down therein. In matters of succession, Act I of 1869 supersedes the *sanad*, as far as that Act lays down a special rule of succession, but where the Act itself says, as when clause (11) of section 22 is reached or in a case under sections 23, 30 or 31, that the succession shall be governed by the ordinary law of the tribe or religion to which the intestate belonged, the search of the heir according to the ordinary law must be made outside the Act or, as Lord Shaw has put it, in the situation apart from the Statute, that is, as if Act I of 1869 had not been passed.

The Bill to provide for the succession to and the rights in respect of certain *talukas* and granted estates in Oudh, as originally introduced by Lord Canning, contained in section 4 rules regulating the devolution of estates according to the law of primogeniture in cases where, owing to a pre-existing custom, the law of primogeniture had prevailed, from former years, or where a *sanad* or grant had been given, declaring that succession to the estate, comprised therein, shall thereafter be regulated by that law. In regard to all other estates the provision made by that Bill in section 5 was that succession to all *talukas* and granted estates in Oudh other than those mentioned in the preceding section, would in cases of intestacy continue to be regulated by the general or local law applicable to such *talukas* or estates, as if the Act had not been passed. In explaining the provisions of that Bill at the time of introducing it, Lord Canning observed that after the grants had been made and by a subsequent order of the Governor-General the principle of succession by the rule of primogeniture in respect both of the *talukas* which had been restored and of estates newly granted was introduced. The principle was affirmed but was not accompanied by any details. But being an Act of the Government of India, he believed that there could be no doubt of its having the full force of law. The present Bill, therefore, *would only declare the principle more formally and provide in detail for the manner in which the rule of primogeniture should take effect.* It would provide that in case of intestacy, the estate or *taluka* should go to the natural born heir, that is, to the eldest son; after failing such heir it should go to an heir by adoption; and failing an adopted heir, to the nearest collateral heir; in default of all these it would provide that the estate should go to the widow for her life and at her death to such son, as she

(17) 18 Ind. Cas. 22; 11 A. L. J. 49; 6 Bur. L. T. 1; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 17 C. L. J. 194; 24 M. L. J. 459; 40 C. 391; 7 L. B. R. 10; 40 I. A. 48 (P. C.).

might adopt according to the custom of her family; and lastly if all these should fail, that the estate should pass to such persons as would inherit, if this Act were not made law. (Oudh Papers for 1865, page 92.) In cases of ambiguity in the provisions of any enactment, as in the case of ancient documents, the highest Courts have invariably allowed the historical examination of the circumstances, leading to the particular enactment or provision [*In re Leavesley* (18) and *Hilder* v. *Dexter* (19)], and if, as stated by Lord Canning, the object of section 5 of his Bill, which now represents in another form the provisions of section 23, was to leave the person concerned to the operation of the ordinary law, the necessary implication is that that ordinary law was to be ascertained and applied, as if that Act had not been passed.

It is next urged that the object of Act I of 1869 was no other than to regulate the course of succession and to supersede the rule relating thereto laid down in the *sanad*. This is unquestionably true, where the Act lays down a special rule of succession, different from that laid down in the *sanad*, but could the same have been intended, where the Act merely says that the succession to the remaining estates shall be governed by the ordinary law? It is suggested that the preamble to Act I of 1869 indicates such an intention. A preamble is a key to open the meaning of the makers of the Act and the mischief it was intended to remedy [*Salkeld* v. *Johnston* (20)]; but it cannot control or cut down the express provisions of the Act itself [*Sutton* v. *Sutton* (21).] The preamble in this case, after referring to the grant of proprietary rights in diverse estates under certain conditions by the British Government, goes on to say that, whereas doubts may arise as to the nature of the rights of the *talukdars* or grantees in such estates and the course of succession thereto, it was expedient to prevent such doubts and to regulate such course, and to provide for some other matters connected therewith.

A perusal of the correspondence which preceded the passing of Act I of 1869 shows that the doubts related both to the validity of the orders of the executive Government, conferring a permanent, heritable and transferable right in the estates granted, burdened with certain conditions, and to the order of succession which was to govern their devolution according to the rule of primogeniture laid down in the *sanad* or according to the custom or personal law. In regard to the former, legal opinion was taken as to the operation of section 65 of the Indian Councils Act, 1861, on the orders and directions of the Chief Commissioner of Oudh and the Government of India (Oudh Papers for 1865, page 143); and as regards the latter, paragraph 136 of the Oudh Administration Report for 1860-61 stated: "Several cases of succession have already occurred. In one of these the *gaddi* had always existed in the family of the deceased *talukdar*, who died intestate and without progeny. It was found that it was a rule of the family, that in such a case the estate went to the widow, who could adopt any member of the clan with the consent of the brotherhood. The Chief Commissioner, however, ruled that the law of primogeniture must, under the Governor-General's instructions, be enforced; that by the law the succession of a female is not recognised, and that the estate must descend to the nearest male heir, who in the case in point was the father of the deceased, he having succeeded by adoption. The present Officiating Chief Commissioner being doubtful whether His Excellency intended to set aside local customs in families in which the *gaddi* had always existed, and substitute in their place the strict rule of primogeniture, has referred for further orders." (*Ibid*, page 34).

Though designed to remove doubts and regulate the course of succession, the Act did not, however, regulate the course of succession, except in regard to certain estates and to a certain extent, for in section 22, clause (11), and sections 23, 30 and 31 recourse was left to be had to the ordinary law to which the members of the intestate's tribe and religion were subject.

(18) (1891) 2 Ch. 1 at p. 8; 60 L. J. Ch. 385; 64 L. T. 269; 39 W. R. 276.

(19) (1902) A. C. 474; 71 L. J. Ch. 781; 87 L. T. 311; 51 W. R. 225; 7 Com. Cas. 258; 9 Manson 378; 18 T. L. R. 800.

(20) (1841) 11 L. J. Ch. 201; 1 Hare 196; 66 E. R. 1004; 58 R. R. 60.

(21) (1883) 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; 31 W. R. 369.

BADRI NARAIN SINGH *v.* THAKURAIN HARNAM KUAR.

Sections 3 and 6 are similarly relied on in proof of the supersession of the *sanad*, but these sections, instead of superseding the *sanad*, only go to affirm it. The *sanad* is specifically referred to in sections 3, 6 and 8 and indirectly referred to in sections 4, 5 and 11. Sections 3 and 11 expressly declare that every *talukdar* holding an estate shall be deemed to have a permanent, heritable and transferable right therein subject to *all* the conditions contained in the *sanad* under which the estate was conferred by the British Government. In *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3) the conditions referred to in section 3 have been taken to imply the conditions of loyalty, good service and the like, and that would unquestionably be the case where the property in dispute appertains to lists II, III or V, for the rule of succession laid down in the *sanad* is superseded *pro tanto* by the special rules of succession prescribed by section 22 of the Act. Their Lordships there observed that the positive limitations contained in section 22 were not in any way controlled by the general provisions of section 3; and the same might be said in regard to the language used in section 11, where lists II, III and V are concerned. But in the case of the other lists, which are not governed by any positive limitations such as those contained in section 22, it might well be doubted whether their Lordships intended that the remaining conditions of the *sanad* were to be entirely superseded or treated as a dead letter. The situation created by sections 3, 4 and 21 of the U. P. Amending Act (III of 1910) has no relevancy, because that Act does not apply so as to disturb vested rights. As pointed out by Lord Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (22), a precedent is of value on account of the principle it embodies or the light it throws on its determination. But if that decision is applied to other cases, regardless of the particular facts under which it was arrived at, the situation reached may lead to complicated results.

Section 1 of the Bill, introduced by Lord Canning to regulate the succession to *talukdari* estates, provided that the *talukdar* with whom the Summary Settlement had been made or to whom an estate had been granted had a right to transfer the estate to any person he liked "subject, however, to *all conditions of service* expressed in the grant or order under which such *taluka* or estate is held and saving all subordinate rights of occupancy or otherwise in such *taluka* or estate" (Oudh papers for 1865, page 88). By Act I of 1869, the proviso was extended to all the conditions affecting the *talukdars* contained in the orders of the 10th and 19th October 1859, appended to the Act, and to *all* the conditions contained in the *sanad* under which the estate was held; and Mr. Strachey, who introduced the Bill which subsequently became law, in discussing the provisions of section 3 said: "It will be observed that there is an important change at the end of section 3. As the Bill originally stood, it provided that the estate should be held subject to *all the conditions affecting it* in the form of *sanad*, contained in the orders passed by the Governor-General of India on the 10th and 19th of October and re-published in the schedule of the Bill. It was subsequently pointed out that all the *sanads* are not in that form, but that several other forms had for some reason or other been adopted. As it would be evidently inadvisable to invalidate those *sanads*, it was thought proper to insert words 'subject to the conditions under which the estate was held', and the form of *sanad* has consequently been omitted from the schedule" (Proceedings of the Council of the Governor-General for 1869, page 19). The opinion then expressed by Mr. Strachey in explaining the provision is, as pointed out by their Lordships of the Privy Council in *Administrator-General of Bengal* v. *Premlal Mullick* (23), of no great value, except for the purpose of indicating the history of the changes that were made from time to time while the Bill was under consideration, (Halsbury's laws of England, Vol. 27, page 141). It cannot, however, be disputed both from what Lord Canning said, and what Mr. Strachey reiterated, that the object of Act I of 1869 was not so much to do away with the *sanad* as to explain and

(22) (1914) A. C. 25 at pp. 39, 40; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

(23) 22 C. 788; 22 I. A. 107; 6 Sar. P. C. J. 603; 11 Ind. Dec. (N. S.) 522.

extend the rule of primogeniture laid down therein, and to give another opportunity to those who had not previously taken primogeniture *sanads* to make a final selection of the list. It was open to the Legislature to modify or supersede the rule of succession, laid down in the *sanad*, but such an intention ought to be clear and manifest. Sections 6 and 22 bear evidence of a manifest intention to supersede the *sanad*, so far as they go, but there are no other sections, from which such an intention can be inferred or deduced. Section 23 contains no positive rule of succession, and merely leaves the persons entered in list IV to the protection of the ordinary law. Having regard to the manner in which the lists were prepared, lists II and III cannot be deemed to have exhausted the cases of impartibility, for as the Chief Commissioner of Oudh observed in paragraph 9 of his letter of the 13th August 1863, there were within his knowledge 12 well-known *gaddi* families which did not agree to change their old *sanads* and take primogeniture *sanads* in return (Oudh Papers for 1865, page 97). The *sanads* represent the root of the title, and must be given force, unless superseded by custom or some positive Act of the Legislature. Section 23 of Act I of 1869 is not such an Act, for it suggests the search for an heir outside the Act by reference to such other laws, including a *sanad* or custom, as might be applicable to the estate. The ordinary law, referred to in section 22, clause 11, and section 23, must, therefore, be deemed to be the law as restricted, controlled or qualified by custom or by the conditions of the grant, if any, and succession must be determined accordingly.

The evidence afforded by the histories, filed by the different members of the branch, to which Chhatarpal Singh belonged, including that by Chhatarpal Singh himself, when read with the other evidence adduced in the case, establishes that the custom of a single heir descent prevailed in the family from the time of Rae Hom. There were no occasions during the early period of the history of the family, when none but a widow was available, except one referred to in the history filed by Jagat Bahadur Singh (Exhibit 49); but it is not clear whether in that case, the family was joint or separate, for in a joint family a brother would generally be preferred to a widow. The subsequent instances, which have, however, occurred in the branch of Ajudhia Bakhsh Singh, leave no room for doubt that widows have succeeded to the exclusion of brothers or nephews On the death of Mahpal Singh, his senior widow, *Musammat* Subhao Kuar, succeeded to the estate and on her death the estate went to his junior widow, *Musammat* Kablas Kuar. On the death of *Musammat* Kablas Kuar, the property went to her daughter, *Musammat* Janki Kuar, though a son of another daughter of hers and some paternal kinsmen of her husband were alive. On the death of Surajpal Singh, his widow, *Musammat* Raghubans Kuar, succeeded to the estate to the exclusion of Raghuraj Singh, the brother of Surajpal Singh, and Partab Singh, another male member of the family. On the death of *Musammat* Raghubans Kuar, Balbhaddar Singh sued for possession of a one-fourth share of that estate, but was unsuccessful. The finding of their Lordships of the Privy Council in *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (9) was that *Musammat* Baij Nath Kuar had succeeded as a widow and that the property of her husband devolved on her death on Raghuraj Singh. Indarpal Singh and Ranbir Singh, two of the witnesses of the plaintiff, admit in their evidence that females succeed to the inheritance, in certain circumstances, and though that fact is now denied by the plaintiff, it is clear from his statement (Exhibit A 39) that the entry of the name of the defendant-appellant was made with his consent. The succession of Thakurain Baij Nath Kuar on the death of her son, Lal Lachhman Singh, and those of *Musammat* Raghubans Kuar and *Musammat* Sanath Kuar on the death of Surajpal Singh (Exhibit A 28) and Amar Nath Singh (Exhibit 49) respectively similarly indicate that a widow or mother was not necessarily excluded by reason of her sex, though the estate might be impartible. My learned colleague has discussed the evidence adduced on the point in considerable detail, and it is, therefore, not necessary to refer to it here at any greater length. In the Will, executed by Chhatarpal Singh (Exhibit 2), a reference is made to a custom by which the estate devolved on the eldest son, and

*In re* SRIMATI PRASANNA MOYEE BASU.

the junior sons were only entitled to maintenance, and a practical instance in which effect was given to that custom is found in the proceedings which resulted in Sumer Singh getting some property from his brother Chandarpal Singh in lieu of his maintenance (Exhibits 15, 16 and 81).

The effect of the primogeniture *sanad* was to give a new title to the grantees, unfettered and unrestricted by any previous conditions, but in spite of that grant the old custom was preserved by the family and maintained. It continued in full force and was given effect on all occasions on which succession opened out on the death of any male member of the family, and not one instance has been cited, showing that a particular kinsman was successful in dislodging a widow from succeeding to the estate by reason of her sex. The conclusion, which can be drawn from the above circumstances, is obviously one in favour of the claim of a widow succeeding to the estate, although the devolution thereof was governed by a custom of a single heir descent. With the exception of two branches of the family, all the other branches of the family of Rae Hom are admittedly entered in list II and have been following the custom of impartibility. The primogeniture *sanad* granted to Chhatarpal Singh also imposed impartibility on the estate, and in the absence of evidence to show that the custom was one of pure lineal primogeniture, as alleged in the plaint, and that a widow was excluded from inheritance, the plaintiff is not entitled to oust her from the estate.

The conflict between the rule of succession, laid down in the *sanad*, and the custom of the family creates another position of some difficulty. Under section 3, clause (*b*), of the Oudh Laws Act (XVIII of 1876) predominance is given to custom in matters of succession, unless it has been expressly altered or abolished by that or any other enactment or declared to be void by any competent authority. The custom of the family will, therefore, govern the succession in preference to any rule laid down in the *sanad*, for that rule is as much capable of being superseded by a positive enactment of the Legislature as by custom.

With regard to the properties entered in Schedules II to V appended to the written statement, it is not disputed that they were acquired partly by Chhatarpal Singh and partly by Ram Kinkar Singh from the income of the estate comprised in the *sanad*. It is not shown that they had any other sources of income. The custom of the family would govern their devolution as much as that of the property comprised in the *sanad*. It is not necessary to determine whether the *sanad* will apply to them or not. No arguments have been addressed to us in regard to the personal property claimed by defendants Nos. 2 to 7.

Defendants Nos 2 to 7 claim reversionary rights in the estate. Their rights are not identical with those of defendant No. 1 and there is no reason why, if they have been dragged into the case, their costs should be treated as having merged in those of defendant No. 1. The contingency of the plaintiff or any of those defendants succeeding on the death of *Musammat* Harnam Kuar is still uncertain.

For the above reasons I agree in dismissing the appeal with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 31 OF 1907.

February 16, 1917.

*Present*:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

*In re* SRIMOTI PRASANNA MOYEE BASU—APPLICANT—APPELLANT.

*In the matter of the Will of* KRITANTA KUMAR BOSE.

*Probate, grant of, delay in—Court Fees Act (VII of 1870), ss. 19 (H) (4), 19 (I)—Motion of Collector, delay in, effect of.*

The grant of Probate to a petitioner, who has filed the valuation required by section 19 (I) of the Court Fees Act and has also paid the Court-fee requisite under that section, cannot be delayed on account of the Collector's omission in making a motion under section 19 (H), sub-section (4), of the Court Fees Act. [p. 577, col. 2.]

Appeal against the decree of the District Deligate, first Court, 24-Pergannahs, dated the 30th January 1917.

FACTS.—In this matter Srimati Prasanna Moyi Basu, executrix to the Will of the late Babu Kritanta Kumar Basu, made an application for probate in the Court of the District

Delegate of 24 Pergannahs. The application was made on 3rd May 1916, and Probate was ordered to be granted on 28th July 1916 and the affidavit as to valuation was sent to the Collector of 24-Pergannahs on 29th June 1916; but the Collector made delay in sending his reports as to the valuation.

Thereafter an application was made under section 19 I of the Court Fees Act, praying for issue of Probate on the valuation made by the petitioners on which proper duty had already been paid. The District Delegate rejected the application recording the following order:—

"Collector has not as yet sent his report. The applicant prays for the issue of a certificate at once under sub-section (2), section 19-I of the Court Fees Act, but in this case there is no motion by the Collector under section 19 H, sub section (4). I do not find any provision to issue a certificate pending enquiry by the Collector regarding the valuation. Prayer rejected."

Against this order the petitioner preferred an appeal to the High Court.

Babu *Bipin Behary Ghose* (with him Babu *Bipin Chandra Bose*), for the Appellant, read sections 19 H, 19 I and 19 J of the Court Fees Act. Section 19 I, clause 2, provides that grant of Probate shall not be delayed even if the Collector makes a motion, but in this case there is no motion and yet the grant of Probate is being delayed. There is a provision for realization of deficit Probate duty by the Collector, and the Government revenue will not suffer in the least if Probate certificate is granted.

Babu *Ram Charan Mitra* (Senior Government Pleader), for the Government, contended that he could not support the orders of the District Delegate and observed that the public revenue was safe as the Collector could recover any excess duty payable by suit and cited *Nikunja Rani* v. *Secretary of State* (1).

JUDGMENT.—The learned Government Pleader, to whom we ordered a notice of this application to be given, has conceded that he cannot oppose this application for issue of Probate.

(1) 31 Ind. Cas. 460; 22 C. L. J. 375; 20 C. W. N 504; 43 C. 230.

The petitioner has filed the valuation required by section 19 I of the Court Fees Act and has also paid the fee requisite under that section. The learned Judge seems to think that because the Collector has not made a motion under section 19 H, sub-section (4), the probate cannot be granted. Sub-section (2) of section 19 I says that the grant of Probate should not be delayed by reason of a motion by the Collector under section 19 H. If the grant is not to be delayed in a case where the Collector has made a motion, we do not see on what principle the grant can be delayed where he has not made a motion.

The appeal is allowed and Probate will be issued at once.

Let the order be sent down at once.

*Appeal allowed.*

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 70 OF 1915.

March 13, 1917.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

GOPAL CHANDRA MUKHOPADHYA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

PROBHAT CHANDRA BISWAS AND OTHERS—DEFENDANTS—RESPONDENTS.

*Partition Act* (*IV of* 1893), *s.* 4, *scope of—Interpretation.*

A restricted scope is not to be attributed to section 4 of the Partition Act. The section applies even where the person who claims partition of a family dwelling-house has also obtained a transfer of a share of other family property.

*Khirode Chandra* v. *Saroda Prosad*, 7 Ind. Cas. 436; 12 C. L. J. 525, followed.

Appeal against the decree of the Hon'ble Mr. Justice Walmsley, dated the 12th April 1915, in Appeal from Appellate Decree No. 602 of 1914.

Babu *Gunada Charan Sen*, for the Appellant.

JUDGMENT.—We are not disposed to accept the argument whereby a restricted scope is attributed by the appellant to section 4 of the Partition Act of 1893. The interpretation he seeks to put upon the section is that it has no application when the person, who claims partition of a dwelling-house, has also obtained a transfer of a share of othe

property. This limited construction was negatived in the case of *Khirode Chandra* v. *Saroda Prosad* (1). In our opinion the effect of section 4 is to exclude the dwelling-house from the partition suit if one or other member of the family is willing to pay the price thereof and purchase it as provided in that section. This was the contingency which happened in this case. It was faintly argued, as a last resort, that the application of section 4 was excluded by reason of the rent sale. Mr. Justice Walmsley has conclusively shown that the rent sale did not, for any practical purpose, affect the mutual rights and obligations of the parties. Consequently section 4 is applicable and in that view there is no doubt that the decree of Mr. Justice Walmsley is correct.

The result is that this appeal is dismissed with costs.

*Appeal dismissed.*

(1) 7 Ind. Cas. 436; 12 C. L. J. 525.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1257 OF 1915.

May 1, 1917.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

BHAIRON PRASAD—PLAINTIFF—APPELLANT

*versus*

KURA MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 102—*Suit for damages for breach of contract—Appeal, second, whether lies—Mortgage—Zar-i-peshgi lease—Ejectment by lessor—Mortgagee, right of, to recover damages for dispossession.*

Under the terms of a contract embodied in a registered instrument the plaintiff was entitled to remain in possession of certain land for five years. After the expiry of that period the proprietors of the land obtained a decree for the ejectment of the plaintiff from the Revenue Courts. The plaintiff then sued the defendants for a sum of Rs. 125 with interest on the allegation that he could not be legally ejected from his possession over the land without the payment of that sum:

*Held*, (1) that if the plaintiff's suit could be treated as a suit for damages for breach of contract, the second appeal to the High Court was barred by section 102 of the Civil Procedure Code, inasmuch as the suit was cognizable by a Small Cause Court; [p. 579, col. 1.]

(2) that if the contract upon which the plaintiff based his suit was a mortgage, then inasmuch as he was not in possession at the date of the suit, he was not entitled to recover the sum paid by him. [p. 579, col. 1.]

Second appeal from the decree of the Additional Subordinate Judge, Cawnpore.

Mr. *Sheo Diyal Sinha*, for the Appellant.

Mr. *Kailas Nath Katju*, for the Respondents.

JUDGMENT.—This is a suit arising out of a certain contract embodied in a registered instrument of the 2nd of October 1903. Under this instrument the plaintiff obtained possession of certain land of which the predecessor-in-title of the defendants was the owner. It is admitted that under the terms of the contract the plaintiff was entitled to remain in possession for five years. After this period had expired the proprietors of the land instituted proceedings against the plaintiff for his ejectment, describing him as a lessee or tenant of the land in question. The case was contested in the Revenue Courts up to the highest Court of revision, but ended in a decree for the ejectment of the plaintiff.

The present suit is based upon the allegation that the plaintiff could not legally be ejected by the defendants from his possession over this land without the defendants first paying him a sum of Rs. 125. The claim is for this sum with interest. The Court of first instance decreed the claim and that decree has been reversed by the Additional Subordinate Judge of Cawnpore. The real question about which the parties have been disputing is whether the document of the 2nd of October 1903 was really a lease or a mortgage. The main point taken in the appeal now before us is that the defendants, having succeeded in obtaining from the Revenue Courts the ejectment of the plaintiff by representing him as a mere lessee, were not entitled in this suit to obtain a decree in their favour on the strength of certain legal difficulties based upon the finding that the document in question was in reality a mortgage, though drawn up under the form of a lease. To this contention there appears to be more than one answer. If the plaintiff had come into Court alleging that he was a lessee, who had formerly held under a contract of lease, pure and simple, and that he had been deprived of his possession as such lessee under circumstances which amounted to a breach of contract on the part of his lessors, for which breach of contract he was entitled to recover damages to an

amount sufficiently apparent from the terms of the contract itself, he might or might not have had an arguable case. The suit, however, would have been a wholly different suit from that actually brought, and it would beyond question have been a suit of the nature cognizable by a Court of Small Causes, within the meaning of section 102 of the Code of Civil Procedure. Supposing that it were possible at this stage to treat the plaintiff's suit as having been nothing more than what is above stated, we could not entertain a second appeal in this matter, in view of the provisions of the section above referred to, the subject-matter of the present suit being admittedly less than Rs. 500 in value. As a matter of fact, the plaintiff based his suit upon the allegation that he was in reality the mortgagee of this land under the contract of the 2nd of October 1903. He distinctly alleged that the contract in his favour amounted in law to a possessory mortgage, although it was drawn up in the form of a *zar-i-peshgi* or a premium lease. This plea by the plaintiff was admitted by the defendants in their written statement. It may be contended that, in making this admission, the defendants were departing from the position taken up by them in the Revenue Courts. The materials on the record before us make it a little difficult to determine this point with certainty; but in any case it seems impossible to hold that the plaintiff is entitled, at a subsequent stage of the litigation, to make it a grievance that an important allegation of fact contained in his own plaint was admitted by the defendants. If the contract of the 2nd of October 1903 was in the eye of the law a mortgage, then the reasoning of the Court below is correct. What the plaintiff really obtained under this contract of mortgage was a right in law to treat his mortgagors as ex-proprietary tenants of the land in suit, and to get a rent assessed on them as such. This point was clearly laid down by a Bench of this Court, of which one of us was a member, in *Dipan Rai* v. *Ram Khelawan Rai* (1), the principle of which seems to have been affirmed in subsequent decisions of this Court. We cannot concern ourselves with the question whether or not the Revenue Courts were right, on the law or on the facts, in ejecting the present plaintiff from his possession over the land in suit. We know that he was not in possession on the date on which this suit was instituted and the Court below is right in saying that he, being out of possession and coming into Court as plaintiff, was not entitled, either to a decree for recovery of possession (which he did not even claim) or to a decree for the recovery of the sum of Rs. 125 paid nominally as a premium upon the contract of lease, if that payment is to be regarded as having been in reality the mortgage-debt advanced upon a contract of mortgage. On these grounds this appeal must fail and we dismiss it with costs.

*Appeal dismissed.*

(1) 5 Ind. Cas. 557; 7 A. L. J. 330; 32 A. 383.

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## PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 163 OF 1916.

February 22, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Roe.

NAND KUMAR SINGH AND OTHERS—DECREE-HOLDERS—APPELLANTS

*versus*

BILAS RAM MARWARI AND OTHERS—FIRST PARTY, JUDGMENT-DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 2, cl. (2)—Decree—Determination of right of party to account for certain years, whether decree—Appeal, whether lies—Court Fees Act (VII of 1870), s. 7, cl. (IV)—Mesne profits, valuation of, claim for—Court-fee, amount of.*

An adjudication by a Court determining the right of one party to an account for certain years and dismissing the claim for certain other years comes within the definition of a decree as given in section 2, clause (4), Civil Procedure Code, and as such is appealable. [p. 580, col. 1.]

*Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*, 23 A. 152; 2 Bom. L. R. 978; 27 I. A. 209; 5 C. W. N. 52 (P. C.), followed.

A claim for mesne profits is not a claim the value of which cannot be ascertained. The plaintiff in such a case must, therefore, put a valuation on his claim and pay *ad valorem* Curt-fee thereon. He cannot recover anything in excess of the valuation thus put by him. [p 580, cols. 1 & 2.]

Per *Roe, J.*—Even if a claim for mesne profits is to be regarded as a claim for accounts, section 7, clause (IV), of the Court Fees Act is peremptory that such suit shall be approximately valued. [p. 580, col. 2.]

Appeal from a decision of the Sub-Judge, Monghyr.

NAND KUMAR SINGH *v.* BILAS RAM MARWARI.

Messrs. *Mustafa Khan*, *Kulwant Sahay* and *Abani Bhushan Mukherjee*, for the Appellants.

Messrs. *Sushil Madhub Mullick* and *Naresh Chandra Sinha*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This is an appeal against an order by the learned Subordinate Judge determining the period within which mesne profits shall be payable. Two preliminary objections have been made. The first is that no appeal lies and the second is that the Court-fee which has been paid is insufficient. The question whether an appeal lies or not has to be determined with reference to the definition of the word decree in the Code of Civil Procedure. If the order by the learned Subordinate Judge amounts to a decree within the terms of that definition then an appeal lies, otherwise there is no appeal. In that definition it is said that a decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. This order by the learned Subordinate Judge certainly appears to be a conclusive determination of the right of one party to an account for certain years in the suit and the dismissal of the claim of that party for certain other years in suit. It is, therefore, in my opinion a decree within the meaning of that definition, and this view of the matter has the support of the judgment of the Privy Council in the case of *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1). The change in the wording of the definition of the decree with reference to the terms of the former section 244 does not appear to me to be relevant in the present instance, for the passage in their Lordships' judgment on which I rely occurs in the portion of the judgment which precedes the discussion of the meaning of the definition of the decree as it formerly stood. I would, therefore, hold that an appeal lies.

In regard to the amount of Court-fee payable, it cannot be said to be a case in which the value of the appeal cannot be ascertained. The appellant hopes, if he succeeds in this appeal, to obtain a large sum which he has stated in his plaint. The Court-fee payable is, therefore, in my opinion an *ad valorem* fee. In expressing this view we are conscious that we are departing from what was considered to be the practice and it would, in our opinion, be fair to allow the appellant time until Monday the 26th February 1917 to amend the valuation in his plaint. Now that he is aware that he will have to pay an *ad valorem* Court-fee he may, if he thinks it desirable, amend the valuation in his plaint. If he does so, he will be limited to the amount stated in his plaint and will not be permitted to recover any amount in excess of that. On that date an order will be given giving the appellant time to pay the Court-fee.

The appellant has been treated with some indulgence. The respondent Rai Bahadur Baijnath Goenka is entitled to his costs for this day's hearing. I assess the fee at five gold *mohurs*. The other respondent is not entitled to any costs.

ROE, J.—I agree.

A suit for mesne profits is a suit for money demanded as damages or compensation and in that sense it is to be assessed with an *ad valoram* fee. Even if it be regarded as a suit for an account, the Court Fees Act, section 7 (*iv*), in its last clause is peremptory that any such suit shall be approximately valued The same provision has now been introduced into the Civil Procedure Code. The old practice of allowing plaintiffs to include in a suit for land a suit for money as mesne profits without paying any Court-fee upon the mesne profits was undoubtedly wrong and in my view a circular should be issued to the lower Courts drawing attention to this error in practice.

*Order accordingly.*

(1) 23 A. 152; 2 Bom. L. R. 978; 27 I A. 209; 5 C. W. N. 52 (P. C.).

SWAMINATHA MUDALI *v.* SARAVANA MUDALI.

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 991 TO 1051 OF 1915.

February 28, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SWAMINATHA MUDALI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

M. SARAVANA MUDALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Lease by Government for* 99 *years—Covenant not to do any act 'which may grow to the detriment or annoyance' of existing tenants—Permanent occupancy rights, implication of—Trusts Act (II of* 1882), *s.* 90—*Transfer of Property Act (IV of* 1882), *s.* 43—*Tenancy by estoppel, when created*—Contemporanea expositio, *doctrine of, applicability of.*

The doctrine of *contemporanea exposito* must be restricted to the acts and conduct of the grantor beginning contemporaneously with the grant and continued for a long course of years and should not be extended to acts and conduct done, say, 40 years after the date of grant. [p. 583, col. 2.]

*Raghojirao Saheb* v. *Lakshmanrao Saheb*, 16 Ind. Cas. 239; 36 B. 639; 16 C. W. 1058; 23 M. L. J. 383; 12 M. L. T. 472; (1912) M. W. N. 1140; 14 Bom. L. R. 1226; 17 C. L. J. 17; 39 I. A. 202, followed.

Government, which absolutely owned certain lands, leased them to the plaintiffs. On the date of the lease, there were tenants already on the land. One of the terms of the lease which the plaintiffs obtained on renewal (and on which date the tenants claimed permanent rights of occupancy) was that the lessees will not do any act "which may grow to the grievance or damage of the Government of India or the Government of Madras or their tenants." Subsequent to the grant, one of the grantees described himself as a *mirasidar* in the *pattas* granted to the tenants and 11 years before the renewed lease one of the lessees recognised the right of permanent occupancy in the tenants and issued *pattas* in recognition thereof:

*Held*, that this covenant was the usual one in English indentures creating leases by which the lessor protects himself against the acts of his lessees which might injure other tenants of his, and could not be construed as conferring permanent rights of occupancy on tenants in the occupation of the land. [p. 584, cols. 1 & 2.]

*Held*, also, that it could not be said in the circumstances of this case that the plaintiffs represented themselves as acting on behalf of these tenants also or ever did represent these tenants when or before they obtained a renewal of the lease from Government and that in such circumstances they could not be presumed to have secured an advantage which they must hold for the benefit of the tenants as trustees under section 90 of the Indian Trusts Act. [p. 585, col. 1.]

Where land really belongs to Government, no question of estoppel and no question under section 43 of Act IV of 1882 arise so as to interfere with the rights of the subsequent grantee from the Government. [p. 585, col. 1.]

A tenancy by estoppel cannot be created where the act of the landlord which is relied upon and which created a lesser right than the landlord represented himself to be entitled to create, did confer upon the tenant a right as lessee for some term, however short. [p. 585, col. 1.]

*Weller* v. *Spiers*, (1872) 26 L. T. 866; 20 W. R. 772, followed.

Second appeals against the decrees of the District Court, Chingleput, in Appeal Suits Nos. 180 to 185, 187 to 194, 196, 197, 199 to 201, 203, 204, 206, 207 to 244 and 246 of 1914, preferred against those of the District Munsif, Tiruvallur, in Original Suits Nos. 112 to 117, 119 to 126, 128, 129, 131 to 133, 135, 136, 138 to 161, 163 to 166, 168 to 172, 174 to 179 and 349 of 1913 respectively.

The Hon'ble Mr. *T. Rangachariar*, for the Appellants.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General) and Mr. *V. V. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—In these 61 connected second appeals the appellants are the principal defendants in the suits. The suits were brought in ejectment, the appellants being treated as having been sub tenants from year to year of persons who owned rights in the lands as grantees of lease-rights under the East India Company under a grant of 1801, that grant being a grant of lease rights for 99 years. After that grant expired in January 1900 the plaintiffs became direct lessees of the Government (from the date of the expiry of the prior grant) for another term of 99 years. The prior grant of 1801 is evidenced by the indenture Exhibit P. 1, while the new grant of 1904 is evidenced by the indenture Exhibit A.

The following facts may be set out to understand the conditions on both sides.

The East India Company claimed to be the owners of the lands in dispute in January 1801. It appears from the Chingleput District Manual that in 1760 a grant was made to the East India Company of the Chingleput District by the Nawab Muhammad Ali as a *jaghir* or estate and that the grant was confirmed in 1763. This word *jaghir* is a word of very undefined signification, but as regards the particular lands in dispute the East India Company considered themselves to be the owners. Soon after

January 1801, the Company became the sovereign power for the territories in which these lands were situated and it is of course absurd to speak of them thereafter as *jaghirdars* of these lands under themselves or to speak of these lands as a *jaghir* estate.

Now the lease of 1801 under Exhibit P was made to two European gentlemen, Messrs. Roebuck and Abbott, who seem to have already (presumably with the Company's permission) almost completed a brick building on a portion of the 300 *cawnies* of the leased lands and seem to have effected other improvements. The material portions of this document Exhibit P are to the following effect:—

(1) The lessees and their heirs and assigns etc., were entitled "to have, hold, use, occupy, possess and enjoy the leased lands" "with all the benefits and advantages" at a yearly rent of Rs. 1,575 in consideration of a small premium of five *pagodas* paid then and the payment of additional premia of Rs. 105 to be paid at the end of every thirty years.

(2) The lessees, etc., "shall not do or cause anything to be done upon the leased premises" "which shall grow to the annoyance, grievance or damage of the said Company, *their tenants* or the inhabitants or their bounds."

(3) If the lessees, or their heirs, or assigns, etc, shall commit breach of any of the covenants, the Company may "re-enter" upon the leased premises "or any part thereof in the name of the whole" and "have again, possess and enjoy the same." Subsequently, by successive assignments the right under Exhibit P—which I shall call grant-ownership—passed in 1816 to a Mudaliar belonging to the well-known Manali family. See Exhibit Q. Since then this grant-ownership has remained either with the members of the Manali family or with the members of a family connected with them by marriage: and at the time of the expiry of the lease in January 1900, the grant-ownership was vested in Manali Ramakrishna Mudali, the father of the present plaintiffs.

About the year 1840, the Manali Mudaliar who then owned the grant-right seems to have sold the lands to his brother, claiming not only the grant-ownership right but also the right as *mirasidar* in the lands. For the first time evidently, about 40 years after the grant, the person representing the original grantees seems to have set up an independent *mirasi* right in the lands. See Exhibit S. Then about the year 1850 or so, this alleged *mirasi* right in the lands seems to have become the subject of dispute between the grant-owners and their tenants now represented by the defendants. That *mirasi* right which included the occupancy right in the lands was finally decided to belong to the grant-owners as between them and their tenants. See Exhibits D to G. In 1889, however, about 11 years before the expiry of the term of the grant, the tenants seem to have been recognized by the then grant-owner as having occupancy rights in their holdings. These documents of recognition—(the *pattas*)—have been noted in the foot-note at page 37 of the judgment of the District Munsif. When the term of the grant of 1801 expired in January 1900, the Revenue Officers of the District entered into correspondence with their higher officers as to the proper mode of the future disposal of these lands. In May 1900 Manali Ramakrishna Mudali applied for the renewal of the lease for another term of 99 years, or, in the alternative, for the grant of a *ryotwari patta* to him by the Government. The tenants seem, *in rivalry*, to have applied for the grants of *ryotwari pattas* to themselves. While these questions were being considered, Ramakrishna Mudali died. The present two plaintiffs are his sons and in December 1904 they were granted a renewal lease evidenced by Exhibit A.

These suits have been brought in ejectment after the issue of notices to the defendants to quit the lands.

The lower Courts decreed the plaintiffs' suits on these two findings of facts, namely, (1) that the East India Company were full owners of the plaint lands (known as Pezhal lines lands) at the time of the grant of 1801 and that the Government were full owners at the time of the second grant of 1904 to the plaintiffs; and

(2) that no *miras* right (whether it means permanent occupancy right or whether it means the peculiar right of some Chingleput *mirasidars* to *swathantharam*, *kuppatam* and other minor perquisites in consideration of their once having been full *kudivaram* owners) – that no *miras* right vested either in

the grant-owners or in any of their successors or in the tenants (defendants).

Now Mr. Rangachariar for the appellants (defendants) contested the validity of the above two findings of fact and he also argued a long array of other contentions which, however, might be summarised under 2 or 3 heads as follows:—(1) that under the grant A itself of 1904 the Government recognized the occupancy rights of the defendants and that, therefore, the plaintiffs cannot contest such rights, which they were bound to recognize under the terms of their own grant;

(2) that in 1839 there was a contract by the then grant-owner Vythilinga Mudali to transfer the rights of occupancy to the tenants and that there was such a transfer in 1889; and

(3) that even if the transfer and the contract of transfer of 1839 conferred no permanent *kudivaram* right in favour of the defendants (the tenants), they were entitled, after the plaintiffs got the second grant, to claim such occupancy rights (at least during the 99 years' term of the second grant) as against the plaintiffs, (*a*) on the strength of section 18 of the Specific Relief Act, or (*b*) under the provisions of section 43 of the Transfer of Property Act, or (*c*) under section 90 of the Trusts Act, or (*d*) on the doctrine of estoppel.

As regards the first question, namely whether the East India Company were full owners, the first grantees, *viz.*, the two European gentlemen to whom the Company granted the lease, could not surely deny the title of their landlord who claimed full ownership. Mr. Rangachariar was obliged to argue that even at the time of the grant there were some *mirasidars*—some unknown people who had occupancy rights in these lands. That is very improbable, as it appears from Exhibit B that the lands were waste lands and that it was only the grantees under Exhibit P who made improvements and built buildings thereon. We are asked to give no weight to Exhibit B on the ground that it contains some mistakes. The lower Courts are entitled to find facts on the evidence including the documentary evidence. The question of the weight to be given to the evidence rests with them, not with us in second appeal. Even if the East India Company were known as *jaghirdars* in 1801, a *jaghirdar* might have absolute interests in waste lands and even in cultivated lands, and the presumption which has been adopted in respect of grants of *jaghirs* by the British Government cannot reasonably be applied to grants made by the Nawabs of the Carnatic. It also appears to me from the documents contained in Exhibit Z that the Government, the tenants, the plaintiff's father, all acknowledged the right of the Government to dispose of these lands in their absolute discretion, either by granting *ryotwari patta* to anybody they liked or by granting a fresh lease. As I have already suggested, even if the East India Company were mere *jaghirdars*, they became full owners after the territory passed to them by treaty and their grant must be a grant of the right to directly take possession of the soil of the lands as lessees, unless it is shown that somebody else owned the *kudivaram* rights in the lands in 1801. As regards the alleged *mirasi* right of others, it was only (as already remarked) about 40 years after the grant that it was first set up and the Government is clearly not bound by what the successors of their grantees stated behind the back of Government. The case of *Raghojirao Saheb* v. *Lakshmanrao Saheb* (1) relied upon by Mr. Rangachariar has no relevancy. Their Lordships of the Privy Council point out in that case the danger of relying upon the doctrine of *contemporanea exposito* and restrict the application of the doctrine to the acts and conduct *of the grantor*, beginning contemporaneously with the grant and continued that for a long course of years. Here we are asked to extend that doctrine to declarations of the grantee's successor made 40 years afterwards behind the back of the grantor. I think that we ought to accept the finding of fact of both the lower Courts that no *mirasi* right existed in these lands in 1801 in any person other than the East India Company and if none existed then, no such right could have come into existence afterwards which could be set up validly against the Government. It may also be noted here that these lands were carved out of two villages by an artificial *line* and hence they seem to have become known as *Puzhal Line* lands. The usual

(1) 16 Ind. Cas. 239; 16 C. W. N. 1058; 23 M. L. J. 383; 12 M. L. T. 472; (1912) M. W. N. 1140; 14 Bom. L. R. 1226, 36 B. 630; 17 C. L. J. 17; 39 I. A. 202.

argument that villages in the Chingleput District were formerly *miras* villages could not, therefore, be applied to these lands. It is unnecessary to speculate whether this assertion of *miras* right in 1840 for the first time (there being no indication in the assertion itself as to how the *miras* right was acquired or how it originated) was due to the grantee's anxiety to protect himself against his tenants' setting up occupancy rights in themselves or whether it was due to his intention to claim occupancy rights for his successors against the Government after the expiry of the term of the grant or to both motives. On the findings that the Government owned and own the absolute right in the soil of the lands and that they are not mere *melvaramdars*, it is unnecessary to consider another contention raised by Mr. Rangachariar that the lands formed part of an unsettled *jaghir* estate [clause 2 (*c*) of section 3 of the Estates Land Act] and that the tenants occupying lands therein are *ryots* in such an estate entitled to permanent occupancy rights from the date when the Estates Land Act came into force, under section 6 of the Act. The above disposes of contentions 1 and 2 of Mr. Rangachariar.

As regards the third contention, namely, that the Government itself by Exhibit A directed the plaintiffs not to interfere with the occupancy rights of the defendants. This contention is founded upon the following covenant in Exhibit A, namely, that the lessees, their heirs, etc., will not do any act, "which may grow to the grievance or damage of the Government of India or the Government of Madras or their tenants." Mr. Rangachariar argued that "their tenants" meant the tenants of the lands, namely, the defendants. This clause has been taken from the former indenture Exhibit P of 1801 where the words are "the damage of the said Company, *their tenants* or the inhabitants or their bounds." Clearly the expression "their tenants" in Exhibit P means the Company's tenants. The same expression when used in Exhibit A clearly means "the tenants of the Government of India or the Government of Madras." This covenant is the usual covenant in English indentures creating leases, by which the lessor protects himself against the acts of his lessees which might injure other tenants of his (*i.e.*, of the lessor) either of the same land or of neighbouring lands, and also against acts of his lessee which might cause nuisance or damage to neighbouring landowners.

The 4th contention of Mr. Rangachariar was argued in a rather indefinite way. That is, sometimes he argued that the event of 1889 on which he relied was a contract to transfer rights in lands and at other times as if it was a completed transfer of such rights. I shall consider his contention in both of its aspects. So far as I could find from the written statement (paragraph 9) the defendants do not set up that there was a contract by Vythilinga Mudaliar to transfer his *mirasi* or occupancy right to them: Nor do they set up that there was an actual transfer of any such right. A transfer of the permanent occupancy right in immoveable property can be made either by a registered instrument or by giving possession if the transfer was an oral transaction of sale. As I said, I cannot find any language in the written statement, which could be treated as asserting a transfer to defendants at that time of an occupancy right. On the other hand, paragraph 9 says and implies that Vythilinga Mudaliar had *not* yet got any occupancy right and that the *ryots had* occupancy right all along, that that right of theirs had been judicially recognised and that all that Vythilinga Mudali did was himself to recognise the right which had been in the tenants from the long past. The theory of transfer being thus brushed aside, there is the question of the contract to transfer. Again, I cannot find that there was a contract to transfer any right, set up in the written statement. It denies that Vythilinga Mudaliar had any right of occupancy which he could contract to transfer. Assuming, however, for argument's sake that there was a contract to transfer, or that there was a transfer, I shall shortly consider the contentions based under the heads (*a*), (*b*), (*c*) and (*d*) already set out. Coming to section 18 of the Specific Relief Act, it has no application as the defendants do not seek any specific relief in this case based on any such contract, that is, they are not suing for specific performance of the alleged contract of transfer of occupancy rights to

last for the second term of 99 years. With regard to section 43 of the Transfer of Property Act, that applies to cases where a person erroneously represents that he is authorised to transfer certain rights in immoveable property. No such representation is alleged and we are asked to imply such a representation as having been made in 1889. It is impossible, in my opinion, to imply any such representation from the mere fact that in issuing *pattas* Vythilinga Mudaliar called himself the *mirasidar* of the land and then acknowledged the tenants' * * * * * * (*kaipathu*) rights. Coming to section 90 of the Trusts Act, it applies to cases where a tenant for life or co-owner or mortgagee or other qualified owner avails himself of his position as such and gains an advantage in derogation of the rights of other persons interested in the property, or where he *representing all persons interested in such property* gains any advantage. It is impossible from the facts of this case to hold that the plaintiffs represented themselves as acting on behalf of these tenants also or ever did represent these tenants when or before they obtained the renewal. On the date of the renewal of Exhibit A, they had themselves ceased to have any interest in the lands. Nor had defendants any rights in the lands on the date when the fresh grant was made. Section 90 of the Trusts Act, therefore, has no application [see also *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2), where Hannay, J., and myself (myself with some hesitation) held that where a land really belongs to Government, no question of estoppel and no question under section 43, Act IV of 1882, arise so as to interfere with the rights of the subsequent grantee from the Government.]

Coming to the question of estoppel, a tenancy by estoppel cannot be created where the act of the landlord which is relied upon (and which created a lesser right than the landlord represented himself to be entitled to create), did confer upon the tenant a right as lessee for some term, however short. (See Foa on Landlord and Tenant, page 473.) See also *Weller* v. *Spiers* (3).

(2) 27 Ind. Cas. 785; 28 M. L. J. 44.
(3) (1872) 26 L. T. 866; 20 W. R. 772.

In the result I would dismiss all these second appeals with costs.

Pleaders' fees Rs. 15 in each case.

SPENCER, J.—I agree.

*Appeals dismissed.*

V. R. P.

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## PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 163 AND 164 OF 1916.

May 17, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

IN No. 163 OF 1916

HARNANDAN RAI AND OTHERS—APPELLANTS

*versus*

*Maharaja* KESHO PRASAD SINGH—RESPONDENT.

IN No. 164 OF 1916

BALWAN RAI AND OTHERS—APPELLANTS

*versus*

*Maharaja* KESHO PRASAD SINGH—RESPONDENT.

*Bengal Tenancy Act (VIII B. C of 1885), ss. 30, 52—Enhancement of rent, suit for—Undivided share in parcel of land, whether holding—'Parcel of land,' meaning of.*

An undivided share in a parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act, and, therefore, no suit for enhancement of rent in respect of such share would lie either under section 30 or section 52 of the Bengal Tenancy Act. The word 'parcel' in the definition of the word 'holding' cannot be said to mean an undivided share. [p. 586, cols. 1 & 2.]

Appeal against a decision of the Special Judge, Shahabad, dated the 8th July 1914, reversing that of the Assistant Settlement Officer, Shahabad, dated the 19th May 1913.

Mr *Baidyanath Narayan Sinha*, for Mr. *Rajendra Prasad*, for the Appellants.

Messrs. *Krishna Sahai* and *Nirsu Narayan Sinha*, for the Respondent.

### JUDGMENT.

CHAPMAN, J.—These two appeals arise out of two suits for the enhancement of rent under the Bengal Tenancy Act. The grounds upon which the enhancement is prayed for are increase in area under section 52 (1) (*a*) and rise in prices under section 30 (*b*). The landlord's case in Suit No. 562 out of which Appeal No 163 arises was that the tenant held a certain area of land bearing No. 1 and also certain undivided shares in other areas of land

which bore Nos. 15 and 25. In the other suit the landlord's case was that the tenant held a certain specific area of land bearing No. 2, and also undivided shares in certain areas of land bearing Nos. 3 and 16.

The main defence was that the suit was bad for misjoinder of parties inasmuch as the other tenants who held shares in the one case in Nos. 15 and 25, and in the other in Nos. 3 and 16 have not been made parties. The finding of the Court of Appeal is in accordance with the landlord's case, namely, that there is a separate tenancy in each case, consisting of a specific area of land held together with undivided shares in certain other areas of land.

It was contended before the learned District Judge and it has also been contended before us that under the Bengal Tenancy Act a suit for the enhancement of rent cannot be brought in respect of such tenancies. Both sections 30 and 52 of the Act require that the landlord should be the landlord of a holding, and a holding has been defined in the Act as meaning a parcel or parcels of lands held by a *raiyat* and forming the subject of a separate tenancy. It is contended that an undivided share in a particular area of land is not a parcel or parcels of land within the meaning of the definition of holding. Therefore the tenancies to which these two suits refer were not holdings within the meaning of the Bengal Tenancy Act, and, therefore, the landlord had no right of enhancement under sections 30 and 52, inasmuch as he is not the landlord of a holding so far as either suit was concerned.

It has been held in a series of cases, *Baidya Nath De Sarkar* v. *Ilim* (1), *Hari Charan Bose* v. *Ranjit Singh* (2), *Haribole Brohmo* v. *Tasimuddin Mondul* (3), *Ahadulla Sheikh* v. *Gagan Mollah* (4), *Parbatty Debya* v. *Mathura Nath Banerjee* (5), that an undivided share in a parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act. There is practically no authority to the contrary, though there is the opinion expressed by Petheram, C. J., in the case of *Hari Charan Bose* v. *Ranjit Singh* (2), where the view taken was that the owner of an undivided fractional share in a parcel of land is the owner of that share in every part of it, and he is, therefore, the holder of an undivided share in every part of it. The weight of authority is on the other side and has ever since been continuously adverse to this view. In our opinion the weight of reason is also on the same scale. It appears to us to be difficult to hold that the word 'parcel' in the definition of the word 'holding' can have been intended to mean an undivided share. It is suggested that recourse may be had to the preamble to section 2 in which this definition occurs, where the usual reference is made to the repugnance in the subject or context, but it does not seem possible to say that there is any repugnancy in the subject or context either in section 30 or much less in section 52. On the basis of an *obiter dictum* of their Lordships of the Privy Council it has been held that a right of occupancy can be acquired in an undivided share in a holding, but the reasons for the opinion have not anywhere been stated. In any event the argument which would result in such a conclusion in respect of a right of occupancy would be different from those applicable merely to the interpretation of the definition of the word 'holding.' The opinion appears to have been given with reference to the former Act of 1869.

The result is that we must hold that in the present instance the tenancies, the rent of which the landlord sought to enhance, were not holdings within the meaning of the Bengal Tenancy Act, and that, therefore, no suit to enhance lay under section 30 or section 52 of that Act The result is that the appeals must be allowed and the suits dismissed with costs in all Courts.

ATKINSON, J.—I agree.

*Appeal allowed.*

(1) 25 C. 917; 2 C. W. N. 44; 13 Ind. Dec. (N. s.) 597.

(2) 25 C. 917*n*.; 1 C. W. N. 521; 13 Dec. (N. s.) 598.

(3) 2 C. W. N. 680.

(4) 2 C. L. J. 10.

(5) 15 Ind. Cas. 453; 16 C. W. N. 877; 40 C. 29; 16 C. L. J. 9.

RADHAKRISHNA AIYAR *v.* SWAMINATHA AIYAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1053 AND 1650 AND 1256 AND 1649 OF 1915.

November 14, 1916.

*Present*:—Mr. Justice Oldfield and Mr. Justice Phillips.

RADHAKRISHNA AIYAR AND OTHERS—DEFENDANTS—APPELLANTS IN S. A. NOS. 1053—RESPONDENTS IN S. S. No. 1650.

SEETHARAMA AIYAR AND ANOTHER—DEFENDANTS—APPELLANTS IN S. A. NOS. 1256 AND RESPONDENTS IN S. A. No 1649

*versus*

R. SWAMINATHA AIYAR, RECEIVER, BROUGHT ON RECORD IN PLACE OF THE FORMER RECEIVER—RESPONDENT IN S. A. NOS. 1053 AND 1256 AND APPELLANT IN S. A. No. 1650 AND 1649.

*Madras Estates Land Act* (*I of* 1908), *ss.* 52 (3), 77 —*Plaint, presentation of, to Chief Ministerial Officer, legality of—Rent, rate of, fixed by decree under Act VIII of* 1865—*Suit, subsequent, under Act I of* 1908—*Decree as to rate, whether* res judicata—*Civil Procedure Code* (*Act V of* 1908), *s.* 11 *O. IV, r.* 1—*S.* 52 (3) *of Act I of* 1908, *scope of.*

Where Head Ministerial Officers of Revenue Courts are authorized to receive plaints, presentation to them is legal and proper under Madras Act I of 1908. [p. 587, col. 2.]

*Receiver of the Nidadavole and Medur Estates* v. *Suraparazu*, 29 Ind. Cas. 449; 38 M. 295, distinguished

There is no reason for restricting the scope of the general reference to *muchilikas* decreed in section 52 (3) of the Act to those decreed by any particular description of Court. The unrestricted effect of the section is to recognize a relation which existed before the Act and to direct its continuance until it is terminated by the method, for which the Act provides. [p. 588, cols. 1 & 2.]

*Vaddadi Jagannadha Bhupathi Deo Garu* v. *Paddala Appalasawmy*, 23 Ind. Cas 576; (1914) M. W. N. 426; 28 M. L. J. 75; *Raja of Pithapuram* v. *Jonnalagodda Venkatasubba*, 31 Ind. Cas. 93; (1915) M. W. N. 813; 18 M. L. T. 348, dissented from.

A decree, therefore, of a Civil Court passed under the repealed Rent Recovery Act (VIII of 1865) fixing the rates of rent between landlord and tenant is *res judicata* in a subsequent suit between them where the rate is in question. [p. 588, col. 2.]

Second appeals against the decree of the District Court, Tanjore, in Appeal Suits Nos. 842 and 832 of 1913, preferred against those of the Court of the Revenue Divisional Officer, Kumbakonam, in Summary Suits Nos. 3 and 4 of 1912.

Mr. *T. Narasimha Aiyangar* (with him Mr. *R. T. Krishnamachariar*), for the Appellants in S. A. Nos. 1053 and 1256 of 1915 and for Respondents in S. A. Nos. 1649 and 1650 of 1915.

Mr. *R. Kuppuswami Aiyar*, for the Respondents in S. A. Nos. 1053 and 1256 of 1915 and for Appellants in S. A. Nos. 1649 and 1650 of 1915.

JUDGMENT.

OLDFIELD, J.—Second Appeals Nos. 1053 and 1256 of 1915 are by the tenants, defendants; and the first question argued in them is whether the plaints on which the decrees appealed against were obtained, were duly presented, the presentation having been to the Head Clerk of the Deputy Collector, the Court of first instance, and it is alleged, not an officer appointed on this behalf within the meaning of Order IV, rule 1. The point was first taken at the trial in the concluding argument; there was, therefore, no reason why the Deputy Collector should, at that stage, record evidence regarding it or why the lower Appellate Court should do so in appeal. The Deputy Collector's statement in his judgment that Head Ministerial Officers have been authorised to accept plaints and other papers must in the circumstances be accepted. *Receiver of the Nidadavole and Medur Estates* v. *Suraparazu* (1), relied on by the defendants, is not in point, since in it the Head Clerk had admitted that he had no authority and there is no such admission before us. This objection is accordingly unsustainable.

The next question is regarding the lower Appellate Court's finding on issue No. 5, that clause 8 of the suit *pattas* is valid and that rent must be calculated in accordance with it. On the latter point, there is no dispute, defendants admitting that the crop was removed without notice to the plaintiff, and that, therefore, the clause, if valid, is applicable. In Second Appeal No. 1053 of 1915 plaintiff relies upon a previous decision, Exhibit C1, as *res judicata*; in Second Appeal No. 1256 of 1915 he relies on it merely as evidence of custom.

It is unnecessary to deal with the objections that Exhibit C1 was obtained against a person, who was dead at its date, and not

(1) 29 Ind. Cas. 449; 38 M. 295,

against the predecessors of the present defendants, since they were first made in this Court and there are no distinct materials in the record for their disposal. The more important objection is that Exhibit C 1 was obtained for *Fasli* 1311 under Act VIII of 1865 in a Court, which would not be competent to try the suit, in which it is now proposed to plead it, and, therefore, it cannot be *res judicata* under section 11 of the Code of Civil Procedure. The answer is that the general doctrine of *res judicata* is not in question, but the application of the special rule stated in section 52 (3), Estates Land Act, under which *muchilikas* decreed for any revenue year remain in force until the beginning of the year for which fresh ones are exchanged or decreed, and that there is no reason for restricting the scope of the general reference to *muchilikas* decreed to those decreed by any particular description of Court. Such a restriction was, no doubt, imposed on the interpretation of the section in *Vaddadi Jagannadha Bhupathi Deo Garu* v. *Paddala Appalasawmy* (2), on the ground that *pattas* and *muchilikas* under Act VIII of 1365 were current for one year only and that the Legislature cannot be supposed to have intended to enlarge their currency. But the words of the section are clear, as they stand, and there is, in my opinion, no necessity or justification for reference to extrinsic considerations in order to their construction. In *Raja of Pithapuram* v. *Jonnalagolda Venkatasuabba* (3), the restricted interpretation was supported also on the ground that any other would have given retrospective operation to the section, in the sense presumably that the effect of the exchange of *patta* and *muchilika* would be extended beyond the period originally contemplated by the parties to it. But, if that case cannot be distinguished on the ground that, unlike the present, it deals with non-occupancy tenants, there is still no reason for treating this objection as decisive. For the presumption against a retrospective construction is not applicable, simply because a part of the requisite for the action of the Statute is drawn from the time antecedent to its passing (Maxwell's Interpretation of Statute, 3rd edition, page 307) or where the Statute affects only the procedure of the Courts (page 313); and in the present case, the unrestricted effect of the section is only to recognise a relation, which existed before the Act, and to direct its continuance until it is terminated by the method for which the Act provides. I would, therefore, respectfully dissent from the two decisions referred to and hold that Exhibit C is *res judicata* in Second Appeal No. 1053 of 1915. The objection therein to the lower Appellate Court's finding on issue No. 5, therefore, fails.

* * * * * * *

PHILLIPS, J.—I agree.

*Second Appeals Nos.* 1053 *and* 1256 *of* 1915 *dismissed.*

*Second Appeals Nos.* 1649 *and* 1650 *of* 1915 *allowed.*

V.B.P.

(2) 23 Ind. Cas. 576; (1914) M. W. N. 426; 28 M. L. J. 75.

(3) 31 Ind. Cas. 93; (1915) M. W. N. 813; 18 M. L. T. 348.

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## PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 621 AND 947 OF 1916.

May 17, 1917.

*Present*:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

BARA LAL NAWAL KISHORE NATH SAHI DEO—DEFENDANT – APPELLANT

*versus*

JALESHWAR DAYAL SINGH AND OTHERS —PLAINTIFFS AND *Babu* BASANTA KUMAR BANERJI AND OTHERS —DEFENDANTS NOS. 2 TO 9—RESPONDENTS.

*Bengal Survey Act* (V *of* 1875), *s.* 62, *whether applies to suit for possession.*

Section 62 of the Bengal Survey Act has no application to a suit where the plaintiff being out of possession claims possession as owner of land from which he has been dispossessed by reason of Survey and Settlement proceedings. [p. 589, col. 1.]

*Bisseswari Koer* v. *Ram Protap Singh*, 4 Ind. Cas. 547; 14 C. W. N. 366, distinguished.

Appeal against the decree of the Judicial Commissioner, Chota Nagpur, modifying that of the Subordinate Judge, Ranchi.

Messrs. *Rai Guru Saran Prasad* and *Krishna Sahay*, for the Appellant.

Messrs. *Krishna Sahai*, *S. N. Palit* and *Rai Guru Saran Prasad* and *Atul Krishna Roy*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This is an appeal against a decree of the Judicial Commissioner of Chota Nagpur, modifying a decree of the

Subordinate Judge of Ranchi. The appeal arises out of a suit brought by the respondents for possession of plots which are numbered in the plaint from 1 to 7. The respondents' case was that all seven plots lay within their village Hesel and were in their possession till they were dispossessed by reason of certain proceedings taken by Survey and Settlement Officers, which resulted in the seven plots being demarcated as part of the village Ranchi belonging to the appellant. Besides the appellant other persons were impleaded as defendants on the ground that they were in possession of the property as tenants or otherwise. The Subordinate Judge dismissed the suit except as to a portion of plots Nos. 5 and 6. The respondents appealed and the appellant filed a cross-appeal. The Judicial Commissioner allowed the appeal of the respondents and decreed the suit as regards plots Nos. 2, 3, 4, 5 and 6 but dismissed it as regards plots Nos. 1 and 7. It appears that in the Court of the Judicial Commissioner the respondents withdrew their claim to plots Nos. 1 and 7 and we are no longer concerned with those two plots. As regards plots Nos. 2 to 6 the Judicial Commissioner differing from the Court of first instance came to the conclusion that they all lay within the respondents' village Hesel and were in possession of the respondents either directly or through tenants till the survey proceedings of 1908 which resulted in the dispossession of the respondents. The only point taken on behalf of the appellant is that the suit is barred by the Bengal Survey Act V of 1875, and reliance is placed on the decision of the Calcutta High Court in *Bisseswari Koer* v. *Ram Protap Singh* (1). That was a case in which the plaintiff sued for confirmation of possession alleging that he was in possession. He failed to prove possession and the Court held that the suit was barred by section 62 of the Survey Act. The judgment in that case distinguishes that case from such a case as the present, in which the respondents being admittedly out of possession claimed possession as owners of land from which they had been dispossessed by reason of Survey and Settlement proceedings. The present suit was based on the alleged title of the respondents, a title which has been found to be proved by the lower Appellate Court. There is nothing in the decision referred to which in any way shows that the present suit is barred. On the contrary there are passages in the judgment of that case which show that the present suit is not barred by the Survey Act. The Judicial Commissioner in a lengthy judgment examined all the oral and documentary evidence and came to the conclusion that the respondents had proved their case. There is no reason whatever for not accepting his finding and if his finding is accepted the defendants' Appeal No. 621 of 1916 must be dismissed.

Appeal No. 947 is an appeal by the plaintiffs in the suit, who are respondents to appeal No. 621. It relates to plots Nos. 3, 5 and 6. Plot No. 3 was in possession of the second defendant to the suit, Babu Basanta Kumar Banerji, and in the Court of the Judicial Commissioner the plaintiffs said that they did not wish to recover *khas* possession as against him. As regards Nos. 5 and 6 it appears that those plots or parts of them are in possession of some of the other defendants. They have shown no right to retain possession of those plots and the decree in respect of plots Nos. 5 and 6 should, in my opinion, be a decree for *khas* possession. To this extent I would allow Appeal No. 947 but I would dismiss it as regards plot No. 3. In Appeal No. 947, I would make no order as to costs. Appeal No. 621 should, in my opinion, be dismissed with costs.

JWALA PRASAD, J.—I concur. There is nothing in the Survey Act itself to bar a suit like the present one to recover possession based on title.

*Appeal No. 947 allowed in part;*
*Appeal No. 621 dismissed.*

(1) 4 Ind. Cas. 547; 14 C. W. N. 366.

PENUMETSA BAPIRAJU *v.* GOPISETTI NARAYANASWAMI NAIDU.

## MADRAS HIGH COURT.

APPEAL SUITS NOS. 99 AND 109 OF 1909.
SECOND APPEALS NOS. 700 AND 917 OF 1909.
September 2², 916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

PENUMETSA BAPIRAJU AND OTHERS—DEFENDANTS—APPELLANTS IN A. S. NO. 99 OF 1909 AND S. A. NO. 700 OF 1909 AND RESPONDENTS IN A. S. NO. 109 OF 1909 AND S. A. NO. 917 OF 1909

*versus*

GOPISETTI NARAYANASWAMI NAIDU, RECEIVER, NIDADAVOLE AND MEDUR ESTATES, AND OTHERS—PLAINTIFFS—RESPONDENTS IN S. A. NO. 99 OF 1909, AND S. A. NO. 700 OF 1909 AND APPELLANTS IN A. S. NO. 109 OF 1909 AND S. A. NO. 917 OF 1909.

*Landlord and tenant*—Mokhasa *holding*—*Rent*—*Co-sharer tenants, liability of, nature of*—*Fractional sharer, right of, to pay proportional rent*—*Burden of proof*—Kattubadi, *suit for*—*Interest on arrears, claim for*—*Madras Rent Recovery Act* (*VIII of* 1865), *s.* 37—*Rent payable by instalments*—*Limitation*—*Receipt for payment of rent, form of*—*Evidence*—*Transfer of Property Act* (*IV of* 1882), *s.* 108 (*j*).

The principle of section 108 (*j*) of the Transfer of Property Act applies to all kinds of leases, including agricultural leases even though the section itself does not apply to agricultural leases. [p. 592, col. 1.]

The liability of co-sharer tenants in a *mokhasa* holding to pay rent to the landlord is joint and several .[p. 592, col. 1.]

The onus of proving that the landlord, by his conduct, treated each fractional sharer as liable only for a proportionate share of the rent and released each of the fractional sharers from liability for the rest of the *mokhasa kattubadi* rent lies on the party setting it up. [p. 592, col. 2.]

The release of one or more of joint obligees of his or their liability in one year cannot affect their joint and several liability for the rents of the subsequent years unless there has been a contract as between the landlord and all the joint tenants to divide a joint holding and the total rent in definite shares or unless there have been several such agreements between the landlord and each of the several joint tenants by which the landlord relinquished his right to proceed against that tenant in all future years for more than a particular fraction of the total rent. [p. 592, col. 1.]

The party, therefore, who sets up that the joint and several liability which once existed has been split up so as to oblige the lessor to sue the separate sharers for only specific fractions of the rent, ought to prove by cogent evidence the number of shares into which the holding was put up and the definite rent payable by each such sharer and the agreement of the landlord to substitute several liabilities for the original joint and several liability. [p. 592, col. 2.]

Section 37 of the Madras Rent Recovery Act (VIII of 1865) which provides for interest at 12 per cent. per annum on arrears of rent due, is applicable to claims for rent of the nature of *kattubadi*. [p. 593, col. 1.]

In a suit for *kattubadi* brought before the Madras Estates Land Act came into force, the relation between the parties is governed by the Madras Rent Recovery Act, VIII of 1865, and the landlord is entitled to interest on arrears at 12 per cent. per annum till date of suit. [p 593, col. 1.]

The decree should provide for subsequent interest at 6 per cent. [p. 593, col. 1.]

A landlord cannot stipulate with his tenant that only a particular form of receipt for payment would be accepted if tendered as evidence in Court. [p. 594, col. 1.]

Where rent for a particular *fasli* is payable in instalments, the cause of action for rent due for that *fasli* accrues only from the date on which the last instalment becomes due. [p. 593, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge, Masulipatam at Ellore, in Original Suit No. 25 of 1906 and Second Appeals against the decree of the Court of the Subordinate Judge, Masulipatam, at Ellore in Appeal Suit No. 49 of 1907, preferred against that of the District Munsif, Narasapur, in Original Suit No. 564 of 1905.

Mr. *Narayanamurthi*, for the Appellants in A. S. No. 99 of 1909 and S. A. No. 700 of 1909 and for the Respondents in A. S. No. 109 of 1909 and S. A. No. 917 of 1909.

Mr. *P. Nagabushanam*, for the Respondents, in A. S. No. 99 of 1909 and in S. A. No. 700 of 1909 and for the Appellants in A. S. No. 109 of 1909 and S. A. No. 917 of 1909.

JUDGMENT.

SADASIVA AIYAR, J.—These two regular appeals and the two second appeals connected with them have arisen out of two suits, one brought in the District Munsif's Court of Tanuku and the other brought in the Subordinate Judge's Court of Ellore between the same parties. The plaintiff in the two suits is the Receiver of the Nidadavole Estate. The defendants own 2 *mokhasa* estates, one of which consists of three villages, and they own that estate in certain shares, the exact number of shares not appearing from the evidence on record or from the pleadings. The three villages forming (as above stated) one *mokhasa* estate contain cultivable lands, the extent of which is about 105 and odd *pattis*.

The three questions which have been argued in the two appeals and in the two second appeals may be formulated thus; Are the defendants (about 24 in number) severally liable to pay certain specific fractional shares of the *kattubadi* rent claimed by the plaintiff or, are they

jointly and severally liable for the total *kattubadi* rent? (2) Are the arrears of *kattubadi* claimed in the District Munsif's Court's suit for *Fasli* 1307 and in the Sub-Court suit for *Fasli* 1312 barred by limitation as held by the lower Courts? (3) Is the plaintiff entitled to interest at 12 per cent. per annum on the arrears claimed in the suit till the respective dates of the suits and whether the lower Courts were justified in allowing interest at 12 per cent. per annum on the amounts claimed from the date of suits till the date of realisation and, if not, what is the equitable order as to the interest after the dates of the suits?

As regards the first question, I think out of the voluminous documentary evidence filed on the defendants' side those documents which have come into existence after 1896, when a former Dewan of the *zemindarini* withdrew two suits which he had brought against some of the sharers in the *mokhasa* with the intention of bringing the suits against all the *mokhsadars* jointly and severally liable, are of almost no value: I am also of opinion that the receipts, *jusalamas* and the distress notices issued by the *tanadars*, *amildars*, *shroffs*, *gumastas*, *samutdars*, etc., on the footing that the numerous sharers in the *mokhasa* were severally liable for the proportionate amount to the extent of lands held by them respectively out of the 105 *pattis*, are also of very little value, especially seeing that some of the *karnams* and *samutdars* seem to own shares in the *mo hasa* and one of them is the 4th defendant in the suits. Then we have the oral evidence which is also of very little value. We have thus only got to consider the documents Exhibits I, II, XIII to XVII, XXX, XXXI, XXXII, XXXIV to XXXVII, XLVI and XLVII. It is admitted that till about 1852 the *mokhasa* villagers paid a consolidated *kattubadi* rent of Rs. 3,826. It is also conceded that the burden lies on the defendants to prove that the *zemindar* or *zemindarini* by his or her conduct treated the fractional sharers liable for the *kattubadi* rent and not only so, but that he or she released each of the fractional sharers from liability in all future years for the rest of *mokhasa kattubadi* rent. The earliest of the documents above-mentioned is Exhibit XLVII, the order in a suit of 1888 brought by the *zemindarini* Papamma Row acting as guardian of her minor grandson by adoption. This document only shows that two of the several sharers in the *mokhasa* were sued for by her for some *kattubadi* due and that the plaint was returned for being presented to the proper Court. I do not think that this evidence is of any value to show that the *zemindar* by his guardian relinquished the right of the *zemindar* to hold these two defendants liable for the whole of the *kattubadi* rent or released the other sharers in the *mokhasa* from the co-ordinate liability to pay the amount of the rent sued for in that particular suit I might here state that it is not denied that for about forty years before 1899 (when she died) Papamma Row was the *zemindarini*, except for an interval after his death when that adopted son's minor son was the *zemindar* under her guardianship. The next document Exhibit XLVI is a judgment in a suit of 1887 brought by her adopted son and continued by Papamma Row as guardian of her adopted son's minor son. That suit was brought against one of the sharers in the *mokhasa* for the rent due for one *fasli*. The suit was dismissed. There is nothing again in it to show that the plaintiff gave up her claims against the other sharers for the fractional rent sued for. Exhibits XXXII and XXXV need not be separately considered, as Exhibit XXXII seems to be the same as Exhibit XLVII and Exhibit XXXV is merely the decree in the suit in which the judgment Exhibit XLVI was pronounced. The next set of documents is Exhibits XXXVI, XXXVII and XXXVIII which are records in Original Suit No. 368 of 1892 brought against two of the sharers in the *mokhasa* estate for the fractional share of the *kattubadi* rent. It does not appear what became of the suit. These documents do not take us further. The next suit is a Small Cause Suit of 1895 and it seems to have become afterwards an original suit of 1896 and Exhibits I and II are the plaint and judgment in that suit. In that suit, there is a distinct finding that there had been no agreement between the plaintiff and the tenant defendant finding either side about the division of the *mokhasa* estate or the division of the *kattubadi* rent and that case, to say the least, does

not help the defendants. Then we have the documents Exhibits XXX, XXXI, XXXIII and XXXIV, which are connected with a Small Cause Suit of 1887 which was brought for a fractional rent against one of the sharers. The suit was also dismissed and here again, there is nothing to show that the plaintiff gave up her claims against the other fractional sharers of the *mokhasa* estate. Thus, all that appears is that between 1887 and 1897 there were about half a dozen suits brought against certain of the fractional sharers. It has to be remembered that even if a promisee absolves one of the joint promisors from liability for a particular amount due under the joint contract, that does "not discharge the other joint promisor or joint promisors nor does it free them from responsibility to the other joint promisor or joint promisors." (See the analogy of section 44 of the Contract Act). Further, the joint and several liability arises owing to the relation created (when the *mokhasa* holding was originally granted) between the landlord and grantee of the *inam*, that that joint and several liability gives a distinct right at the end of each year to the landlord to recover the rent of that year and that the release of one or more of the joint obligees of his or their liability in one year cannot affect their joint and several liability for the rents of the subsequent years, unless there has been a contract as between the landlord and all the joint tenants to divide a joint holding and the total rent in definite shares or unless there have been several such agreements between the landlord and each of the several joint tenants by which the landlord relinquished his right to proceed against that tenant in all future years for more than a particular fraction of the total rent. The existence of a contract or such contracts seems not to be very probable in these cases, as I find that the number of the shares into which the *mokhasa* lands have been divided among the defendants, the equality or the unequality of the shares and the exact amount of rent due by each sharer are all left in great doubt and indefiniteness. In Original Suit No. 42 of 1866 between these tenants among themselves (to which the *zemindar* was not a party) there seems to have been a division into fourteen shares; whether these sharers were equal or unequal, whether the amount of *kattubadi* itself was divided equally or unequally among the fourteen sharers and what the several amounts due by each sharer was even among themselves are not proved and even the decree in that suit has not been produced. It appears also from the evidence that the fourteen shares afterwards became thirty shares and I find in one case about one-fortieth of the rent was sued for from one sharer and the desposition of some witness in a former suit (I do not see how that evidence is at all relevant) was filed to show that a fractional sharer is liable to pay a rent of Rs. 2 and odd out of Rs. 3,826. (See Exhibit XXXIV.) Again, it is clear from the Transfer of Property Act, section 108, clause (*j*), that the liability of a lessee to pay the whole rent due by him cannot be got rid of by his transferring portions of his lease right to others, and the principle of that section applies to all kinds of leases though the section itself may not apply to agricultural leases. The party, therefore, who sets up that the joint and several liability which once existed has been split up so as to oblige the lessor to sue the separate sharers for only specific fractions of the rent, ought to prove by cogent evidence the number of shares into which the holding was put up and the definite rent payable by each such sharer and the agreement of the landlord to substitute several liabilities for the original joint and several liability, and I agree with the lower Courts in their view that the evidence in this case falls short of establishing that position.

The next question in the tenants' appeal and second appeals relates to the amount of the annual *kattubadi*, whether it is Rs. 2,826 as claimed by the plaintiff or Rs. 2,900 and odd as alleged by the defendants. The lower Courts have given satisfactory reasons for their conclusion that it is Rs. 3,826 and it is at that rate that the rent has been claimed by the plaintiff and has been paid by the tenants for several years. The story of the defendants that they were paying this higher amount all along through mistake is not worth serious notice. This contention was not also pressed before us. The next question relates to the rate of interest till the date of suit and the rate

of interest to be awarded after the date of suit. It must be admitted that the learned District Munsif, while allowing interest at 12 per cent. as claimed by the plaintiff, gave no specific reasons for the award of interest either because no issue as to the rate of interest or as to the liability for interest was raised before him or (it may be) because the question was not argued before him. The learned Subordinate Judge also has not given any reasons for the award of interest at 12 per cent. But it is clear that when these suits were brought, the *zemindar* and the *mukhasadar* were landlord and tenant governed by the Madras Act VIII of 1865. Though in *Lakshminarayana Pantulu* v. *Venkatrayanam* (1) it was decided that as between the tenants of the first class of *kattubadi inamdars* and their *zemindars* the provisions in Act VIII of 1865 as to the necessity for the exchange of *pattas* and *muchilikas* to enable the *zemindar* to bring a suit for the *kattubadi* rent are not applicable, that same judgment contains observations indicating that other provisions of the Act (not connected with rights arising from the exchange of *pattas* and *muchilikas*) do apply as between the *zemindars* and such tenants. These suits having been brought before the Estates Land Act came into force, the relation between the parties are governed by Act VIII of 1865 as decided in *Gopisetti Narainsawmi Naidu* v. *Tallunraju Vencatasubrayudu* (2). The decisions in Civil Revision Petitions Nos. 31 of 1904 and 424 of 1904 are also direct authorities for the position that section 37 of the Rent Recovery Act (which provides for interest at 12 per cent. per annum being claimable on rent due) is applicable to claims for rent of the nature of *kattubadi*. The award of interest at 12 per cent. till the date of suit by the lower Courts must be upheld. As regards subsequent interest after the date of suit, I think it is equitable to reduce it to 6 per cent., which is the usual rate allowed by Courts. In the result the Regular Appeal No. 99 of 1909 and the Second Appeal No. 100 of 1909 are dismissed, except with the slight modification as to the rate of subsequent interest in Appeal No. 99 of 1909. The appellants must pay the plaintiffs' costs as the appellants have substantially failed.

Coming to the landlord's appeals Regular Appeal No. 109 of 1909 and Second Appeal No. 917 of 1909, three points have been raised in these appeals. The first relates to the question whether the claims for the rent due for *Faslis* 1307 and 1312 are barred. According to plaintiffs' own documents, the rents were payable in each *fasli* in four instalments in the months of September to December of that *fasli*. The suit in the Munsif's Court and the suit in the Subordinate Judge's Court were brought in June 1901 and in July 1905 respectively, about three and a half years after the last of the instalments in those two respective *faslis* fell due. The lower Courts were, therefore, right in treating the claims for the rent of those two *faslis* as barred by limitation. The next contention of the plaintiff is that though he did not claim in his plaint interest from the respective instalment dates in each of the other two *faslis* (for the rents of which he obtained decrees) and though he claimed interest in the plaints in the two suits only from the ends of those two *faslis*, he is entitled to be awarded in the decrees additional interest between the dates of the instalments and the ends of the *faslis*, as his claim for one of the three *faslis* in each suit was dismissed as barred. The plaintiff chose to give up the interest between the dates of the instalments and the end of the *faslis* in order, if possible, to escape from the bar of limitation as regards the rents of *Faslis* 1307 and 1312. The failure of that insidious attempt cannot justify a revival of the right which he deliberately relinquished in the plaint as regards a portion of the interest. I would, therefore, disallow this contention also.

The last contention on the plaintiff's side is that the receipt given by his own officers for the portions of the rents ought not to be accepted by the Courts, as he had given notices to his officers and in the villages that unless receipts are given in particular forms prescribed by him payments made and receipts given in other forms to evidence the payments would not be accepted. In

(1) 21 M. 116; 8 M. L. J. 43; 7 Ind. Dec. (N. S.) 439.

(2) 9 Ind. Cas. 642; (1911) 1 M. W. N. 233; 9 M. L. T. 315.

short, the plaintiff wanted to make his own law as to the evidence to be accepted by Courts as to the fact of payment of rent by his tenants. This is a contention which has only to be stated to be at once rejected. The plaintiff's Appeal No. 109 of 1909 and Second Appeal No. 917 of 1909, therefore, fails and are also dismissed with costs.

BURN, J.—I agree.

*Appeals dismissed.*

V.R.P.

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PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1039 OF 1916.

May 24, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

BARHAMDEO NARAIN SINGH —DEFENDANT—APPELLANT

*versus*

RAMANAND PRASAD SINGH AND ANOTHER—PLAINTIFFS, AND SALIGRAM SINGH—*Pro forma* DEFENDANT No. 2—RESPONDENTS.

*Mortgage—Zarpeshgi—Mortgagee, liability of, to pay certain annual instalments to mortgagor—Instalments, whether constitute rent under Bengal Tenancy Act—Suit to recover arrears of instalments—Limitation Act (IX of 1908) Sch I, Art. 116—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, applicability of.*

An advance of Rs. 12,000 was made under a registered deed to a *zemindar*. In lieu of the advance he put the creditor in possession of his share in a *zemindari* in *zarpeshgi thicca*. The *thiccadar* was to deduct Rs 620 out of the income of the property on account of interest and to pay Rs. 83-4-0 annually to the owner:

*Held*, (1) that the deed amounted to a usufructuary mortgage and that the person in possession was a mortgagee; [p. 595, col. 1.]

(2) that the annual payments to be made by the *thiccadar* were not of the nature of rent within the meaning of the Bengal Tenancy Act; [p. 595, col. 1.]

(3) that a suit for the recovery of arrears of these instalments was governed not by Article 3 of Schedule III, Part I of the Bengal Tenancy Act, but by Article 116, Schedule I of the Limitation Act. [p. 595, col. 1.]

Appeal from a decision of the Additional Sub-Judge, Gaya, dated the 25th September 1916, reversing that of the Munsif, Gaya, dated the 24th January 1916.

Messrs. *Kulwant Sahai* and *Amir Hossain*, for the Appellant.

Messrs. *Fakhruddin* and *Shiva Prasad Singh*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This was a suit for the recovery of money alleged to be due in respect of certain payments which were undertaken to be made by the executant of a registered deed dated the 29th March 1907. Under that deed an advance of Rs. 12,000 had been made to a *zemindar*. The deed recites that in lieu of this bond certain *zemindari* rights were made over to the person who made the advance at what is called a fixed annual rental of Rs. 903-4-0 for a period of nine years. The property was said to be made over under a *zarpeshgi thicca* and the persons to whom the property was thus made over were to deduct Rs. 620 on account of interest of the *zarpeshgi* and to pay the balance of Rs. 83-4-0 annually, instalment after instalment, according to the *kists* detailed in the bond. There is a promise in the bond to repay the advance in the year 1323, and that upon this repayment the document is to be returned, if the repayment is not made the person who made the advance is to remain in possession of the property until the advance is repaid in full; and until the advance is repaid the properties are to be considered to have been hypothecated; they are not to be transferred or encumbered, and, if they are so transferred or encumbered by the owner, the transfer is to be considered null and void. If the persons who made the advance are dispossessed of the property they may then immediately sue for the recovery of the advance made by them from the other properties and persons to whom the advance was made.

The learned Munsif held that the suit for these arrears of the annual payment of Rs. 83-4-0 was a suit for rent and, therefore, only three years' dues could be recovered. In appeal the learned Subordinate Judge has held that these dues were not rent but that they were payments due under a registered agreement and, therefore, the Article of the Limitation Act which is applicable is Article 116, and the claim for the entire six years was not barred by limitation. It is contended before us that the learned Munsif was right and that the learned Subordinate Judge was wrong. If the suit was for rent, then undoubtedly the land being agricultural land the special period of limitation of three years provided for in the Bengal Tenancy Act would apply.

The question we have to determine is, whether the suit was for rent or not, and a decision upon that question depends upon

whether the person who is liable to make these payments was a tenant. Did he hold under the person to whom the payments had to be made? It seems clear to us that upon the terms of the bond the land was held as security for the advance which had been made. The holder of the land was entitled to remain in possession until he was redeemed, and if his possession was disturbed he was entitled to recover the advance which he had made. That being the nature of the deed, we are of opinion that the deed was an usufructuary mortgage, and that the person in possession held possession as a mortgagee and did not hold under the person to whom these annual payments were due. That being so, these amounts which were annually payable were due from him as mortgagee under an arrangement with the mortgagor and were not due from him as a tenant. The suit was not for rent and the learned Subordinate Judge was correct in holding that the suit was not barred by limitation.

In disposing of the appeal it is well to make clear that the plaintiff admittedly is entitled to a decree as against the appellant only for one-half of the rent due for the six years. It is admitted before us that the other half has already been received by him from the defendant No. 2.

The result is that this appeal is dismissed with costs.

ATKINSON, J.—I agree.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1776 OF 1916.

January 29, 1917.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

SARJU DUBE AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

BADRI NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

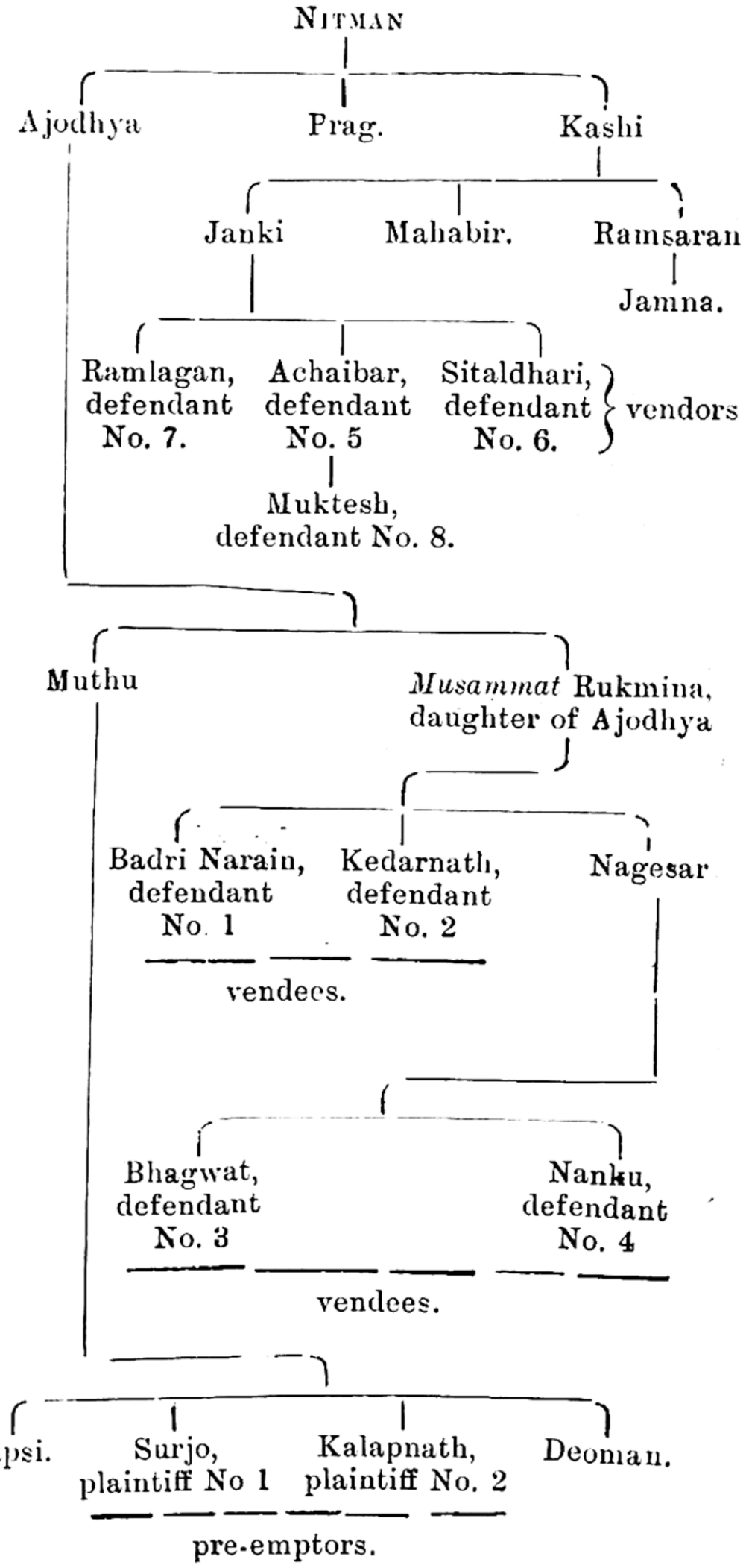
*Pre-emption—Hindu Law*—Rishtedar qaribi, *grandfather's brother's daughter's son, whether is.*

A grandfather's brother's daughter's son is a *rishtedar qaribi*. [p. 596, col. 2.]

Second appeal against the decree of the District Judge, Gorakhpur, dated the 5th September 1916, reversing that of the Munsif, Gorakhpur, dated the 16th May 1916.

FACTS.—This was a suit to enforce a right of pre-emption. The Court of first instance decreed the suit. The lower Appellate Court reversed the decree. The plaintiffs appealed.

The following pedigree will help in understanding the facts of the case:—




The vendors were the grandsons and a great-grandson of Kashi.

The vendees were the sons and grandsons of a daughter of Ajodhya, brother of Kashi.

MOHINI MOHAN GUHA *v.* JHANDA MIA CHOWKIDAR.

The pre-emptors were the grandsons of Ajodhya. The *wajib-ul-arz* ran thus:—

"*Jab koi hissedar haqiyat apna intiqal karna chahe to awwal biradar haqiqi, dusre rishtedaran qaribi, tisre hissedaran sharikpatti. bad hissedaran deh ke hath muntakil kar sakta hai, agar in men se koi bhee lene ki khwahish nahin kare ya qimat wajibi nahin dewe to intiqal kuninda ko ikhtiyar hoga ki jiske hath chahe farokhat karlewe.*"

The lower Appellate Court dismissed the suit by the following judgment:—

"The defendant purchasers have appealed against a decree of pre-emption on the ground that the lower Court has wrongly given a preference to the plaintiffs as being blood relations of the vendors whereas the purchasers are also blood relations and co-sharers.

There were three brothers, Ajodhya, Prag and Kashi. The vendors are descended from Kashi. The plaintiffs and defendants are both descended from Ajodhya, the plaintiffs are his son's sons and the defendants are his daughter's sons. The lower Court has made a mistake (*i*) in holding that the words blood relations exclude blood relations *ex parte materna*, (*ii*) in mixing up marriage with relationship through the mother, (*iii*) in holding that the defendants are not heirs to the vendees.

The lower Court referred to a ruling, *Mahabir Prasad* v. *Mahadeo Prasad* (1), where it was held that a son-in-law was not a blood relation. Of course, for he had no blood in his veins which came from his father-in-law. A phrase in that ruling has been taken by the lower Court to refer to relations *ex parte materna* but it is by no means clear that the Hon'ble Court meant to refer to facts other than the facts before it. Under ordinary Hindu Law the defendants are heirs to the vendors and the only point is that they are more remote heirs than the plaintiffs; but there is nothing stated in the *wajib-ul-arz* as to any preference among blood relations themselves. The words blood relations are words borrowed from English Law and they have the ordinary meaning in English Law. I may, however, note that even if the words used had been cognates interpreting "*rishtedar qaribi*", then, as Mayne on page 716 states, relations through the mother are also cognates.

(1) 33 Ind. Cas. 495; 14 A. L. J. 447.

I consider that the defendants are also blood relations and the plaintiffs have no preferential right of pre-emption and I dismiss their suit with costs in both Courts."

Mr. *Braj Mohan Vyas*, for the Appellants.—The sole question is whether the vendees who are the vendor's father's father's brother's daughter's sons and grandson are the *rishtedar qaribi* of the vendors. I submit they are not. The ruling reported as *Mahabir Prasad* v. *Mahadeo Prasad* (1) clearly lays down that in Hindu families the daughter marries into an entirely different family and that she becomes a member of that family and to a large extent ceases to be a member of her own family.

Moreover, the word '*qaribi*" "is very suggestive. Here are two persons the pre-emptors and the vendees. The question is who is *rishtedar qaribi*. The plain answer is, the pre-emptors, and if succession were to open to-day the vendees will not be heirs. The pre-emptors would be, as they belong to the same stock.

JUDGMENT.—We think the view taken by the Court below is correct.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2519 OF 1915.

February 26, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

MOHINI MOHAN GUHA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

JHANDA MIA CHOWKIDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Taluq, noabad—*Tenure-holder, interest of, whether permanent and heritable.*

The interest of a tenure-holder with regard to uncultivated lands of a *noabad taluq* is not permanent and heritable. Therefore a tank in a *noabad taluq*, which is more or less silted up, and a portion of the waste land, can be settled by Government with a person other than the original tenure-holder. [p. 597, col. 2.]

Appeal against the decree of the District Judge, Chittagong, dated the 29th July 1914,

reversing that of the Munsif, South Raujan, dated the 29th October 1914.

FACTS of the case appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babu *Khitish Chandra Sen*), for the Appellants.—The lower Appellate Court makes out a new case and finds that defendant No. 4 obtained a settlement of this tank from Government. The lower Appellate Court was clearly wrong in so doing. The land was a part of *noabad taluq*. The holding is permanent, though the rent is variable, so the Government could settle the land only with the original tenure-holders. Refers to *Jogesh Chandra Roy* v. *Secretary of State* (1) and *Haider Ali Sikdar* v. *Secretary of State* (2) and to the District Gazetteer of Chittagong, page 148. The tenant is entitled to get settlement but not of the uncultivated lands. The Government should have settled this land with the tenure-holder, under the *noabad taluq*.

Babu *Jogesh Chandra Roy* (with him Babu *Chandra Sekhar Sen*), for the Respondents, contended that inasmuch as the tank in question formed part of an uncultivated waste land of a *noabad taluq*, the appellants could not come and say that the Government should have settled it with the original tenure-holders. There is no authority to show that the rule that the interest in a *noabad taluq* is permanent and heritable and the revenue payable to Government is only variable applies in the case of uncultivated lands also. The Government was not required by law to settle the uncultivated land with the original tenure-holders, so the appeal ought to fail.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs from a decision of the learned District Judge of Chittagong, dated the 29th July 1915, reversing the decision of the Munsif of South Raujan. The plaintiffs brought the suit to recover possession of a share in the tank. The first Court decreed the suit. The lower Appellate Court has reversed that decision and dismissed the suit.

Two points have been argued in this appeal. First of all, the learned Judge has found as a fact that the defendant No. 4 obtained a settlement from the Government of this tank. It is said that that was a new case and, therefore, the learned Judge of the lower Appellate Court was not entitled to find that case in favour of the defendant No. 4. I do not think that that is so. That case seems to have been set up at the outset and the statements of the Munsif in his judgment, though perhaps not so clear, go to warrant the fact.

The other point that has been raised is that this land forms a part of what is known as *noabad* land. It is said that the Government could only settle the land with the original tenure-holders, that is, that an interest in a *noabad taluq* is permanent and heritable and that the only thing that is liable to be varied is the amount of the revenue payable to the Government. It is admitted that the authorities show that, at any rate, with regard to uncultivated lands, that rule does not apply. In this case the land is clearly uncultivated. It was a tank which is now more or less silted up and a portion of waste land. There is nothing in the authorities to show that it is necessary for the Government to settle this uncultivated land with the tenure-holders under the *noabad taluq*.

The appeal, therefore, fails and is dismissed with costs.

RICHARDSON, J.—I agree.

*Appeal dismissed.*

(1) 24 Ind. Cas. 5; 18 C. W. N. 531 at p. 533.
(2) 4 Ind. Cas. 49; 13 C. W. N. 235; 9 C. L. J. 265.

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## PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 329 OF 1914.

May 14, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

*Srimat* NARAIN DEO—APPELLANT

*versus*

*Thakurain* KUSUM KUMARI—RESPONDENT.

*Will—Execution—Undue influence—Advice or persuasion, whether unlawful—Illness of testator, effect of—Burden of proof.*

The onus is upon the propounder of a Will to prove that the testator not only did make the Will but that he possessed sound testamentary disposition

NARAIN DEO v. KUSUM KUMARI.

at the time of making the Will and that he made the Will of his own accord and not on account of any importunity or coercion. [p. 604, col. 2.]

Advice or even persuasion cannot be said to be unlawful unless it deprives the testator of the freedom of the will and amounts to coercion. [p 604, col. 1.]

Illness is not in itself sufficient to invalidate a Will, unless it impairs the mind in such a manner as to deprive the executant of the power of understanding the consequences of making the Will. [p. 603, col. 1.]

Appeal from a decision of the District Judge, Bhagalpore.

Messrs. *Naresh Chunder Sinha* and *Pancha Nand Ghose*, for the Appellant.

Messrs. *S. N. Palit* and *Chandra Sekhar Sarkar*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—This is an appeal against the grant of Letters of Administration with the Will annexed to the testator's widow Thakurain Kusum Kumari. The appeal is by the defendant caveator, who is a somewhat distant agnate of the testator, Thakur Protap Narain Deo. The property is of considerable value, being the estates known by the name of the Lachhmipur Raj, in the District of Bhagalpur and the Sonthal Pergannas.

Protap Narain Deo had succeeded to the estate as an adopted son. The finding of the Court is that death took place at 2 A. M. on Sunday the 23rd of November 1913. The evidence is that the Will was executed at 10 A. M. the previous morning, Saturday the 22nd November.

At the commencement of the year 1913, the testator Protap Narain Deo had four wives but no children. The respondent Thakurain Kusum Kumari is his eldest widow.

The story of the execution of the Will told in the evidence is as follows:—

In February or March 1913, the testator had a draft Will prepared by one Rai Tarini Prasad Bahadur, a leading Pleader of Bhagalpur, in favour of his eldest wife Kusum Kumari above referred to. The execution of the Will was postponed in the hope of having an issue and with that in view the testator married a fifth wife in June 1913. In August 1913 the idea of making a Will again came under discussion. Tarini Prasad's draft was looked for but was missing and another draft was prepared by another Pleader named Jogendra Nath Bose, Tarini Prasad having died in the meantime. This second draft was settled by Babu Chandra Sekhar Sircar, a leading Pleader of the Bhagalpur Bar. On this draft being taken to the testator at Deoghar where he was staying with his third, fourth and fifth wives, the testator said that he wanted to execute a Will in favour of his third wife who had been nursing him, his illness being consumption. Thereupon a draft in favour of the third wife was made by one of the Pleaders who had brought the second draft to him at Deoghar. This draft in favour of the third wife was taken to Babu Chandra Sekhar Sircar for revision. The Pleaders returned with the revised draft and a note from Chandra Sekhar advising the testator against the course which he was proposing to take. This note is dated the 19th November. Four Pleaders attended upon the testator on Friday the 21st November with the draft and the note. One of these Pleaders pressed the testator to execute the Will in favour of his first wife. The testator remained silent, the Pleader then suggested that he should adopt. He refused and the Pleaders left Deoghar in the course of that day. During that night the testator had a conversation with his third wife in which he intimated to her his intention to follow the advice which had been given to him and she assented. Accordingly on the morning of Saturday the 22nd November he informed his Dewan that he was of opinion that the Will should be executed in favour of his first wife. The Dewan asked if he should send for the Pleaders who had taken away the draft; the testator answered that he had found the original draft made by Tarini Prasad in February or March previous. The only alteration necessary was to include the fifth wife whom he had married since the preparation of that draft. Alterations were accordingly made and the Will executed and attested by as many as nineteen attesting witnesses. The Sub-Registrar was sent for and came after his day's work was over at 3 o'clock in the afternoon. The Will was registered by him at 4 o'clock. That night at about 2 A. M. the testator died.

To prove the execution of the Will six of the attesting witnesses have been examined. There is also the evidence of the

third wife Champaklata Kumari in support of the Will, although she is not actually an attesting witness thereto, and there is the evidence of the Sub-Registrar who registered the Will on the day that it was executed. Among the attesting witnesses is one Babu Jamini Bhusan Roy, a medical practitioner of some distinction who had been summoned from Calcutta to attend the deceased during the last days of his illness. The evidence, therefore, as it stands, is of considerable weight.

The arguments by which this evidence has been assailed are as follows:—

It is said that the circumstances do not sufficiently explain the sudden change in the disposition of the testator after the departure of his legal advisers on the evening of the 21st of November. It is suggested that the Dewan manufactured the Will and had it registered. But in the first place no adequate motive for the manufacture of the Will can be suggested. The only result of the Will was to give the widows a power of adoption. In the absence of a Will the widows would have succeeded in any case although without the power to adopt. There was no motive for altering the Will in favour of the first wife so far as the Dewan was concerned, unless it be said that he wished to prevent litigation. Such a wish would clearly be an inadequate motive for running the risk of perpetrating a forgery. It is said that the story about the draft made by Tarini Prasad Bahadur in February or March 1913 is improbable; that the sudden finding of the draft by the testator ought not to be believed; the draft had previously been missing. It is pointed out that Tarini Prasad's draft bears no signature and that the witness Abdul Gaffur who is said to have taken the instructions of the testator to Tarini Prasad was not examined. The suggestion is that the evidence is false and it was considered safe to mention the name of Tarini Prasad as he had since died. There is no doubt that there is something in this comment. On the other hand it is a minor point and the comment is clearly insufficient to outweigh the value of substantial positive evidence of the execution of the Will. The only other comment on the evidence in which there is any substance at all is with reference to the comparison of the signatures upon the Will with the signatures on two documents Exhibits A and B of the year 1911. In the endorsement on the Will for the purposes of registration the spelling of the word "Narain" is different The signature on the third page of the Will—the letter *ye* of the word "*Sri*"—is differently formed and all the signatures in the Will are in what is called the *shekasta* form of handwriting, while the signatures in Exhibits A and B are in formal handwriting, resembling print. This comparison, however, in my opinion is not of sufficient substance to outweigh the valuable positive evidence. It is clear that these *shekasta* signatures in the Will are not copies of the forms of signature on Exhibits A and B. It may be that the testator adopted the *shekasta* style of writing during his illness. The testator was known to the Sub-Registrar who had been introduced to him at a Darbar. The acceptance of the appellant's case involves, therefore, the subornation of a Government Officer, the Sub-Registrar. The witnesses include persons who would naturally be present; the *mosaheb*, the *guru*, a local doctor, and the estate Kaviraj. There is also the evidence of the Calcutta physician, an independent witness. I have read this evidence and have not been able to find any sufficient ground for saying that the District Judge was wrong in giving credence to it.

The affirmative evidence offered by the caveator to prove that the story of the execution of the Will was untrue consists mainly of the evidence of one Narain Panda. He says that at the time when the Will was supposed to be executed four of the attesting witnesses to the Will including the Calcutta physician were sitting with him and were not with the Thakur. This evidence has been dealt with at length by the learned District Judge and the witness has been rightly discredited. It is, of course, extremely improbable that if the Thakur was seriously ill that morning as the witness admits, the Calcutta physician should not have attended upon him.

I accordingly find that the Will is a genuine document.

I have next to consider whether the Thakur

at the time he executed the Will had a sound disposing mind. No doubt he was emaciated and weak, but the Will was one with which his mind had been occupied for some months previously. The alternatives which his mind had to choose from were a Will in favour of his elder wife on the one hand and a Will in favour of the third wife on the other. The terms of the Will would be the same in either case and had previously been settled. It is difficult to conceive that if any strength remained in the mind at all there would not be strength enough to choose between these two alternatives. The Calcutta physician states affirmatively that he was capable of understanding business at the time when he executed the Will. His condition does not appear to have been materially altered for three or four days before his death and there is the fact that he received the Pleaders on the previous evening and had mind enough to refuse to adopt when they requested him to do so. It has been argued that Colonel Browne the English Doctor should have been examined regarding the testator's mental condition, but Colonel Browne left on the 19th and he would not have been able to give a decided opinion as to the condition of the mind of the testator at the time when the Will was executed. There was no doubt that his condition caused alarm on the 19th, yet we have the affirmative evidence of the Calcutta physician that his mind was not prostrated and it was quite clear that it was not. The Sub-Registrar, who saw him at 4 o'clock on the evening of the day the Will was executed, says that he was not in an unsound state of mind and that he gave rational answers to questions put by him. All the attesting witnesses give evidence to the same effect. It must be remembered too that his third widow Champaklata says that he discussed the terms of the Will with her during the previous night. On behalf of the caveator the main evidence relied upon in this connection is the evidence of Sarat Chandra Mukherjee who was the retained Pleader of the Estate. It was he who engaged Colonel Browne and the Calcutta physician Jamini Bhusan; he went with them to Deoghar on the evening of the 18th Tuesday and saw the testator twice a day until the time of his death. When he saw him on the Friday morning he says the testator could not speak; sometimes he made expressions of merriment and pointed out by moving his fingers. His evidence does not appear to me to displace to any material extent the evidence that the testator was of sound disposing mind, especially as the witness says that on the Friday morning he exhorted the testator to adopt a son—a statement which implies that his impression was that the mind of the testator was not completely prostrate.

It is then contended on behalf of the caveator that the validity of the Will is vitiated by the fact of the importunity which was exercised by the Pleaders. Such pressure, however, as was brought to bear upon the testator was directed mainly to persuade him to adopt a son. There was some pressure also no doubt in favour of the elder wife but he resisted this pressure. He refused to adopt a son and he would not assent to a Will in favour of his elder wife. The Pleaders left, and it is clear from the evidence of Champaklata that he consulted the latter and before finally deciding to make a Will in favour of his elder wife obtained her assent. No doubt in cases of importunity it is important to bear in mind the weakness of the testator's condition. But he had the strength of Will left sufficient to resist the pressure brought upon him to adopt. It is, therefore, impossible to find that he did not exercise an independent will. The Pleaders had no sort of hold over him; it was a case of independent advice given from outside by persons who had no sort of control over the testator. It is said that the Pleaders told him that it would be illegal to make a Will in favour of his third wife; but it is only the Dewan who uses the word illegal in this connection and he only says that it was the Vakil Sarat who told the testator that it would be illegal. Now it is quite clear from Sarat's evidence that he had little, if any, influence over the testator. The other legal advisers had not suggested that a Will in favour of the third wife was illegal, and I am not satisfied that any impression was created in the mind of the testator that a Will in favour of the third wife would be illegal. There is nothing in the evidence of Champaklata to suggest that any such idea was in the mind of the testator,

The result is that I find that the Will was executed by the testator and he had a sound disposing mind at the time and that the Will was not vitiated by any improper importunity. I would, therefore, dismiss the appeal with costs.

JWALA PRASAD, J.—The subject-matter of litigation in this appeal is the Will of one Thakur Pratap Narain Deo. He was possessed of large property known as the Lachhmipur Estate in the District of Bhagalpur. He died at about 2 A. M. on November 23rd, 1913. The Will propounded is said to have been executed by him in favour of his first wife, petitioner respondent, on 22nd November 1913, at about 10 A. M. and to have been registered that very day at about 4 o'clock in the afternoon by the Sub-Registrar of Deogarh at the residence of the deceased under Act XVI of 1908 in force in the District of the Sonthal Pergannas. The testator died childless leaving five wives behind him, the eldest being named Thakurain Kusum Kumari and the third Thakurain Champaklata Kumari. It is unnecessary to mention the names of the other wives for the purposes of this case.

On January 5th, 1914, Thakurain Kusum Kumari applied before the District Judge of Bhagalpur for the grant of Probate of the aforesaid Will of her late husband, and in the alternative for grant to her of Letters of Administration with the Will annexed. On 21st February 1914 a caveat was lodged before the District Judge by one Srimat Narain Deo, the youngest of three brothers who claimed to be next of kin to Lalit Narain Deo, whose adopted son the deceased Thakur Pratap Narain Deo was. An objection raised in the lower Court that caveator had no *locus standi* to oppose the application for the grant of Probate applied for was overruled by the District Judge by his order dated 25th November, 1914. After contest the District Judge of Bhagalpur granted the petitioner Letters of Administration with the Will annexed and rejected the objection of the caveator by his judgment dated 15th June 1914. The caveator has appealed to this Court. The appellant alleged in his objection petition in the lower Court that the testator died on the 22nd November 1913, and not on 23rd as stated by the applicant, suggesting thereby that he had died before the execution of the Will. This allegation has not been substantiated and in view of the overwhelming evidence on record to the contrary the appellant has given it up in this Court.

The main grounds urged before us by the learned Counsel for the caveator are as follows:—

1. That the Will was not executed at all by Thakur Pratap Narain Deo and the signatures on the Will are not his signatures.

2. That the testator at the time he is said to have executed the Will was not possessed of sound disposing mind.

3. That the Will is not the result of the free volition of the testator but is the outcome of importunity of persons surrounding him.

As to the first of these, namely, that the Will was not executed at all by Thakur Pratap Narain Deo, Counsel for the appellant has based his contention mainly upon the fact that the signatures of the testator on the Will in question are different in style from those on certain documents, Exhibits A and B, filed in the lower Court. The Will in question has been attested by several witnesses, six of whom have been examined in this case. These witnesses have sworn that the testator put his signatures on the Will in their presence. The most important of these witnesses is the Kaviraj of Calcutta, Jamini Bhushan Roy, M. A., M. B., who attended the deceased from the 19th till his death on the 23rd November. The other witnesses are the Dewan and some other servants of the testator. The Sub-Registrar who has also been examined says in his evidence that he saw the testator sign the Will in his presence at the time when the admission of the testator was taken by him for the purpose of registering the Will. No sufficient reason has been assigned by Counsel for the appellant why the evidence of these witnesses should not be accepted. In face of the direct evidence of these persons it is impossible to set aside the Will on the mere difference in style between the signatures on the Will in question and those on Exhibits A and B. The signatures on Exhibits A and B appear to be similar, while the signatures on the Will in question

appear to be different in style from those on Exhibits A and B. The signatures on Exhibits A and B are in ordinary style, while those on the Will in question are in a style called *shikasta*. No expert has been examined in this case to prove that the signatures on the Will and those on Exhibits A and B are of different persons, and it is difficult for us to say that they are not of one and same person. The documents, Exhibits A and B, were executed in May and September 1911, respectively, and the Will is dated November 22nd, 1913. The difference in the style may possibly be accounted for by the difference between the dates of these documents. Besides the signatures on the Will were affixed when the testator was admittedly ill. This may be another reason for the difference in the style of the signatures. It is difficult to override the direct evidence of the persons who saw the testator put his signatures on the Will by conjectures based upon the difference in the style of the signatures. To set aside the direct evidence in this case involves a conspiracy of the Dewan and the servants, and notably of the Calcutta Kaviraj and of the Sub-Registrar of Deogarh to set up a false and fabricated Will. There is no motive for such a conspiracy, and it is impossible to conceive what advantage could have been gained by these persons in setting up a false Will.

The Sub Registrar knew the testator personally, and has mentioned this fact in the endorsement on the Will. It would have been extremely dangerous for the Dewan and the servants of the testator to put up a false person to admit the execution of the Will before the Sub-Registrar. The Kaviraj of Calcutta is a medical practitioner of high status who has calls in the *mofassil*, is M. A., M. B., of the Calcutta University, a Fellow of the said University and a member of the Senate A faint insinuation has been made against him of having possibly been bribed in order to put his signature on the Will as an attesting witness and thereafter to prove the Will in Court by false evidence. Far from having been substantiated, the charge against him is, in my opinion, base and groundless. The motive suggested is also not adequate. I have, therefore, no hesitation in accepting the direct evidence in this case that the Will was executed and signed by the testator.

The learned Counsel for the appellant complains that certain documents called for by him, namely the account books of Debi Prasad Marwari and the Power-of-Attorney executed by Thakur Pratap Narain Deo in favour of the Hon'ble Sheo Shankar Sahai Bahadur, C. I. E, have not been produced in order to enable the Court to compare the signatures on those documents with the signatures on the Will. There does not appear to be any substance in this complaint, when the direct evidence on record proves beyond doubt that the testator did actually sign the Will.

The second contention of the learned Counsel for the appellant, namely, that the testator was not possessed of sound disposing mind at the time of the execution of the deed is based upon the fact that the testator was suffering from pthisis or consumption for sometime before his death; that he was bedridden at the time of the execution of the deed and that he died only about 13 hours after the execution of the Will. This contention is concluded by the evidence of the aforesaid Calcutta Kaviraj. The fact that he has attested the Will as a witness is in itself sufficient to show that he as a medical attendant believed that the testator was possessed of sound disposing mind. He was constantly in attendance upon the deceased from the 19th of November till his death. He has already stated in his evidence that the deceased was capable of understanding business.

The Sub-Registrar, N. N. Mukherji, says in his evidence that the deceased gave rational answers to the questions put by him at the time when he went to take his admission for the purpose of registering the Will.

The evidence of the Kaviraj and the Sub-Registrar is conclusive to show that the deceased was of sound mind both when he executed the Will at 10 A. M. and when he admitted the execution thereof and put his signatures thereon at 4 P. M. on the 22nd. The other witnesses corroborate the evidence of the Kaviraj and the Sub-Registrar.

There is no reason why the evidence of his third wife, Champaklata, should not be accepted as proving that the deceased was

perfectly sound and capable of executing the Will in question. The evidence is that from the 19th to 21st the deceased was actually engaged in and applied his mind to considerations regarding the making of a Will by him. On the 21st he possessed sufficient strength of mind to resist the suggestions made by his Pleaders that the Will should not be executed in favour of his third wife. No doubt the deceased was ill for sometime before, but illness is not in itself sufficient to invalidate a Will unless it impairs the mind in such a manner as to deprive the executant of the power of understanding the consequences of making the Will. This is clear from Explanation 4 of section 46 of the Indian Succession Act, which embodies the principles enunciated in Judicial pronouncements both in England and in India. I am, therefore, of opinion that the deceased was possessed of sound disposing mind when he executed the Will. I do not agree with the appellant in his contention that Colonel Browne should have been examined in the case. The evidence of Colonel Browne will not be very material for he saw the deceased only on the 19th, whereas the Calcutta Kaviraj was in attendance all through from the 19th up to the time of his death.

The third ground urged by the Counsel for the appellant against the Will is that it is not a voluntary act of the testator but is the result of an importunity of the people surrounding him. It is said that the deceased had long before abandoned the idea of executing a Will in favour of of his first wife, and on the 21st November, that is only a day before the execution of the Will, he distinctly expressed his intention of making a Will in favour of his third wife inspite of the suggestions of his advisers to the contrary, and that it is impossible that the deceased could have, of his own accord, changed his mind so suddenly and that the Will in question must, therefore, have been the result of the persistent solicitations of the Dewan and other persons who surrounded him, when the deceased had physically and mentally become infirm and incapable of resisting the importunity offered to him. The contention does not appear to be borne out by the facts proved in the case. The evidence is that so far back as February or March 1913, the deceased had contemplated making a Will in favour of his first wife and had also a draft made for that purpose by a leading Vakil of the Bhagalpur Bar, namely, Rai Tarini Prasad Bahadur. The execution of the Will was, however, postponed at that time, as the deceased thought of marrying a fifth wife in the hope of getting an issue and in fact did marry. In August 1913, he again reverted to his intention of making a Will in favour of his first wife and had another draft made, as the draft of Tarini Prasad was missing at the time.

When the second draft was shown to him at Deogarh, the deceased said that he wanted to make the Will in favour of his third wife. His Dewan and the Pleaders who had come from Bhagalpur with the draft pointed out to the Thakur that it was the custom of the family that the eldest wife should get the property and that the execution of the Will in favour of the third wife might lead to litigation. But the deceased did not listen to this advice and had a draft of the Will in favour of the third wife made by his Dewan Nadiya Chand Dutt. This draft was sent by him to Babu Chandra Sekhar Prasad, a leading Pleader of the Bhagalpur Bar, for revising it. Babu Chandra Sekhar made some alterations in the draft and returned it to him, with a note that the execution of the Will in favour of a junior wife in preference to the first would be a departure from the old and ancient custom of primogeniture prevailing in the family and might lead to litigation. He also suggested in his note that the difficulty might be avoided if the Thakur were to adopt a son to himself. The draft and the note bear the date 19th November 1913, and were put up to the deceased on the 21st, in the presence of three Pleaders from Bhagalpur and a Pleader from Calcutta. The Pleaders gave him the same opinion as was embodied in the note of Babu Chandra Sekhar mentioned above, and added that he should execute a Will in favour of his first wife. The Thakur remained silent, meaning thereby that he did not approve of the suggestions. The Pleaders then proposed to him that he should adopt a boy, to which the Thakur

said that he would not adopt because he thought that he might get an issue. The Pleaders then left him and went away to Bhagalpur by the evening train that very day.

It is contended by the appellant that the above amounted to an importunity offered to the deceased to execute a Will in favour of the first wife. I do not agree with this. All that the above amounts to is that the Dewan and his Pleaders pressed upon his consideration what they considered to be a good advice, but an advice or even persuasion cannot be said to be unlawful unless it deprives one's freedom of the will and amounts to coercion. It was pointed out by Lord Cranworth in *Boyse* v. *Rossborough* (1) that an influence in order to be undue within the meaning of any rule of law which will make it sufficient to vitiate a Will must be an influence exercised either by coercion or by fraud. *Vide* Williams 47-51. Section 48 of the Indian Succession Act says that an importunity must take away the free agency of the testator in order to render a Will void. As a matter of fact the deceased did not yield to the advice offered to him and rejected it, and the Pleaders left the place.

On the night of that day he said to his third wife that he wanted to execute the Will in her favour but that everybody else was of a different opinion. The third wife told him that she herself had no objection to the Will being made in favour of the eldest wife. The third wife had in the meantime consulted her father who was at Deogarh, and her father told her that she should not take a Will in her favour as that would lead to litigation. The consultation of the testator with his third wife on Friday night after the Pleaders had left seems to me to be the determining factor in the final intention of the testator to execute the Will in favour of the first wife. It was to please the third wife, who was nursing him during his illness, that the testator had thought of altering his original intention of making a Will in favour of his first wife, and when she herself said that she would like the Will to be executed in favour of the first wife there was nothing to prevent the testator from giving effect to his original intention. It is significant that the first wife was not at Deogarh at that time and so she could not influence him to make the Will in her favour, and there is no reason why the Dewan and other servants would exercise an undue influence on her behalf.

It is thus clear that when at 7 A. M. of the 22nd the testator said to his Dewan that he would execute the Will in favour of the first wife, he did so out of his own accord and in the exercise of his own judgment in the matter, and not on account of any importunity offered to him.

The original draft of the Will made by Rai Bahadur Tarini Prasad was put by him in his box as he wanted to marry the last wife for getting an issue. This draft was taken out by him, and after some necessary corrections being made was handed over to one Abdul Gafoor for fairing it out. There was no necessity for him to consult the Pleaders again, or to have another draft made. Abdul Gafoor wrote the Will in question from the draft. The deceased had the Will read to him before putting his signatures thereon in presence of the attesting witnesses, including the Calcutta Kaviraj referred to above. Abdul Gafoor has not been examined in the case, and this omission has been severely commented upon on behalf of the appellant. I think the scribe should have been examined, but in view of the unquestionable evidence on the record of the Will having been duly considered and signed by the testator, the omission to examine Abdul Gafoor is not at all fatal to the case of the respondents.

It is needless to refer to the authorities quoted by the appellant's Counsel in the course of his arguments. There can be no dispute that the onus is upon the propounder of the Will to prove that the testator not only did make the Will but that he possessed sound testamentary disposition at the time of making the Will and that he made the Will of his own accord, and not on account of any importunity or coercion. This has to be determined by the actual facts established in the case

(1) (1857) 6 H. L. C. 2 at p. 6; 26 L. J. Ch. 256; 3 Jur. (N. S.) 373; 5 W. R. 414; 10 E. R. 1192; 108 R. R. 1.

under consideration. As shown above, it has been proved in this case that the Will was duly made and that the testator was not in any way unlawfully influenced in making the Will. The appellant has not rebutted satisfactorily the evidence adduced by the respondent that the Will was duly made by the deceased.

The appeal is, therefore, dismissed with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3079 OF 1915.

April 24, 1917.

*Present*:—Justice Sir Charles Chitty, Kt., and Mr. Justice Beachcroft.

HARISH CHANDRA ROY AND OTHERS—DEFENDANTS NOS. 1 AND 3—APPELLANTS

*versus*

SARAT CHANDRA BANDOPADHYA—PLAINTIFF AND SATISH CHANDRA ROY—DEFENDANT NO. 2—RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 319—Symbolical possession—Limitation.*

An order of Court giving symbolical possession to an auction-purchaser under section 319, Civil Procedure Code of 1882, on an application by the auction-purchaser made more than 3 years after the sale is confirmed is not without jurisdiction and a nullity, as such an order can be made by the Court of its own motion, without the intervention in any way of the auction-purchaser, and no period is fixed for such an order under section 319 of the old Code. [p. 606, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 11th September 1915, reversing that of the 2nd Additional Munsif, Narayanganj, dated the 30th April 1915.

FACTS of the case appear from the judgment.

Dr. *Sarat Chunder Basak* (with him Babu *Prokash Chunder Pakrasi*), for the Appellants.—Under section 318 of the Civil Procedure Code of 1882, and Article 178 of the Limitation Act of 1877, delivery of possession could have been given to the decree-holder auction-purchaser up to June 1902. So any delivery of possession given after that date was a nullity and without any effect. There was in this case no proper legal delivery of possession, as the delivery of possession was not made within the statutory period from the confirmation of sale. Any delivery given by the Court after the proper time would not place the auction-purchaser in a better position. It is settled law that as between the parties to the suit symbolical possession is as good as actual possession, but to make the principle applicable, the delivery must be within time. There cannot be any legal delivery of possession by the Court if the Court professes to give it after the time within which the possession should have been delivered. The limitation in this case would run from the date of confirmation of sale. There must be some limit of time within which possession should be delivered. Even under section 319 of the Code of 1882 the Court cannot postpone it for an indefinite period of time. So the present suit being out of time should fail.

Babus *Upendra Lal Roy* and *Suresh Chunder Das*, for the Respondents, were not called upon in reply.

JUDGMENT.—The only question in this case is one of limitation. It appears that the defendants were the owners of the property in dispute, an 8-anna share in a *sikmi taluq*. That property was sold for arrears of rent at the instance of the landlord Radhika Mohan Roy on 9th May 1899 and purchased by the decree-holder himself. The sale was confirmed on 20th June 1899. The sale certificate was issued on 6th May 1904. Symbolical possession was given under section 319 of the Code of Civil Procedure of 1882 on 23rd July 1904. The present plaintiff bought the property from the representative of the decree-holder on 8th June 1906, and filed the present suit to recover possession on 9th March 1914. If the time be taken to have run from the date of the confirmation of the sale on 20th June 1899 the suit would obviously be out of time. If, on the other hand, it is taken to run from the date of the delivery of possession to the purchaser, *i.e.*, 23rd July 1904, the suit is not barred.

The Code of 1882 is applicable to the case. It is admitted that the property was in possession of tenants under the

defendants-judgment-debtors. Section 319 was, therefore, the section which applied to the delivery of possession in this case. The purchaser appears to have made an application for delivery of possession but to have made it more than three years after his right to make that application had accrued. He would, therefore, be out of time under Article 178 of the Limitation Act (XV of 1877). Section 319, however, does not like section 318 prescribe that the Court's order shall be made on application by the purchaser. Whether this was an intentional difference in the sections or not it is not necessary to discuss. There is, however, this distinction that under section 318 the presence of the purchaser would be necessary before he could be put in possession by the Court. It may have been thought, therefore, necessary that in such a case he must first apply for delivery of possession before the Court could give it to him. Under section 319 all that has to be done is to affix a copy of the certificate of sale in some conspicuous place on the property and proclaim to the occupant by beat of drum or some other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser. This could be done by the Court of its own motion and without the intervention in any way of the purchaser. In any case it has not been shown us that any period of limitation was fixed by the law as it then stood for an order by the Court under section 319. If that be so, it cannot be said that the order of the Court dated 23rd July 1904 giving symbolical possession was without jurisdiction. It is conceded by the learned Pleader for the appellant that if this view be taken, the point of limitation cannot be successfully pressed.

The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

## PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1254 OF 1916.

May 16, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

RAM SAHI AND OTHERS—APPELLANTS

*versus*

*Mahanth* MAHABIR GIR AND OTHERS—RESPONDENTS.

*Rent suit*—Bhauli *land*—*Produce, quantity of, proof of*—*Road-cess return, admission in, value of*—*Average rate of rent.*

Where a plaintiff sues for arrears of rent of *bhauli* land, he should be allowed to prove the actual produce for the years in suit and its prices. An admission of the rate of rent in a road-cess return some years prior to the years for which rent is claimed is not conclusive as to the average rate. [p. 607, col. 1.]

Appeal from a decision of the District Judge, Saran.

Messrs. *Parmeshwar Dyal* and *Rajendra Prasad*, for the Appellants.

Mr. *B. N. Mitra*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—The suit which gave rise to the present appeal was a suit brought by the landlords against their tenants for *bhauli* rent of the years in suit. The landlords have an interest in the village to the extent of one-third. They have made all the co-sharer landlords parties to the suit.

Issue No. 2 raised in the suit was to the following effect :—

"What was the quantity of produce for the landlord's share and what is its price?"

The first Court gave a decree to the plaintiffs for rent in proportion to the one-third share which the plaintiffs had in the village at Rs. 5 per *bigha*. The reason why this rate was adopted was that in 1309 the plaintiff Ram Sahai had filed a road-cess return on behalf of all the co-sharers in which he had stated the lands to be *bhauli*; but for the purpose of re-valuation he had given a certain figure in order to indicate the value of the produce and this figure was Rs. 5. It was held by both the Courts below that inasmuch as the plaintiffs in 1309 had stated that the rate was Rs. 5 per *bigha* they cannot be allowed to go behind their statement.

On behalf of the appellants it is contended that they ought to have been allowed to produce evidence as to the amount of produce

for the years in suit but that they have not been allowed to do so It appears from the order sheet that on their behalf not a single witness was examined although they had given a list of witnesses.

It is further contended that Rs. 5 was the figure for 1309 and that since that year the prices of crops have risen and that the appellants should have been allowed to prove the actual produce for the years in suit and should have been given a decree in accordance with the produce for those years.

An issue having been framed as quoted above, I think it was necessary that the plaintiffs should have been allowed to adduce evidence in order to rebut the presumption arising from their own admission that the average rate was Rs. 5 per *bigha*.

For these reasons I would remand this case to the lower Appellate Court, so that an opportunity may be given to the appellants to adduce whatever evidence they wish to rebut the presumption arising from their admission that the rate was Rs. 5 per *bigha*.

The District Judge is requested to decide this issue after an opportunity is given to the plaintiffs to adduce their evidence as to the actual produce of the lands for the years in suit and to return the record to this Court, together with his findings on this issue, not later than the second week of July 1917.

ROE, J.—I agree. The issue will be decided by the District Judge. The evidence may be put on the record either by himself or by the Subordinate Judge.

*Case remanded.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1197 OF 1915.

July 24, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

ASWINI KUMAR SAMADDAR—PLAINTIFF—APPELLANT

*versus*

BANAMALI CHAKRABARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Decree obtained by fraud, suit to set aside—Previous relevant decree, whether must be set aside—Evidence Act (I of 1872), s. 44.*

The plaintiff brought a suit to set aside an *ex parte* decree on the ground of fraud. In order to succeed in the suit, it was necessary for him to show that an earlier High Court decree (to which he was no party) was also invalid on the ground of fraud:

*Held*, that the suit was maintainable without the plaintiff first setting aside the High Court decree by a suit framed for the purpose, as he was entitled under section 44 of the Evidence Act to impeach it in the present suit on the ground of fraud. [p. 607, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Backergunge, dated the 5th March 1915, affirming that of the Officiating Munsif, Additional Court, Barisal, dated the 6th August 1913.

Babu *Nakuleswar Mookerjee*, for the Appellant.

Dr. *D. N. Mitra* and Babu *Satindra Nath Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal against a suit to set aside an *ex parte* rent-decree on the ground of fraud.

In order that the plaintiff may succeed in this suit, it is necessary for him to show that an earlier decree obtained in the High Court is also invalid on the ground of fraud.

Both the lower Courts have held that the plaintiff cannot maintain this suit without first setting aside the High Court decree by a suit framed for this purpose. The learned Subordinate Judge based his decision on the ground that the plaintiff was no party to the High Court decree. But this is no reason why the plaintiff should not show that the High Court decree was obtained by fraud or collusion under section 44 of the Evidence Act.

In Woodroffe and Ameer Ali's Law of Evidence, 5th edition, it is remarked: "With regard to the parties who may show fraud, it is clear that a stranger to a judgment, against whom such judgment is used as evidence, may impeach it on the ground of fraud in the suit in which it is so used." The plaintiff here is a stranger to the judgment and if the judgment is used against him as evidence, he is entitled under the section to impeach it. Both the lower Courts were, therefore, wrong in holding that the suit is not maintainable.

The case is sent back to the Court of first instance for decision on the other issues.

The appellant will get the usual certificate under the Court Fees Act for the refund of his Court-fee. The other costs will abide the result.

*Appeal allowed; Case remanded*

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## MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 93 OF 1915.

March 20, 1917.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Oldfield.

V. KRISHNAIYAH—APPELLANT

*versus*

C. GAJENDRA NAIDU AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Civil Procedure Code (Act XIV of 1882), s. 248—High Court Original Side decrees, revivor of—Decree against several persons—Notice, issue of, to some—Limitation, fresh starting point of—Limitation Act (IX of 1908), Sch. I, Arts. 182, 183.*

Both on the reason of the thing and on the analogy of the provisions of the Civil Procedure Code which apply the doctrine of revivor to India, as regards the revivor of the decrees of the High Court, Original Side, notice must go to the parties against whom it is sought to revive the decree. [p. 608, col. 2.]

Explanation I in the 3rd column of Article 182 of the Limitation Act refers only to applications under the Article and has nothing to do with the revivor of Original Side decrees. [p. 608, col. 2; p. 609, col. 1.]

Appeal from the judgment of Mr. Justice Bakewell, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 203 of 1899.

Messrs. *Venkatasubba Rao* and *Radhakrishnayya*, for the Appellant.

Messrs. *K. Ramachandran*, *T. Venkatasubba Aiyar* and *Narayana Sastri*, for the Respondents.

JUDGMENT.—This appeal raises an interesting point as to which Mr. Venkatasubba Rao has candidly put the authorities before us. The question is whether Mr. Justice Bakewell was right in holding that an order of revivor of a decree on the Original Side made against the first defendant under section 248 of the old Code was inoperative as against the 2nd defendant to whom no notice went. The term "revivor" in the 3rd column of Article 183, as is well known, refers to the Common Law practice which prevailed in the Supreme Courts in India under which, if a writ of execution was not sued out within a year and a day, it was necessary to revive the decree by a process known as *scire facias* or more fully *scire facias quare executionem non habeat*, that is to say, by calling on the judgment-debtor to show cause why the plaintiff should not have execution against him. When the Code of Civil Procedure came to be enacted, the rule was embodied in what was section 248 of the old Code and now Order XXI, rule 22, under which when an application for execution is made more than one year after the date of the decree, notice is to go to the person against whom execution is prayed, requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. This rule requires notice to go against the person against whom execution is applied for, and the 6th sub-section of the 3rd column of Article 182 of the Limitation Act provides that when such notice has been issued, the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him is to form a fresh starting point. We think both on the reason of the thing and on the analogy of the provisions of the Code which apply the doctrine of revivor to India that as regards the revivor of Original Side decrees, notice must go to the parties against whom it is sought to revive the decree. The whole doctrine, as is explained in the passage from Blackstone cited in Mr. Justice Bakewell's judgment, had its origin in the presumption of satisfaction which was held to arise when execution had not been applied for within a year after the date of the judgment. As regards Article 182, Explanation I in the third column provides that where the decree or order has been passed severally against more persons than one, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all. This only applies to applications under Article 182, which in terms excludes applications such as the present provided for by Article 183. The Explanation refers only to applications under Article 182 and has nothing to do with the revivor of

Original Side decrees. For these reasons we think that the judgment of Mr. Justice Bakewell is right and that the appeal must be dismissed with costs of the 1st respondent.

*Appeal dismissed.*

V.R.P.

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## CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 156 OF 1915.

March 1, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

ABINASH CHANDRA DAS AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

HEM KUMARI DASI WIFE OF BASANTA KUMAR BISWAS—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 148, Sch. II, para. 16—Award fixing time for payment—Court, whether can extend time.*

A valid award on a voluntary reference in a pending suit is binding and conclusive on all the parties and the Court is not authorised to interfere with any portion of it. [p. 610, col. 1.)

Where in a suit, the matter in dispute is referred to arbitration by agreement of the parties and an award is duly made by which one of the parties is directed to pay a certain sum to the other party within a specified time and a decree is made thereon, the Court has no power to extend the time fixed by the award for the payment, even on the ground that the case is a hard one. [p. 610, col. 1.]

Appeal against the order of the Subordinate Judge, Nadia, dated the 18th March 1915.

FACTS of the case appear from the judgment.

Babu *Manmatha Nath Roy* (with him Babu *Upendra Narayan Bagchi*), for the Appellants.—The lower Appellate Court was wrong in dismissing the application for execution. The award was made on the 23rd December 1913 and the time allowed to defendant No. 1 to pay to the plaintiff Rs. 3,600 was six months. The six months allowed by the award expired on 3rd June 1914. The payment into Court of Rs. 3,600 on the 4th June 1914 was clearly out of time and so the appellants were entitled to possession in accordance with the terms of the award. The lower Court held that it had power to extend the time and the payment on 4th June was a good payment. The lower Appellate Court has erred in holding that the Court had the right to extend the time fixed by the award of the arbitrators. The Court cannot interfere with the award of the arbitrators in any of its points. The Court has erroneously exercised jurisdiction in extending the time.

Babu *Hara Prasad Chatterji*, for the Respondent.—The decree on the award is made in the form of a decree in a redemption suit.

[FLETCHER, J.—It is not a decree under the Code of Civil Procedure.]

Section 148, Civil Procedure Code, applies to this case. Under this section the Court may, in its discretion, enlarge the period originally fixed even when that original period has expired. This section applies to an award made by arbitrators. When the money has been deposited before final decree for redemption has been made and the Court has accepted the money, the principle of *Bepin Behary Shaha* v. *Mokanda Lal Ghosh* (1) should be followed. Here the Court must have condoned the delay of the respondent, when it accepted the deposit.

### JUDGMENT.

FLETCHER, J.—This is an appeal from an order of the learned Subordinate Judge of Nadia, dated the 18th March 1915. The appeal is preferred against an order dismissing an application for execution. The facts are as follows:—The defendant No. 2 in the month of January 1901 mortgaged a certain property to the plaintiff to secure the sum of Rs. 4,750. A suit was brought on the mortgage and it was decreed for the sum of Rs. 7,000. In execution of that decree the property was put up for sale and purchased by the plaintiff, the mortgagee, for the sum of Rs. 5,800 On attempting to take possession the plaintiff was resisted by the defendant No. 1, on the allegation that she (defendant No. 1) had a lease of the property after the date of the mortgage for a term of eleven years expiring in the year 1322 *B. S.* So her lease has now wholly expired. The plaintiff then instituted a suit for possession. By agreement between the parties the matter in dispute was referred to arbitration. The arbitrators duly made their award on the 3rd December 1913 and the award was as follows:—"Our award on the issues considered

(1) 1 Ind. Cas. 780; 36 C. 122 at p. 128; 8 C. L. J. 547.

BEGAN KUER *v.* JHARI MAHTON.

together is that the plaintiff should get *khas* possession of the properties in suit by evicting the defendants, unless the defendant No. 1 pays to the plaintiff Rs. 3,600 including costs and interest within six months from this date." No money was paid in accordance with the terms of the award within the six months allotted, which expired on the 3rd June 1914. On the 4th June 1914, the sum of Rs. 3,600 was, however, paid into Court. No payment having been made up to the 3rd June 1914, on the 5th June 1914, the plaintiff applied for possession in accordance with the terms of the award, the award having been filed in Court in the ordinary way and a decree having been passed thereon. The learned Judge of the Court below held that he had power to extend the time fixed by the award, that the payment into Court on the 4th June 1914 of Rs. 3,600 was a good payment and that, therefore, the defendant No. 1 had complied with the terms of the award. It may be noticed in passing that the first defendant did not pay any portion of the Rs. 3,600 to the plaintiff within the time fixed by the award. The learned Judge held, however, that he had power to extend the period fixed by the award. In my opinion, he had not the power to do so. The statement in Russell on Arbitration which may be taken as a correct statement of the law on the point is to this effect. I read from the Chapter I, page 307, of the Ninth Edition: "A valid award on a voluntary reference is a final and conclusive judgment as between the parties respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal both as to fact and law;" and again in the same chapter at page 318 the learned author states. "Upon an award for the payment of money at a particular time and place, the party who is to pay ought to come and tender the money at the time and place even if the other party be not there to receive it." It is quite clear that the arbitrators were acting within their powers when they directed that the payment should be made within six months from the date of their award, and that being their judgment, it is binding and conclusive on all the parties and the Court is not authorized to interfere with that portion of the award any more than with any other portion of the award. The learned Judge clearly had no jurisdiction to extend the time on the ground that the case was a hard one. As to whether the case is a hard one, it may be doubted whether it is so. This lady, the defendant No. 1, had a lease for eleven years which has now expired. The right of redemption that was given to her was clearly for the purpose of supporting that lease for eleven years, which she would be deprived of by the plaintiff having purchased in execution of a decree on his mortgage which was executed prior to her lease. But that reason has now ceased to exist. The lease has now come to an end and the defendant No. 1 has enjoyed all the rights that she had under that lease which is not binding as against the plaintiff. I think that the learned Judge was wrong when he extended the time fixed by the award. We, therefore, allow the appeal, set aside the order of the Court below and in lieu thereof direct that execution do issue on the terms of the award for the purpose of giving *khas* possession of the properties to the plaintiff. The contesting respondent must pay to the appellant his costs in this Court as well as in the Court below. We assess the hearing fee at three gold *mohurs*.

NEWBOULD, J.—I agree.

*Appeal allowed.*

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PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 885 OF 1916.

May 21, 1917.

*Present*:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

*Musammat* BEGAN KUER AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

JHARI MAHTON—PLAINTIFF—RESPONDENT.

*Possession, suit for*—Benamidar, *whether can sue.*

A *benamidar* who has no interest of his own in the land in dispute cannot maintain a suit for possession on the basis of the sale-deed in his favour. [p. 611, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 6th April 1916.

Mr. *Kailash Pati*, for the Appellants.

Messrs. *Mrityun oy Lal* and *Atul Chandra Dutta*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit by the respondent for possession of

immoveable property on the strength of a deed of sale executed in his favour. The first Court dismissed the suit on grounds which it is not necessary to specify. The District Judge reversed the decree of the first Court and passed a decree in favour of the respondent. The appellants have pleaded *inter alia* that the respondent was merely the creature of a *Mukhtar* named Jagdish Narayan and had paid them nothing. At the trial evidence was given by the respondent that he was the real purchaser and by the appellants that the real purchaser was Jagdish Narayan. In the course of his judgment the District Judge used language which seemed like a finding that the respondent was no more than the *benamidar* of Jagdish Narayan. There being some doubt whether the finding was sufficiently definite, we adjourned the hearing of the appeal and subsequently heard the parties on the evidence relating to the question whether the respondent was the real purchaser or only a *benamidar*. Having examined the evidence I have no doubt whatever that the real purchaser was Jagdish Narayan and that the respondent was only his *benamidar* and has no interest whatever in the land claimed in this suit. There is a long string of decision in the Calcutta High Court according to which a *benamidar* cannot maintain a suit of the kind now before us. I think that we ought to follow those decisions in his Court, whatever our personal views on the subject may be. I would allow this appeal, reverse the decree of the District Judge and restore the decree of the first Court with costs here and in the lower Appellate Court.

JWALA PRASAD, J.—I agree.

*Appeal accepted.*

## MADRAS HIGH COURT.

APPEAL SUIT No. 74 OF 1915 AND
CIVIL REVISION PETITION No. 1046 OF 1915.

December 1, 1916.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

THULJARAM ROW—DEFENDANT No. 2—APPELLANT IN A. S. No. 74 OF 1915 AND PETITIONER IN C. R. P. No. 1046 OF 1915

*versus*

GOPALA AIYAN AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1, 3 AND 4—RESPONDENTS IN A. S. No.74 OF 1915

GOPALA AIYAN AND OTHERS—PETITIONERS—RESPONDENTS IN C. R. P. No. 1046 OF 1915.

*Civil Procedure Code (Act V of 1908), s. 11, O. XXIII, r. 1—Withdrawal of claim, order for—Incompetency of Court to permit withdrawal, effect of*—Res judicata—*Jurisdiction, irregular exercise of.*

An order permitting the withdrawal of a claim under Order XXIII, rule 1, Civil Procedure Code, which is beyond the competency of the Court to pass, is not a nullity but an order passed in the irregular exercise of jurisdiction, and such an order does not operate as *res judicata* so as to bar a subsequent suit for the same relief. [p. 613, col. 1.]

*Kali Prasanna Sil* v. *Panchanan Nandi*, 33 Ind. Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1000, 44 C. 367 and *Robert Watson & Co.* v. *Collector of Zillah Rajshahye*, 13 M. I. A. 160; 12 W. R. (P. C.) 43; 3 B. L. R. 48; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 511 (P. C.), distinguished.

Even if the order in the earlier suit be treated as a nullity, a second suit for the same relief is not barred as the claim remains undisposed of. [p. 612, col. 2.]

Where a Court is properly seized of jurisdiction of the subject-matter of a suit and of the parties, orders passed in violation of the provisions of law regulating the further proceedings in the suit in relation to the subject-matter till the termination of the suit cannot be said to be so totally without jurisdiction as to render them nullities. Such an order can only amount to a material irregularity in the exercise of jurisdiction. [p. 613, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in Original Suit No. 62 of 1913, and petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Temporary Subordinate Judge, Tanjore, in I. A. No. 246 of 1915 in Original Suit No. 628 of 1913.

Mr. *A. Krishnasami Aiyar* (with him Mr. *S. Rangachariar*), for the Appellants.

Mr. *T. R. Ramachandra Aiyar* (with him Messrs. *T. R. Krishnasami Aiyar* and *K. Balasubramanya Aiyar*), for the Respondents.

THULJARAM ROW *v.* GOPALA AIYAR.

JUDGMENT.

SRINIVASA AIYANGAR, J.—This is an appeal of the 2nd defendant, the present owner of the equity of redemption in a suit by the mortgagee to enforce his security. The mortgagee was himself the owner of the lands. He sold them to the 1st defendant's deceased husband one Jatavallabar on the 5th Jauuary 1899, who on the same day mortgaged them to the vendor to secure Rs. 11,000, the bulk of the price. The mortgagor covenanted to pay interest at half a rupee per cent. per month *i.e.*, 6 per cent. per annum once every year. He agreed to pay Rs. 1,000, out of the principal amount on the 30th July 1899 and the balance immediately the vendor mortgagee's minor sons attained majority, which event happened in April 1905, when the youngest of them became a major. In default of payment of the latter sum on the due date, the mortgagor agreed to pay interest at 12 annas per cent. per month (*i.e.*) 9 per cent. per annum. Most of the interest has not been paid and no portion of the principal money, and the suit is to recover the mortgage money by sale of the security. The plaintiffs—the 1st is the mortgagee and the other two are his sons—claimed interest at the rate of 9 per cent. not merely on the sum of Rs. 10,000, but also on the sum of Rs. 1,000. It was allowed by the lower Court and the first point raised in the appeal is against that claim. The language of the mortgage-deed is quite plain and against the claim of the plaintiffs. The decree of the lower Court must be modified by allowing interest on the Rs. 1,000 at 6 per cent. per annum instead of 9 per cent.

The 2nd point is more serious and it is this. The mortgagee in 1903 sued for the interest accrued due till then and for the Rs. 1,000 out of the principal. He prayed for the sale of a part of the security, *viz.*, that specified in Schedule B to that plaint to realise the interest and of another part specified in Schedule A to realise the principal amount. Jatavallabar was the 1st defendant in that suit but he died before the trial and on his death, the present 1st defendant was brought on the record. Besides Jatavallabar, three other persons who apparently claimed the A Schedule property adversely to both the mortgagor and the mortgagee, were made defendants. Jatavallabar or the present 1st defendant did no appear to defend the suit, but the other defendants set up their adverse title. At the final hearing, the plaintiff after having adduced evidence as regards his claim for interest against the mortgagor, 1st defendant, applied for leave to withdraw his claim for Rs. 1 000, the first instalment of the principal, with liberty to file a fresh suit on the ground that he was not ready with his evidence to prove his title to sell the A Schedule properties with which alone the contesting defendants were concerned. This was allowed by the Judge and a mortgage-decree was passed for the interest by sale of the B Schedule properties; as regards the claim for Rs. 1,000 the order was: "suit withdrawn in respect of claim B with liberty to sue again and plaintiff to pay corresponding costs of defendants Nos. 2 to 4." The appellant contends that the order permitting the withdrawal was beyond the competence of the Court and is a nullity and the present suit, in so far as it includes a claim to recover Rs. 1,000 and the subsequent interest, is barred as the matter was *res judicata*. There is a short answer to this contention, *viz.*, that if the previous order is a nullity, that being the only order which disposed of the claim for Rs. 1,000, that claim still remains undisposed of and must be tried, and it has now been tried in this suit. In *Kali Prasanna Sil* v. *Panchanan Nandi* (1), which was principally relied on by the appellant, the 1st Court had dismissed the suit on the merits and in appeal, that dismissal was confirmed; but the Appellate Court, in addition, purported to give leave to withdraw the suit, which permission was held to be a nullity. The result was the original dismissal of the suit became final and the matter became *res judicata* under section 11 of the Code corresponding to section 13 of the Code of 1882. That appears also to have been the case in *Robert Watson & Co.* v. *Collector of Zillah Rajshahye* (2). There was a dismissal of the suit for want of evidence which was a dismissal on the merits, as is shown conclusively by the subsequent proceedings in the case. There was first a summary appeal to the Sudder Court, but they held that the

(1) 33 Ind. Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1000; 44 C. 367.

(2) 13 M. I. A. 160; 12 W. R. (P. C.) 43; 3 B. L. R. 48; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R 511 (P. C.).

appeal must be brought by way of a regular appeal, *i. e.*, not as an appeal from an order, but as from a decree on the merits; and on a regular appeal being preferred, the appeal was dismissed. See page 164 of the report; Macpherson's Civil Procedure, Chapter XXXIX, for summary appeals. There was no question of permission to withdraw, for there was no such procedure then, and there was only a statement that the order then passed which was a decree for dismissal was not intended to bar the plaintiffs from proceeding as if the action had not been brought. This statement, it was held by their Lordships, could not prevent the actual dismissal from operating as a bar to the maintainability of the subsequent suit under section 2 of the Act of 1859, which corresponds to the present section 11 of the Code. That those decisions do not affect the present case is obvious, for there had been no adjudication of any sort in the case on the claim of the plaintiff and the matter cannot, therefore, be treated as *res judicata*. The decision of their Lordships in *Parsotam Gir* v. *Narbada Gir* (3) is conclusive on the point. In that case there was first a suit for recovery of possession of certain villages which was decreed by the first Court which decree, on appeal to the High Court, was reversed and the suit dismissed. The Appellate Court, however, expressly stated that they were not deciding on the rights of the parties. A second suit was brought by the same plaintiff against the representative of the same defendant for the same reliefs and their Lordships, reversing the judgment of the High Court, held that the subject-matter of the second suit was not *res judicata*.

The provisions of clause 3 of Order XXIII, rule 1, do not help the appellant as there has been no withdrawal without permission and the appellant is not entitled to treat one portion of the order, that giving permission, as a nullity while holding the plaintiff bound by his withdrawal.

It is not, therefore, necessary to express an opinion on the question, whether an order granting permission to withdraw with liberty to sue again, in a case where the Court grants such permission on an erroneous construction of the provisions of law which gives the power, is a nullity. But with all respect to the learned Judges who decided otherwise, I venture to doubt whether such an order is a nullity as one passed without jurisdiction, strictly so called. When a Court is properly seized of jurisdiction of the subject-matter of a suit and of the parties, orders passed in violation of the provisions of law regulating the further proceedings in the suit in relation to the subject-matter till the termination of the suit cannot be said to be so totally without jurisdiction as to render them nullities. It can only amount to a material irregularity in the exercise of jurisdiction; for example, there is Order I, rule 10, which gives power to the Court to add or strike out parties; if an improper order is made under that rule, can the parties ignore it and treat it as a nullity though such an order may be said to have been made in one sense without jurisdiction? [See the language used by Lindley, L. J. in *Moser* v. *Marsden* (4).] Or again if an injunction is issued or a Receiver appointed under conditions or in circumstances not coming within the terms of the sections conferring the power, can a party treat those orders as nullities? I think the true rule is that if the Court has jurisdiction to pass orders of a particular kind, that in a particular case it passed an order which it should not have passed is not a case of total want of jurisdiction so as to render that order a nullity. This is well illustrated by *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (5), where a Court having general jurisdiction of such suits rendered judgment for recovery of land outside its territorial jurisdiction and yet that judgment was held not to be a nullity.

The consequence of holding that an order giving permission to withdraw with liberty to sue again is a nullity and is capable of collateral attack may be serious. The terms of the rule are wide, and in particular cases it may be very difficult to decide whether permission should or should not have beed granted; orders improperly passed but with jurisdiction and orders passed without jurisdiction are incapable of precise defini-

(3) 26 I. A. 175; 21 A. 505; 1 Bom. L. R. 700; 3 C. W. N. 517; 7 Sar. P. C. J. 538; 9 Ind. Dec. (N. S.) 1028 (P. C.).

(4) (1892) 1 Ch. 487 at p. 491; 61 L. J. Ch. 319; 66 L. T. 570; 40 W. R. 520.

(5) 27 M. 118.

tion. In this very case there was a serious argument that the order was quite proper, at any rate it was not one passed without jurisdiction, though we are inclined to hold that the permission should not have been granted. If a party who is dissatisfied with such an order is to be allowed to treat it as a nullity in a subsequent proceeding, without vacating the order by proper proceedings, the plaintiff may be subject to a serious risk, conceivably without any fault of his own. This was the view taken in *Perumal* v. *Pichan* (6) by my learned brother and another learned Judge of this Court which was not cited at the Bar and in *Chhajju* v. *Khyali Ram* (7) by the Allahabad High Court. This contention must, therefore, be disallowed.

Two more points were taken, but were not pressed. The decree of the lower Court will, therefore, be modified in respect of interest as stated above and the appeal otherwise dismissed. The appellant will pay and receive proportionate costs here and in the Court below from the plaintiffs.

The plaintiffs have preferred a memorandum of objections; but there is no substance in the points taken and it must be dismissed with costs.

It is argued that 9 per cent. is to be substituted for 10 per cent. as regards the principal, and the decree of the lower Court will be amended accordingly.

C. R. P. No. 1046 of 1915 is also dismissed, as it has now become unnecessary.

ABDUR RAHIM, J.— I agree.

*Appeal partly allowed; Decree modified.*

V.R.P.

(6) 8 Ind. Cas. 268; 21 M. L. J. 574; (1910) M. W. N. 791; 9 M. L. T. 275.

(7) 14 Ind. Cas. 175; 9 A. L. J. 578.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3585 OF 1914.

March 1, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

BHUPENDRA KUMAR SARKAR AND OTHERS— PLAINTIFFS—APPELLANTS

*versus*

*Rani* KISSORI DASI EXECUTRIX TO THE ESTATE OF LATE RANESWAR BHOWMIK — DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 68—Landlord and tenant—Interest on arrears of rent disallowed—Regulation VIII of 1819—Collector, whether has judicial capacity—Collector, power of, to make order as to costs in proceedings before him—Tender of rent—Contract Act (IX of 1872), s. 38—Costs.*

In decreeing a suit for arrears of rent a Court is entitled under section 68 (1) of the Bengal Tenancy Act to disallow interest to the landlord-plaintiff, if it finds that a proper tender had been made by the tenant defendant of the rents due before proceedings were instituted for their realisation. [p. 615, col. 2.]

Under the provisions of Regulation VIII of 1819 the Collector has power, when an application is made under the Regulation for the purpose of realising the rent in arrears, to determine the actual rent due and has a *quasi*-judicial capacity, and, therefore, has jurisdiction to direct in what manner the costs of the proceedings before him ought to be borne. [p. 616, col. 1.]

Ordinarily a litigant who succeeds on his claim, although he may be deprived of his costs for some reason, cannot be ordered to pay the costs of the other side. But in a case where the tenant defendant having tendered the rent due made an offer of performance under section 38 of the Contract Act before a suit was instituted for its recovery, the Court which decrees the suit has jurisdiction to direct that the plaintiff should pay to the defendant his costs in the suit. [p. 616, col. 1.]

Appeal against the decree of the District Judge, Berhampore, dated the 19th August 1914, confirming that of the Munsif, Berhampore, dated the 30th March 1914.

FACTS of the case appear from the judgment.

Babu *Karunamoy Bose*, for the Appellants.—Section 68 of the Bengal Tenancy Act has no application to this case. The Collector who awarded costs to the respondent acted wholly without jurisdiction in so doing. There is nowhere in Regulation VIII of 1819 any provision for the awarding of such costs or for the realisation.

[Babu *Ram Chandra Majumdar*, for the Respondent.—The application of the landlords under Regulation VIII of 1819 was dismissed, and the Collector, who heard the application, had certainly jurisdiction to award costs to the *patnidar* under section 14 of the Regulation. This has been the practice for the last 50 years.]

Section 68 (2) refers to a case where a suit is instituted for recovery of arrears of rent without reasonable or probable cause, i.e., where there is no just claim on the part of the landlord. In this case admittedly rent was due to the landlords and the

tender alleged to have been made was not a proper tender made at a proper time. The *patnidar* might have deposited his rent in Court, if he had the real intention of paying it before it fell into arrears. As soon as rent falls into arrears the landlord has every right to bring a suit for the recovery of the arrears. Section 38 of the Contract Act shows what are the essentials for a proper tender. According to the contract of lease, the *patnidar* was bound to pay the rents according to the instalments, and unless tender was made before the instalments fell due, such tender was not a good tender. Moreover, no damages were claimed by the tenant defendants in their written statement, and, therefore, the lower Courts were wrong in awarding damages to the defendants.

Babu *Ram Chandra Mazumdar* (with him Babu *Upendra Narain Bagchi*), for the Respondents.—Before proceedings were taken before the Collector under Regulation VIII of 1819, my client offered the whole amount due. But the landlords did not accept the amount. The *patnidars* were unnecessarily harassed by the proceedings, and the Collector had every power to award to them costs by way of compensation. The *zemindar* cannot claim the power of initiating proceedings before the Collector under Regulation VIII, without having the risk of paying costs to the *patnidars* when such proceedings are found to have been instituted without reasonable cause. A Collector determining a proceeding taken by the *zemindar* for realisation of *patni* rent under the Regulation acts like a Civil Court; so he has jurisdiction to award costs. Refers to section 8, paragraph 2 of Regulation VIII of 1819, Regulation VII of 1832, Act X of 1859 and *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1). The lower Appellate Court has found that a proper tender was made before the institution of the proceedings before the Collector. That finding is conclusive in second appeal.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against the judgment of the learned District Judge of Berhampore, dated the 19th August 1914, affirming the decision of the Munsif of the same place. The plaintiffs brought the suit to recover the rent in arrear, they being the *zemindars* and the defendant being the *patnidar* under them. The plaintiffs put in before the Collector an application under Regulation VIII of 1819, for the purpose of realising the rent in arrears. They claimed a sum in excess of what was admitted by the defendant. The result was that the Collector having adjudicated under section 14 of the Regulation on this matter found the rent to be as stated by the defendant and awarded a sum of Rs. 32 to the defendant as her costs in the proceedings before him. The plaintiffs did not accept this and brought the present suit for recovering the rent in arrears. The suit failed in both the lower Courts and the grounds on which it failed are these:—First of all the Courts found that a proper tender had been made by the defendant of the rent due before the proceedings were instituted and that, therefore, no interest ought to be awarded to the plaintiffs under section 68 (1) of the Bengal Tenancy Act. The second finding was that the defendant was entitled to set off the sum of Rs. 32 awarded to her as costs by the Collector and the third finding was that the defendant was entitled to get damages under the provisions of section 68 (2) of the Bengal Tenancy Act. At the hearing of the appeal before us, another point was made, namely, that there was a clear admission in the written statement that a sum of Rs. 75-8-6 was due to the plaintiffs and that the Courts ought not to have gone behind that admission. But this last point is not raised in the grounds of appeal before us and apparently it was not raised in the grounds of appeal before the lower Appellate Court. It is too late now to consider this point, that was not made until the case was actually argued before us.

Now, as to the first point, namely, the disallowance of interest, the learned Judge was clearly entitled to disallow interest under section 68 (1) of the Bengal Tenancy Act, he having found that the defendant had made an offer of performance within the meaning of section 38 of the Indian Contract Act. Once he has made that finding, then the defendant is not responsible for the non-performance; that means that she is not liable to pay interest on the amount due.

The second point was that the Collector had no jurisdiction under the provisions of

(1) 9 C. 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind. Dec. (N. S.) 846.

Regulation VIII of 1819 to award to the defendant any costs of the proceedings before him. Mr. Majumdar, who has conducted the appeal on behalf of the defendant-respondent, has given us an interesting historical statement as to the position of the Collector under that Act and as to how he came to supersede the Civil Court as originally provided in the Regulation. I think the case rested on a broader basis than that. The Collector had power to determine the actual rent and had a *quasi*-judicial capacity and, therefore, had jurisdiction to direct in what manner the costs of the proceedings before him ought to be borne. I think the learned Judge was right in coming to the conclusion that the costs before the Collector awarded in favour of the defendant should be set off as against the amount sued for.

The next point was as regards the claim under section 68 (2) of the Bengal Tenancy Act. The learned Judge has found that the suit was instituted without reasonable and probable cause and in that view, sub-section (2) of section 68 clearly gave the Court jurisdiction to award damages under that section.

Finally the learned Judge directed the plaintiffs to pay the costs of the suit. Ordinarily, of course, a litigant who succeeds on his claim, although he may be deprived of his costs, cannot be ordered to pay them. But in a case that comes under section 38 of the Indian Contract Act, the defendant is not responsible for non-performance and if he is not responsible for non-performance, if he is not awarded the costs of the suit, it may be said that he is made responsible for the non-performance of the contract. I think, therefore, that the Judge had jurisdiction to direct that the plaintiff should pay to the defendant her costs in the suit although not twice over, as was apparently ordered by the Munsif. In the lower Appellate Court, apparently the order for costs was not made twice over and the order, though made in that form in the Court of first instance, may perhaps be varied by simply altering the decree of the Munsif from one dismissing the suit with costs to a simple dismissal of the suit without any order as to costs, the defendant having already been given credit for the amount awarded to her by the Court for the costs of the suit, Subject to this slight alteration in the decree of the Court of first instance, the present appeal fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1625 OF 1915.

February 14, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

RAHMATULLA SHEIKH—DEFENDANT—APPELLANT

*versus*

ISABUDDIN SARKAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Ejectment of under-*raiyat *on expiry of term of* kabuliyat*—Stipulation for second settlement—Under-*raiyat *not expressing willingness to carry out stipulation, consequence of—Pleadings—Time, whether of essence of contract.*

In a suit brought by the plaintiff, a *raiyat*, to eject the defendant, an under-*raiyat*, on the expiry of the term of his *kabuliyat* which contained a condition to the effect that on the expiry of the term of the lease the tenant shall take a second settlement and unless he does so he shall have no interest in the land, the defendant pleaded that the *kabuliyat* was improperly obtained from him by the plaintiff and he was, therefore, not bound by the terms thereof, but he did not say that he was willing to take a fresh settlement nor did he express such willingness until after the close of the evidence and apparently when the case was being argued:

*Held*, that the plaintiff was entitled to a decree for ejectment when it was found that the terms of the *kabuliyat* were binding upon the defendant and that the defendant was not entitled to plead an equitable defence against the plaintiff's right to possess the land, as he never pleaded that he was ever ready and willing to take a second settlement and did not prove that he was ready and willing to perform his part of the contract. [p. 617, col. 2.]

In a case of this nature, time is not of the essence of the contract unless it is made so. [p. 617, col. 2.]

Appeal against the decree of the District Judge, Rangpur, dated the 6th May 1915, reversing that of the Officiating Munsif, Gaibanda, dated the 13th June 1914.

FACTS of the case appear from the judgment.

Babu *Atul Chandra Gupta*, for the Appellant.—There is a condition in the *kabuliyat* which runs to the effect that, 'on the expiry of the term of the lease, I shall take a

second settlement'. The defendant is entitled to a second settlement under the terms of the lease. When a tenant says: 'I shall take as fresh settlement,' in a *kabuliyat* in this country it creates a bilateral contract. Time is not of the essence of the contract in the present case. No time has been stated in the lease. Refers to *Moss* v. *Barton* (1). This is the ordinary rule. Unless the defendant makes a default, he cannot be evicted. There is no evidence whatsoever that the defendant has made any default in regard to the second settlement. Further, the defendant expressed his willingness to take a fresh settlement. And as time is not of the essence of the contract here, the defendant has a right to remain in possession on taking a fresh settlement.

Babu *Bepin Behari Ghosh*, for the Respondent.—The tenant did not seek for specific performance of the contract. His lease ends under section 49 (*b*) of the Bengal Tenancy Act. He cannot resist an action in ejectment by the landlord. Clause (*b*) of section 49 covers the case of a written lease without a term of years. *Komaruddi* v. *Sreenath Chowdhury* (2).

Babu *Atul Chandra Gupta* replied.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant from a decision of the learned District Judge of Rangpur, dated the 6th May 1915, reversing the decision of the Officiating Munsif of Gaibanda. The suit was brought by the plaintiff, a *raiyat*, to eject the defendant, an under-*raiyat*, whose term had expired. Against the plaintiff's claim, the defendant pleaded that the *kabuliyat* which he had executed in favour of the landlord, the plaintiff, had been obtained from him improperly and so he was not bound by the terms thereof. That point has been found against the defendant. The *kabuliyat* contained a condition to the following effect: "On the expiry of the term of the lease, I shall take a second settlement. Unless I do so, I shall have no interest in the land." The defendant has not taken a fresh settlement and, according to his contract, he is to have no interest in the land. He never said that he was willing to take a fresh settlement and he never expressed his willingness until after the close of the evidence and apparently until the case was being argued. The defendant's case was that he was not bound by the terms of the document at all; and the case whether he had always been ready and willing to perform his part of the contract by taking a fresh settlement was never tried. If that case had been in issue instead of the case as to whether the defendant was or was not bound by the terms of the agreement, the plaintiff might have produced evidence to show that the defendant far from being ready and willing to perform the contract was in default and had been in repeated defaults. It is quite true, as Mr. Gupta, who appears for the defendant-appellant, says, that in a case of this nature, the time is not the essence of the contract unless it is made so. But notwithstanding that, except the statement made before the learned Judge, there is nothing to show that the defendant was ever ready and willing to perform his part of the contract; and, unless he was ready and willing to perform his part of the contract, the plaintiff was entitled to eject him. It is only when he proves that he was ready and willing that he would be able to plead an equitable defence against the plaintiff's right to possess the land. In this case, if the defendant meant to rely upon this point, he ought to have set it up in his written statement and had a distinct issue raised on it instead of pleading a false case as it turns out to be that the *kabuliyat* had been taken from him by improper means. Although the reasons given by the learned Judge in his judgment express somewhat too broadly the duties of the defendant under the terms of the agreement. I am satisfied that this defendant never did set up in the suit, until he was far too late, that he was willing to be bound by the obligation in the *kabuliyat* and that he had always been ready and willing to perform his part of the contract. That case cannot be properly decided without having the point raised in proper time and without having an issue properly framed on the point and evidence taken on both sides as to whether the defendant's statement is or is not true. I think, on the whole, that the result arrived at by the learned District Judge decreeing the plaintiff's suit is correct,

(1) (1866) 1 Eq. 474; 35 Beav. 197; 13 L. T. 623; 55 E. R. 870; 147 R. R. 110.

(2) 8 C. W. N. 136.

The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

*Appeal dismissed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1707 OF 1914.

May 8, 1917.

*Present:*—Mr. Justice Scott Smith and Mr. Justice Broadway.

BISHEN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

FEROZ CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

*Punjab Pre-emption Act (II of 1905), s. 29—Delivery of possession by attornment of tenants and by pointing out land sold—Pre-emption, suit for—Limitation.*

In a suit for pre-emption it appeared that the sale sought to be pre-empted was an oral one and had taken place some six months prior to 26th July 1907, and that possession was, in June 1907, delivered to the vendors by getting the tenants to attorn to the vendees and by pointing out on the spot each and every field which had been sold. The suit having been instituted on the 1st October 1909:

*Held*, that the vendees came into physical possession of the land sold in June 1907 within the meaning of section 29 of the Punjab Pre-emption Act and that the suit having been instituted more than one year after that date was, therefore, time-barred. [p. 620, col. 1.]

Second appeal from the decree of the Divisional Judge, Rawalpindi, dated the 5th May 1914, reversing that of the Subordinate Judge, Jhelum, dated the 10th February 1911, decreeing the claim in part.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—These are two appeals by rival pre-emptors against the decisions of the lower Appellate Court that their suits are barred by time. The sale sought to be pre-empted was an oral one of agricultural land and took place, according to the statement of Jawala Shah, in the mutation proceedings, some six months prior to 26th July 1907, which is the date of the *patwari's* report. The mutation was sanctioned on the 30th August 1909. Bishan Singh and others, plaintiffs-appellants in Appeal No. 1707 brought their suit on the 1st October 1909. Ishar Das and another, plaintiffs-appellants in Appeal No. 2235, brought their suit on the 19th of April 1910. The first Court held that the land sold did not admit of physical possession and that the starting point for limitation under section 29 of the Punjab Pre-emption Act of 1905 was the date of the mutation. It, therefore, held that both the suits were in time, and gave the pre-emptors decrees for the land in proportion to the respective amounts of land revenue paid by them. In appeal the Divisional Judge held that it was proved that the vendees took possession of part of the land sold in May and June 1907 and consequently that the limitation ran from those months, and both the suits having been brought more than a year after June 1907 were barred by time.

Mr. Shafi, who appeared for the appellants in Appeal No. 1707, urged that the lower Appellate Court ought to have stated definitely on what pleas, and in what manner, the vendees had obtained possession. He went on to argue that any possession which the vendees had obtained was only constructive, and not physical possession within the meaning of section 29 of the Pre-emption Act and that, therefore, limitation ran from the date on which mutation was attested. In his judgment the Divisional Judge refers to *Khasra* Nos. 2920, 3025 and 2189, in regard to which he says it was argued before him that the vendees had taken possession in June 1907, but he has not clearly stated that these are the fields of which he finds that the vendees did actually take possession, though we think this was probably his intention. It was also argued before him that the vendees ejected certain tenants and replaced them by others in *Rabi* of 1964 corresponding with May 1907, and thereby took physical possession of those fields. He has not, however, come to any definite finding that the vendees obtained physical possession of those fields within the meaning of section 29 of the Act.

In view of his somewhat indefinite finding we have examined the evidence as to the taking of possession by the vendees. The numbers of which Mr. Sheo Narain

argues the vendees took physical possession are Nos. 2920, 3025 and 2189. In regard to these the following is the evidence on the record. At page 37 of the paper-book in answer to question 5 of the interrogatories Narain Das, *Patwari*, stated as follows: "In the *girdawari* papers for *Rabi Sambat* 1964, the land is entered to be in possession of *Sardar* Hari Singh, etc. In the *roznamcha* the following remarks appear under date the 19th June 1907 :—

'At the request of Jawala Sahai, resident of Chakwal, I pointed out to him on the spot the fields which are entered in the papers as belonging to the brother of Hari Singh, etc.'" This witness was also examined in Court (see page 63 of the paper-book), where at line 27 he states: "the mutation entry is made on 26th July 1907. As per my diary for that date I went to point out the fields on 19th June 1907." Kirpa Ram witness, who is agent of *Sardar* Hari Singh vendor, stated (page 59, line 22, paper-book): "possession was delivered between 14th and 30th of *Bisakh* (May 1907), the exact date not known. It was delivered on the spot by directing the tenants that the vendees shall take the produce for *Rabi* 1964. The *patwari* was called. He pointed out the fields. A small portion was uncultivated. It was pointed out on the spot." At page 60, line 16, he says:—"The fields were shown one by one on the spot." It should be noted that Jawala Shah, to whom the fields were pointed out, is the father of the minor vendees. The three numbers mentioned above were admittedly uncultivated in June 1907. It appears then from this and other evidence that possession was delivered by getting the tenants to attorn to the vendees and by pointing out on the spot each and every field which had been sold. It is further in evidence that *Khasra* Nos. 2920 was demarcated at the instance of Jawala Shah at the *girdawari*, *i.e.*, October 1908. We need not, however, refer to this in detail because in our opinion the vendees obtained physical possession of part of the property sold in June 1907.

Mr. Shafi has referred to *Batul Begam* v. *Mansur Ali Khan* (1), in which it was held that a share in an undivided *zemindari mahal* is not susceptible of "physical possession" in the sense of Article 10 of the Second Schedule to Act XV of 1877, and also that constructive possession, *e. g.*, by receipt of rent from tenants, is not "physical possession" within the meaning of the said Article. In this judgment the view of Sir Robert Stuart, C. J., expressed in *Jageshar Singh* v. *Jawahir Singh* (2), that physical possession did not include constructive possession was quoted with approval. Mr. Shafi also referred us to *Batul Begam* v. *Mansur Ali Khan* (3), in which their Lordships held that an undivided share in certain villages did not admit of physical possession and that that expression meant a *personal and immediate possession* Now in accordance with these rulings we must hold that the vendees' possession through their tenants was not physical possession within the meaning of section 29 of the Punjab Pre-emption Act. We see no reason, however, for holding that their possession of the uncultivated Nos. 2910, 3025 and 2189 was not physical possession. It was not constructive possession through an agent or tenant, but was the vendees' own personal possession. In this connection we would refer to *Bahadur Chand* v. *Naina Mal* (4), in which it was held that to obtain possession of waste land it is not necessary that the purchaser should step on to the land or get into corporal contact with it. All that is necessary is the physical possibility of the buyer dealing with the land exclusively as his own. See also Markby's Elements of Law, 6th edition, page 183, Article 356, where the following passage occurs :—

"It is not necessary in order to obtain possession that the purchaser should step on to the land at all. If it is near at hand, and the seller points it out to the buyer, and shows that the possession is vacant, and signifies his desire to hand it over to the buyer, whilst the buyer signifies his desire to receive it, enough has been done to transfer the possession. The physical possibility of the buyer dealing

(1) 20 A. 315; A. W. N. (1898) 61; 9 Ind. Dec. (N. S.) 562.

(2) 1 A. 311; 1 Ind. Dec. (N. S.) 239.

(3) 24 A. 17; 5 C. W. N. 888; 28 I. A. 248; 3 Bom. L. R. 707; 8 Sar. P. C. J. 133

(4) 25 Ind. Cas. 35; 14 P. R. 1915; 231 P. L. R. 1914; 133 P. W. R. 1914.

with the thing exclusively as his own, which is all that is necessary, exists whether he thinks proper to use it by stepping on to the land or not."

Having regard to these authorities we are clearly of opinion that the vendees in June 1907 obtained personal and immediate possession of these three numbers of uncultivated land. This possession was certainly not constructive, and we see no reason for not holding that it was physical possession within the meaning of section 29 of the Punjab Pre-emption Act. Both the present suits are, therefore, clearly barred by time and we dismiss both the appeals with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

APPEAL SUIT No. 260 OF 1915.

January 26, 1917.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

RAMASAMI NADAN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

SUBRAMANIA NADAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Court Fees Act* (*VII of* 1870), *s.* 7, *cl.* 4 (*c*)—*Suit to declare deed not binding on person not party to it—Valuation—Court-fee.*

The plaintiff in a suit to declare that a deed is not binding on a person not a party to it and for consequential relief is entitled to value the reliefs as he likes and pay the Court-fee on such valuation.

Such a suit, is not in substance, a suit to obtain the cancellation of the deed.

*Malikka Meladathil* v. *Kunji Achammal*, 5 Ind. Cas. 927; 7 M. L. T. 177; 20 M. L. J. 791; *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*, 30 M. 18; 1 M. L T. 412; *Samiya Marali* v. *Minammal*, 23 M. 490; 10 M. L. J. 240; 8 Ind Dec. (N. S.) 744, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Tinnevelly, dated 24th April 1915, in Original Suit No. 48 of 1914.

Dr. *S. Swaminadhan*, Messrs. *A. Chidambaram* and *K. P. Ramakrishna Aiyar*, for the Appellants.

Mr. *S. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.—The plaint contains two principal prayers, *firstly*, that certain sales in favour of the defendants Nos. 2 to 18 made by the Official Receiver, Gopala Aiyar, be declared to be not valid in law, and *secondly*, that fresh Receiver be appointed and the properties made over to him. On the first prayer, the plaintiffs have paid Rs. 10 that is for the declaratory relief valuing the suit for purposes of jurisdiction at Rs. 38,000; and the 2nd prayer they valued at Rs. 100, and have paid thereon an *ad valorem* fee of Rs. 7-8-0. The Subordinate Judge is of opinion that they ought to have paid *ad valorem* fee on Rs. 38,000. He relies upon certain rulings of this Court in support of that view. We do not think that those rulings really lay down any such proposition. The case in *Malikka Meladathil* v. *Kunji Achammal* (1) which follows the case in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (2) and also the case in *Samiya Marvali* v. *Minammal* (3) were all cases in which the plaintiff was a party to the deed which he wanted to have declared invalid on the ground of fraud or on similar allegations. But in this case the plaintiffs were no parties to the sales and they seek to have a declaration to the effect that the sales were brought about by the fraud of the Official Receiver and consequently not valid and binding upon them. As pointed out in a somewhat similar case in *Unni* v. *Kunchi Amma* (4), the claim for the cancellation of the deeds of sales was not a necessary part of the reliefs which the plaintiffs were seeking and, therefore, it was not right to say that the suit was in substance a suit to obtain the cancellation of the deed. Granting that it was so, the plaintiffs were entitled to value the relief as they liked and pay the fee on such valuation. Even if the second prayer may be taken to amount to consequential relief, that would not, in our opinion, make any difference; because under section 7, clause 4, sub clause (*c*), the plaintiffs are reliable to pay Court-fee on their own valuation. It is contended by the learned

(1) 5 Ind. Cas. 927; 7 M. L. T. 177; 20 M. L. J. 791.
(2) 30 M. 18; 1 M. L. T. 412.
(3) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.
(4) 14 M. 26; 5 Ind. Dec. (N. S.) 19.

Vakil for the respondents that as a matter of fact the valuation for the purposes of Court-fee must be taken to be Rs. 38,000 which was the valuation in the plaint for the purposes of jurisdiction. But he overlooks the fact that the consequential relief on which alone the fee was to be paid at the *ad valorem* rate has been valued at Rs. 100 which the plaintiffs were entitled to do and they have paid Court fee on that. We do not think, therefore, that the order of the Sub-Judge is right. It will be set aside and the case will be remitted to him for disposal according to law. Costs will abide the result.

*Appeal allowed*; *Case sent back.*

V.R.P.

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 42 OF 1915.

October 17, 1916.

*Present*:—Mr. Justice Walsh and Mr. Justice Stuart.

HANSRAJ—PLAINTIFF—APPELLANT

*versus*

BIJAI RAM SINGH—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 105 (2)—Decision on interlocutory matter, failure to appeal against, effect of—Appeal—Point going to root of suit not argued, effect of.*

Apart altogether from the doctrine of *res judicata*, a decision in a suit given on an interlocutory matter, whether appealable or not, if not appealed from is binding upon the parties in every proceeding in that suit. [p. 622, col. 2.]

*Ram Kirpal* v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.), followed.

Where in an appeal which comes before an Appellate Court and is heard upon the merits a point which goes to the root of the suit is not argued it must be taken to be abandoned. [p. 622, col. 1.]

First appeal from an order of the Subordinate Judge, Agra, dated the 4th December 1914.

Messrs. *Benode Behari* and *Baleshwari Prasad*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—In this case it is not necessary for us to decide the question as to whether this suit was cognisable in the district of Agra or not. That is a point on which there appears to be a considerable difference of opinion, so recently as 1914 and 1915 in this Court, and one day no doubt it will be necessary to set the question finally at rest, but, in our opinion, this appeal must be allowed upon another ground. The suit is brought to set aside a decree which it is alleged that the defendant fraudulently obtained *ex parte* against the plaintiff in the Court of Howrah in Bengal and which he has endeavoured to enforce by execution against the plaintiff in the district where the plaintiff resides and has property. The suit has had a somewhat varied career. It was originally heard in May 1912 upon a preliminary point when the Munsif decided that he had jurisdiction to determine the suit. That fact is not unimportant because it is perfectly clear that the point was present to the mind of those who were advising the defendant in the Court of First Instance from the very exception of the suit itself, and not only that but it was present to their mind as a preliminary objection to the whole suit. It was determined by the Munsif in favour of the plaintiff and some months afterwards, namely, in January 1913, the plaintiff obtained a decree upon the merits in the same Court from another Munsif. From that decree an appeal was brought to the District Judge and determined by Mr. Lyle on the 17th of June 1913 By the decree passed on that occasion for a reason which it is not necessary to mention, the District Judge remanded the case for retrial in the Munsif's Court. It will be necessary in a moment to refer again to that judgment, but for the present it is only necessary to observe that that order of remand was open to an appeal and no appeal was brought from it. The suit, therefore, returned once more to be dealt with by the Munsif and it was determined for the second time upon the merits on the 31st of March 1914. In December 1914 a further appeal was brought which unfortunately came before a different District Judge in the same Court at Agra and he held, basing himself upon the authority reported as *Dau Diyal* v. *Munna Lal* (1) that the original Court, the Munsif's Court, had no jurisdiction to try the suit at all, and, he, therefore, returned the plaint once more directing it to be presented to the proper

(1) 24 Ind. Cas. 978; 36 A. 564; 12 A. L. L. 955.

Court. Against that order the present appeal is brought. Now the one question about which there has been substantial argument, is whether or not the first order of the first District Judge, namely, the 17th of June 1913, dealt with the question of jurisdiction. It is difficult to see how a Judge, where in the proceedings in the Court below there has been a serious controversy as to the jurisdiction of the Court to entertain the suit at all, could remand the suit to be retried by that Court without holding that that Court had jurisdiction to try it. But in this particular case pursuing the course which they had originally taken in the Munsif's Court, the defendant's advisers when they appealed for the first time, put in the forefront of their attack a ground of appeal that the suit was not cognizable at all by the Munsif's Court at Fatehgarh. Mr. Uma Shankar Bajpai has argued with his usual ability, that that point has not been decided by the District Judge and in a sense that is true. He does not expressly refer to it nor give any reasons for refusing to give any effect to the ground of appeal raised, but it seems to us that one or two consequences must follow where an appeal comes before an Appellate Court and is heard upon the merits. If this point, which went to the root of the suit, was not argued, it must have been abandoned and, therefore, it is equivalent to a decision against the appellant. On the other hand if the point was argued, even though the Judge himself does not give any reasons for dismissing it in his judgment, the mere fact that he held that the suit was properly valued and cognizable by the Munsif's Court, involved a holding by him that the Munsif had jurisdiction to try it. In the face of a ground raised in that way in the notice of appeal, it would be an idle thing for any Judge to send back the suit and put the parties to the expense of a second trial upon the merits unless he was satisfied that the Court below to which he was sending the case, had no jurisdiction to try it. In our view the judgment of the 17th of June 1913 was a decision against the appellant, the present respondent, that the Munsif's Court had jurisdiction to try the suit. It seems to us that that is fatal to the present respondent's position upon two grounds. In a case reported as *Ram Kirpal* v. *Rup Kuari* (2), the Privy Council decided that apart altogether from what is now section of the Civil Procedure Code, or what is known as *res judicata*, a decision whether appealable or not, if not appealed from in a suit given on an interlocutory matter, is binding upon the parties in every proceeding in that suit. To quote from the judgment of Sir Barnes Peacock "If an appeal did not lie the judgment was final. If the appeal did lie and none was preferred, the judgment was equally final and binding upon the parties and those claiming under them." Applying the principle of that case it is quite clear that the judgment of Mr. Lyle is final and binding on the present respondents, that there was jurisdiction in the Munsif's Court to try the suit. It seems to us further that there is another ground, namely, sub-section (2) of section 105 which stands in the way of the respondents in this Court. That sub-section runs as follows: "Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness." Now two things are quite clear that if there was no jurisdiction for the Munsif to try the suit at all, the present respondent was the person aggrieved by the order of remand. Further by now asserting that there was no jurisdiction, he is clearly attempting to dispute its correctness. It is quite true that on one ground at any rate, which was decided in his favour, the case was sent back for re-trial and to that extent he is not disputing and is not likely ever to dispute the correctness of the order of remand. But that is only a partial statement of the position. By asserting that the Court below was without jurisdiction altogether, he is clearly challenging or disputing the correctness of the decision of a Court which ordered that Court to try it. It seems to us that the case comes within the mischief of sub-section (2) of section 105, and on that account

(2) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).

he is prevented now from questioning the correctness of the decision of Mr. Lyle. The result is that this appeal must be allowed and the order of the District Judge directing the plaint to be returned to the other Court, must be reversed and restored to the file to be heard on the merits in the ordinary course.

*Appeal allowed.*

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CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 64 OF 1917.
March 23, 1917.
*Present*:—Mr. Justice Fletcher and
Mr. Justice Smither
*Seth* DOOLY CHAND—JUDGMENT-DEBTOR—APPELLANT
*versus*
*Maharaja* SIR RAMESWAR SINGH BAHADUR—DECREE-HOLDER—RESPONDENT.

*Transfer of Property Act* (*IV of* 1882), *ss.* 49, 76 (f)—*Mortgage—Agreement to keep mortgaged premises insured, failure to perform—Insurance effected by Receiver in mortgage suit—Money received under insurance policy, applicability of.*

A mortgage-deed provided that during the continuance of the security the mortgagor should insure and keep insured the mortgaged premises, and that if he failed to do so, it would be lawful for the mortgagee to make payments necessary for the purpose and that such payments would be a charge upon the mortgaged premises. The mortgage-deed also provided that all sums of money received under and by virtue of any such insurance should be applied by the mortgagee, if so required by the mortgagor, in or towards substantially re-building, re-instating or re-pairing the said premises. Neither the mortgagor nor the mortgagee insured the property, but the Receiver, appointed in the suit on the mortgage, under the Court's direction kept the property insured against any loss or damage by fire, for the benefit of all the parties to the suit. Before the property was brought to sale in execution of the mortgage decree it was destroyed by fire, whereupon the Receiver obtained under the policy of insurance a large sum of money:

*Held*, (1) that the money received by the Receiver was not governed by the terms of the mortgage-deed, inasmuch as the insurance was kept on foot by the Court through the Receiver as a matter of protection for the benefit of all persons who were parties to the mortgage suit, and not by the mortgagor or the mortgagee in accordance with their contract in the mortgage-deed; [p. 625, col. 1.]

(2) that the Court had ample discretion in directing in what manner the money so received, should be laid out, and that the mortgagor could not claim that it should be laid out in restoring the premises that had been destroyed or damaged by fire. [p. 625, col. 1.]

Appeal against the order of the Subordinate Judge, 2nd Court, 24-Pergannas, dated the 24th February 1917.

FACTS of the case appear from the judgment.

Mr. *B. Chuckerberty* (with him Babu *Shib Chunder Palit* and *Noni Lal De*), for the Appellant.—Under the covenant in the mortgage-bond the mortgagor is entitled to insist on the re-building of the house burnt down by accidental fire with the money realized from the Insurance Company. The mortgagee can not successfully resist this right of the mortgagor because the contract in the bond clearly says that in case the mortgaged premises be burnt down by accidental fire the house is to be re-built with the money that would be realized from the Insurance Company, if the mortgagor so requires. I submit that but for that covenant in the mortgage-bond the mortgagee could have claimed that money. When there is a clear provision in the bond for the way in which the money is to be used the mortgagee is not entitled to claim that money. See section 19, Transfer of Property Act.

Mr. *B. C. Mitter* (with him Babu *Ambica Pada Chowdhury*), for the Respondent.—After the final decree for mortgage was passed the covenant in the mortgage-bond passed from the domain of contract to that of the judgment passed in that suit. The contention of my learned friend that the mortgagee decree-holder is bound by the covenant in the mortgage bond, that he is bound to apply any money received from the Insurance Company in re-constructing the mortgaged premises has no substance, because after the final decree for mortgage was passed the contract now sought to be enforced was at an end, and the rights of the parties are to be governed by the terms of the final decree. Moreover, the mortgaged property is now in the hands of the Receiver, who is an officer of the Court, and the mortgagor cannot insist on the re-building of the house by the Court. I rely on *Sundar Koer* v. *Rai Sham Krishen* (1), *Garden* v. *Ingram* (2).

(1) 34 C. 150 at p. 161; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.).

(2) (1852) 23 L. J. Ch. 478; 98 R. R. 452.

Mr. *B. Chuckerberty* in reply.—There is a contract for the re-building of the house with the money due from the Insurance Company, and that contract is not merged in the decree. The contract remains good and enforceable even after the passing of the decree, and I am entitled to take advantage of the clause in the contract. I would also refer to section 76, clause (*f*), of the Transfer of Property Act.

[FLETCHER, J.—That section cannot apply because the mortgagee has not been put in possession of the property.]

But the Receiver is in possession of the property on behalf of and for the benefit of the mortgagee. Under the circumstances when the mortgagee has been sufficiently secured your Lordships should exercise your own discretion in my favour.

JUDGMENT.

FLETCHER, J.—This is an appeal by a judgment-debtor against an order of the learned Subordinate Judge of the second Court at Alipore, dated the 24th February 1917. The appeal arises under the following circumstances. By an indenture of mortgage made in the month of July 1911 between the judgment-debtor of the one part and the decree-holder of the other part, the judgment-debtor mortgaged to the decree-holder a certain Jute Press together with the machineries and fixtures to secure a sum of $2\frac{1}{2}$ lakhs of rupees with interest. In the said indenture was contained a covenant by the mortgagor that he would at all times during the continuance of the security insure and keep insured to the full value thereof and for not less than Rs. 3,30,000 the mortgaged premises from loss or damage by fire in the name of the mortgagor in some office to be approved of by the mortgagee and that he would assign, endorse and deliver to the mortgagee the policy for such insurance and the receipt for every such payment within seven days after payment and that, in default, it would be lawful for the mortgagee to make those payments and such payments when made by the mortgagee would be a charge upon the mortgaged premises. The mortgage-deed also contained an agreement on the following terms: "It is hereby agreed and declared that all sums of money received under and by virtue of any such insurance as aforesaid shall be applied by the mortgagee, if so required by the mortgagor in or towards substantially and to the satisfaction of the mortgagee re-building re-instating or re-pairing the said premises so to be insured as aforesaid." Eventually, the mortgagee brought a suit upon the mortgage. On the 14th January 1914, a Receiver was appointed by the Court in the mortgage suit. A preliminary decree was then passed on the 6th April 1914 and the decree absolute was made on the 23rd November 1914. On the 18th January 1915, an order was made by the Court that the property should be brought to sale for the satisfaction of the amount found due on the mortgage security. Then, on the 19th December 1916, there occurred a fire and the Receiver received from the Insurance Company in which the premises were insured from loss or damage by fire the sum of Rs. 86,000 and odd. The mortgagor then applied to the Court that the money so received by the Receiver should be laid out in restoring the premises that had been destroyed or damaged by fire. The learned Judge refused that application. Against that order, the judgment-debtor has appealed to this Court.

Two questions have been raised in this appeal. *First* of all, that the manner in which the money received by the Receiver from the Insurance Company was to be applied being provided for by the mortgage deed and the parties having regulated their rights by contract, the contract must be given effect to by the Court and *secondly*, that if that be not so, the Judge did not exercise a wise discretion in declining to order the money received by the Receiver to be laid out in restoring the premises that had been damaged by fire. The first point is "Is that money in the hands of the Receiver governed by the terms of the mortgage deed." In my opinion, it is not; and I state shortly why. First of all, the mortgage-deed applies, as it states in its terms, to a policy which is kept on foot by the mortgagor, although the mortgagee had the option of making the payments if he thought fit. In this case, the premiums that were paid on the policy were not paid by the mortgagor and the mortgagee had never thought fit to make these payments. It is only with reference to the money received under and by virtue of "any such insurance as aforesaid" that the mortgagor has the right under the terms of the deed, to direct as to whether the money shall be laid out in restoring the premises

destroyed by fire. As I have already pointed out "any such insurance as aforesaid" means an insurance effected in accordance with the terms of the mortgage-deed. The parties did not provide for what would happen in a case where the property having come in the custody of the Court, the officer of the Court under the direction of the Judge had kept the property insured against any loss or damage by fire for the benefit of all the parties to the suit. In my opinion, this case is not governed by the terms of the mortgage-deed. The insurance was kept on foot by the Judge as a matter of protection for all persons who were parties to the suit. It may be that there are other parties besides the mortgagor and the mortgagee A subsequent mortgagee may be called a party for whose benefit also the Court took the precaution of insuring the premises. If that is so, then the money having been in the custody of the Court and it having arisen by the payments made by an officer of the Court, the Court had ample discretion in directing in what manner the money so received should be laid out. The question, therefore, is "Has the Court exercised its discretion rightly and for the benefit of all the parties to the suit." The judgment-debtor's case is that the premises should be re-built. As far as I can see, there was no evidence before the learned Judge showing that the premises could be restored to their former state for the sum received from the Insurance Company. In the absence of that evidence it would be impossible for the learned Judge to come to the conclusion that these premises could be restored as they existed before the fire. The costs of building materials and the other matters connected with the re-building may have and probably have substantially gone up within the last few years. Also the Judge had to consider whether it was convenient for the Court to superintend and undertake the re-erection of a large building as a Jute Press. What the nature of the building was I do not know. But having regard to the amount for which it was mortgaged apparently it was a building of considerable size and the amount of the damage done by the fire must have been considerable because the money received by the Receiver amounted to the sum of Rs. 86,000 and odd. In that view, I think the learned Judge having come to the conclusion that it would not be convenient to have these buildings restored, no grounds have been shown to us on which we can say that the learned Judge improperly exercised his discretion. The learned Judge clearly, in my opinion, had a discretion to decide in what manner the money received by the Receiver ought to be applied, and he came to the conclusion that the most convenient and the best course for the application of the money would be to allow the mortgagee to receive it in part satisfaction of his mortgage money rather than to direct the Receiver to undertake the re-construction of the building. In the result, I see no reason to differ from the conclusion arrived at by the learned Subordinate Judge of the Court below. The present appeal, therefore, fails and must be dismissed with costs, five gold *mohurs*.

SMITHER, J.—I agree.

*Appeal dismissed.*

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## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 731 OF 1916.

May 10, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

SUBA MAHTON—APPELLANT

*versus*

MUNSHI MAHTON AND OTHERS—RESPONDENTS.

*Hindu Law — Joint family — Minor — Guardian, natural—Father's brother's wife—Alienation—Legal necessity—Performance of* gaya saradh *of uncle.*

A Hindu minor's aunt (father's brother's wife) is not his natural guardian. [p. 626, cols. 1 & 2.]

The expenses of the performance of *gaya sradh* of a Hindu minor's uncle, not being beneficial to the minor, do not constitute any legal necessity, and the minor is not bound to defray the same. [p. 626, col. 2.]

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 17th March 1916.

Mr. *Parmeshwar Dyal*, for the Appellant.

Mr. *Lal Mohan Ganguli*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—The plaintiff is the appellant. His suit was for confirmation of possession or in the alternative to recover possession of the suit land.

KALI DASS MULLICK v. EAST INDIAN RAILWAY CO.

The facts of the case are that there was one Nathu Mahton who had two sons, namely, Lallu Mahton and Jagat Bihari Mahton. Lally had a son named Munshi Mahton. Lally died, and Jagat Bihari also died leaving his widow *Musammat* Dako Koer.

The principal defendant in the case is Munshi. *Musammat* Dako is also one of the defendants.

The claim of the plaintiff is based on a deed of sale executed by *Musammat* Dako. It appears that Nathu Mahton was the head of the joint family. Lallu and Jagat Behari were joint. So after Lallu and Jagat Behari's deaths the estate according to the law fell into the hands of Munshi Mahton. This Munshi Mahton, however, is a minor. *Musammat* Dako his aunt executed a document for sale of the minor's property. The defendant No. 1 defended the suit through his guardian one Farhat Husain a Pleader appointed by the Court as his guardian *ad litem*. He contested the suit on the ground that *Musammat* Dako had no business to sell the property inasmuch as the sale proceeds never benefited the minor. It appears from the contents of the deed of sale that the property was sold to pay off a certain debt incurred for the performance of *gaya sradh* of Jagat Behari.

The Munsif dismissed the suit. On this there was an appeal by the plaintiff to the lower Appellate Court and the appeal thus preferred was dismissed by that Court, upon which, the present appeal has been preferred to this Court.

The first question for determination is whether *Musammat* Dako was the legal guardian of the minor and whether the sale proceeds by the sale of the property were in any way used for the benefit of the minor. Under the Hindu Law as discussed by Mayne in section 211 of his book the father is the guardian and next to him the mother and in default of her, a paternal kinsman who has preference over the maternal kinsman. *Musammat* Dako is not the mother of the minor. She is only an aunt having married the uncle of the infant. She is, therefore, not a natural guardian of the minor. That being so, the sale effected by her of the property which really belongs to the minor could not be an effective sale.

Then comes the question as to whether the sale proceeds were used for the benefit of the minor. The plaintiff's case is that the money was really obtained for payment of a previous debt incurred for the performance of the *gaya sradh* of Jagat Behari. The question is whether the performance of this *gaya sradh* was at all beneficial to the minor. I do not see how the said *sradh* could at all be considered beneficial to the minor either in this life or in the life to come. This being my view of the question involved I am of opinion that the judgments of the two Courts below are correct and cannot be assailed. For these reasons the appeal is dismissed with costs.

ROE, J.—I agree. The father's brother's wife cannot possibly be the natural guardian. For in all disputes as to whether the family is joint or not her interests are directly antagonistic to those of the minor. I also agree that the only ceremonies that need be performed out of the property of a deceased uncle are the monthly, six-monthly and annual obsequies as laid down by Thomas Strange in Volume I, Chapter VIII

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

RULE *Nisi* No. 957 OF 1916.

April 3, 1917.

*Present*:—Justice Sir John Woodroffe, Kt., and Mr. Justice Cuming.

KALI DAS MULLICK—PLAINTIFF—PETITIONER

*versus*

THE EAST INDIAN RAILWAY CO, BY THEIR AGENT OF CALCUTTA—DEFENDANT—OPPOSITE PARTY.

*Contract Act (IX of 1872), s. 23—Railway Company, liability of, to compensate consignor—Risk note exonerating Company from liability except for loss of complete package, whether contrary to public policy—"Package," meaning of.*

The form of risk-note under which a Railway Company is exonerated from liability to compensate a consignor, except for the loss of a complete package, is not contrary to public policy. [p. 627, col. 1.]

The word "package" in a risk-note means both that which is packed, and that in which it is packed, *i. e.*, its covering or receptacle. [p. 627, col. 1.]

Rule against an order of the Sub-Judge, third Court, Hooghly, exercising the powers of a Court of Small Causes.

KAILASAM PILLAI *v.* NATARAJA TAMBIRAN.

Dr. *Jadunath Kanjilal*, (with him Babu *Jogendra Komar Dey*), for the Petitioner.

Babus *Mohendra Nath Roy* and *Ambika Pada Chowdhury*, for the Opposite Party.

JUDGMENT.—The Judge finds that there was theft of some *ghee* by the servants of the Railway Company, but that the case is covered by the risk-note as there was no loss of any complete package.

It does *prima facie* seem to be hard that the Railway Company can avoid responsibility in such a case by producing the empty tins. But this has been so held already by this Court, and the word "package" seems to mean both that which is packed and that in which it is packed, its covering or receptacle.

Then it is said that if that be so the risk-note in this respect is contrary to public policy. The previous cases, however, decided this point to the contrary and nonetheless so because the risk-note which was discussed in those cases is not now in force, for, the risk-note now in use is not so wide as the risk-note before the 9th March 1907. If the former risk-note was held not to be against public policy, *a fortiori*, the present risk-note is not. Moreover, in the case of the *William Dring* v. *Shiv Prosad Bhakat* (1) in which the risk-note was exactly in the same form as that now before us, the learned Judges say this: "It was suggested by the learned Pleader that the contract embodied in the risk-note was contrary to public policy. This question has also been considered in more than one case and decided in favour of the Railway Company. It may be pointed out that the risk-note in its present form is not so wide as it previously was." The contention as regards notice also fails. We think that the Rule fails.

The Rule is, therefore, discharged.

We make no order as to costs.

*Rule discharged.*

(1) 18 Ind. Cas. 216; 17 C. W. N. 529.

MADRAS HIGH COURT.

APPEALS NOS. 317 AND 318 OF 1913.

December 15, 1916.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Napier.

IN A. NO. 317

KAILASAM PILLAI—PLAINTIFF NO. 2—APPELLANT

*versus*

NATARAJA TAMBIRAN AND OTHERS—DEFENDANTS AND PLAINTIFF NO. 1—RESPONDENTS

IN A. NO. 318

SUPPIAH GURUKKAL—PLAINTIFF NO. 3—APPELLANT

*versus*

NATARAJA TAMBIRAN AND OTHERS—DEFENDANTS AND PLAINTIFF NO. 2—RESPONDENTS.

*Hindu Law—Religious office, appointment to—Appointment by compromise, effect of—Compromise of doubtful claims, applicability of principles of, to appointment of successor by head of religious institution—Family settlement*—Mutt, *head of, whether trustee*—Mutadhipathi, *powers of*—Laches *in contesting validity of appointment, effect of*—Chinnapatam, *nature and duties of—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 120.

The head of a *mutt* does not stand in relation to the *mutt* properties in the position of a trustee in the absence of evidence to the contrary, and no suit lies to remove him from office under section 92, Civil Procedure Code. [p. 638, col. 2.]

*Ram Parkash Das* v. *Anand Das*, 33 Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.), considered.

The appointment by the head of a religious institution of his successor-in-office in accordance with the usage of the institution is invalid if made as the result of a compromise, whereby the appointor either averts a danger or secures an advantage to himself. [p. 637, col. 2.]

The Chinnapatam is an office inferior in sanctity to that of the Pandarasannadhi or head of a Mutt and the position of the Chinnapatam is analogous to that of an ordinary reversioner with a mere *spes successionis* dependent on his surviving the Pandarasannadhi who appoints him. [p. 632, col. 1; p. 637, col. 2.]

The cause of action for a suit to remove a person from the office of Pandarasannadhi arises from the date of the vesting of the said office in him on the application of Article 120 of the Limitation Act, and not from the date when he was appointed to the Chinnapatam office. [p. 637, col. 2.]

During the progress of litigation between *T.* and *N.* in which the latter questioned the appointment of *T.* as Pandarasannadhi under an alleged forged Will, *T.* entered into a compromise with *N.* whereby, in consideration of *N.* abandoning the contest and

KAILASAM PILLAI *v.* NATARAJA TAMBIRAN.

refraining from putting *T.* to proof of the Will, *T.* appointed *N.* to succeed him to the office of Pandarasannadhi on his death, and immediately appointed him Chinnapatam, giving him large properties of the *mutt*:

*Held*, that the appointment was invalid. [p. 631, col. 2.]

*Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*, 10 M. 375; 3 Ind. Dec. (N. S.) 1015, distinguished.

Per *Wallis, C. J.*—The principles relating to family settlements and compromises of doubtful claims are inapplicable to agreements to fill up a religious office of importance in the eyes of Hindu worshippers, which raise very different considerations. [p. 632, col. 1.]

Per *Napier, J.*—The trustee of a religious and charitable trust has, in respect of litigation not affecting the office, the same right of compromise as an ordinary trustee has, and a compromise even of conflicting claims to an office is not necessarily unlawful or opposed to public policy, but must be scrutinized by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trust of the institution or affects adversely the interests of the religious office. [p. 636, col. 2.]

A mere irregularity in the appointment may be cured by efflux of time. If the qualifications of a person appointed fall little short of those required by usage and the appointment is otherwise unobjectionable and is made in the interests of the institution, the Court will not interfere with the appointment. But the case is different where the appointment is not made in the interests of the institution. [p 638, col. 1.]

Appeals against the decrees of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suits Nos. 17 and 18 of 1912.

Mr. *A. Krishnasami Aiyar*, (with him Messrs. *T. C. Sreenivasa Aiyangar* and *C. A. Seshagiri Sastri*), for the Appellant in No. 317.

Mr. *A. Krishnasami Aiyar*, for the Appellant in No. 318.

The Hon'ble Mr. *S. Srinivasa Aiyangar* Advocate-General (with him Mr. *S. Ramasami Aiyar*), for the Respondents in both.

These appeals coming on for hearing on the 5th, 6th, 7th and 8th December 1916 respectively, and the cases having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—These are appeals in two suits originally numbered Original Suits No. 1 and 2 of 1905 in the District Court of Madura brought with the consent of the Advocate-General under section 539 of the Code of Civil Procedure by different plaintiffs. In Original Suit No. 1, the subject of Appeal No. 317, it was sought to have it declared that there was no lawful trustee of the Tiruvannamalai Mutt and of the dependent Devasthanams or temples, while in the second, the subject of Appeal No. 318, the declaration was only sought in respect of the Devasthanams or temples. The reason for filing the two suits was that it was considered doubtful whether the holder of the religious office of Pandarasannadhi of the Mutt was a trustee within the meaning of section 539 of the Code of Civil Procedure. The case set up in the plaint was that after the death in May 1893 of Arumugam a former Pandarasannadhi one Tandavaraya took wrongful possession of the Mutt under a Will which the Sub-Registrar and the District Registrar subsequently refused to register on the ground of forgery, and that shortly after the first defendant was appointed as his successor "out of fraudulent and sinister motive" and that the appointment was void. The first issue settled in both suits was, "whether the 1st defendant (the *de facto* incumbent of the office) is a mere trustee of the Mutt and has not got an estate for life in the Adhinam properties? On the 14th March 1906 the District Judge dismissed both suits holding, on the authority of *Vidyapurna Thirtha Swami* v. *Vidyanidhi Thirtha Swami* (1), that the Pandarasannadhi was not a mere trustee and that no suit lay for his removal under section 539, either as regards the Mutt or the trusteeship of the Devasthanams which in his opinion went with it. When the case came before Munro and Abdur Rahim, JJ., on appeal, they held that in any case there was no reason why the properties belonging to the Devasthanams which the 1st defendant admittedly held in trust should not be protected if it were proved that the defendant had been guilty of waste and mismanagement as alleged or why if a proper case was made out the Court should not make the necessary provision for a proper administration of the trust. They accordingly allowed Appeal No. 90 of 1906 in Original Suit No. 2 of 1905, and adjourned the other Appeal No. 91 of 1906 in Original Suit No. 1 of 1905 pending the answer

(1) 27 M. 435; 14 M. L. J. 105.

to a reference which they made to the Full Bench nearly in the terms of the first issue, "does the head of a Mutt hold the properties constituting its endowment as a life-tenant or as a trustee?" The Full Bench answered that he was not a trustee except in so far as it might be shown that he held any particular properties on trust. At the same time they refused to regard him as a life-tenant. When the case went back to Munro and Abdur Rahim, JJ., they stated that the reply was that in the absence of evidence to the contrary the head of a Mutt is not a trustee. They accordingly reversed the decree of the District Court in this suit also, and remanded it for disposal according to law.

The two cases after remand were transferred to the file of the Temporary Subordinate Judge of Ramnad and numbered in that Court 17 and 18 of 1912 and they were tried together with a third Suit No. 19 of 1912 brought by one Ponnambalam for a declaration that he had been duly elected to the vacant office of head of the Mutt by the Thambirans or disciples. This suit was dismissed and the dismissal has become final as no appeal has been filed.

As regards the Original Suit No. 1 of 1905 the Subordinate Judge found that there was no evidence to the contrary to show that the Pandarasannadhi was a trustee, and he accordingly held that the suit was liable to dismissal on this ground. No attempt has been made to question his finding on the evidence, but it is contended that the decision of the Full Bench is opposed to the recent decision of the Privy Council in *Ram Parkash Das* v. *Anand Das* (2). This is strongly contested on the other side, but we do not propose to go into this question, as we consider that the point has already been decided in this suit by a Bench of this Court in the former appeal, and that the proper way of questioning it is by appeal from that decision

The third issue in both suits was: "The plaintiffs suing the 1st defendant as a trespasser, is the suit maintainable under section 539 of the Code of Civil Procedure?" We agree, therefore, with the Subordinate Judge that as regards Original Suit No. 1 of 1905 (No. 17 of 1912) this must be answered in the negative and the suit must be dismissed in so far as it relates to the office of Pandarasannadhi and its endowment.

As regards the second suit Original Suit No. 2 of 1905, now 18 of 1912, the defendant's Pleader did not press this issue at the trial and it was accordingly found for the plaintiffs, and the suit was held to be maintainable under section 539 as relating only to the Devasthanam properties. It still involves the question whether the 1st defendant is the lawful Pandarasannadhi as, if he is not, he has no right to the trusteeship of the Devasthanams, and those interested in these charities have a right to sue to have proper provision made for the trust. The Subordinate Judge has accordingly gone into the question of the validity of the 1st defendant's appointment and has found that it is not open to objection and we have now to deal with that finding on appeal.

It is unnecessary to summarise the numerous descriptions of this office which are to be found in the decisions of this Court. The evidence shows that, as in the case of other similar Mutts, the Pandarasannadhi for the time being nominates one of the disciples who have received initiation as *sanyasis* or ascetics to succeed him on his death and confers upon him *abishegam*, a sort of ordination, which, as appears from the evidence in this and other cases, is regarded as having the effect of deification and also empowers him to initiate disciples as *sanyasis*. During the lifetime of the Pandarasannadhi his successor in this Mutt is said to fill the office of Chinnapattam. When the nomination is made at the point of death, it is not unfrequently made by Will as well as by conferring *abishegam* when possible, the Will being intended to evidence the exercise of the power of appointment.

In the plaint as already stated the plaintiffs attacked the 1st defendant's appointment on the ground that Tandavaraya under whom he now claims was not himself the lawful Pandarasannadhi and also on account of the circumstances under which the 1st defendant's appointment was made.

(2) 33 Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.).

KAILASAM PILLAI *v.* NATARAJA TAMBIRAN.

This last question though distinctly raised in the pleadings was not, to say the least, very clearly taken in the issues in these two suits, but it was the subject of the fourth issue in the third suit which was tried with them:—Whether the appointment of the 1st defendant to the Chinnapattam by the late Pandarasannadhi "was made *mala fide* to serve his own purpose, and therefore invalid?" It is, I think, clear that the parties in these two suits also went to trial on this issue, and that we are bound to deal with it. At the hearing in the lower Court it was admitted that Tandavaraya was the lawful head of the Mutt and the case must be dealt with on that basis. It is still, however, necessary to refer to the circumstances under which he was appointed in so far as they effect the nomination of the 1st defendant as his successor. As already stated Arumugam the former head died suddenly in May 1893, six months after he had been acquitted on a charge of murder. In the proceedings taken for the registration of his alleged Will evidence was given that he regarded Tandavaraya one of the Tambirans or disciples of the Mutt as responsible for his prosecution. On his death this Tandavaraya entered on the office under an alleged appointment by the deceased both by Will and *abishegam* shortly before his death. It appears that some suspicion of foul play was entertained and that an investigation was held by the Sub-Magistrate, as one of the reasons given by the District Registrar in Exhibit D for refusing to register the Will was that no mention was made of it by Tandavaraya during this inquiry. The result of the inquiry would appear to have been that there was no ground for taking action against any one. The 1st defendant was away at the time, and when he returned to the District he did not return to the Mutt but went to live under the protection of the *Zemindar* of Sivaganga who also refused to recognise Tandavaraya and joined with him in opposing the registration of the Will put forward by Tandavaraya. On the 11th June 1893 the 1st defendant presented a petition Exhibit M to the District Court and another Exhibit U to the District Registrar, and two days later he published notices in the District Gazette and the Madura Mail and circulated a notice to the public Exhibits H, H1 and H2 in which he claimed that he had been appointed to the Chinnapattam by the late Pandarasannadhi and was entitled to succeed and that the Will put forward by Tandavaraya was a forgery. In the petition to the District Judge he also accused Tandavaraya of murdering the deceased. A perusal of the District Registrar's judgment Exhibit D delivered after an elaborate investigation in which both sides were represented by prominent practitioners, shows the very serious difficulties which Tandavaraya would have had to face if he had been called upon to substantiate his claims to the succession in a Court of Law by proving the execution of the Will. It was in these circumstances that certain persons intervened to bring about a compromise between the 30th April 1894 the date of the judgment and the 2nd July 1894 when Exhibit L was executed. The evidence shows that the compromise was mainly brought about by three persons whose respectability has not been questioned. The 1st defendant was first induced to leave the entourage of the Sivaganga *Zemindar* and go to Madura and after the terms had been settled he returned to the Mutt where Tandavaraya and he executed Exhibit L. The document recites that Tandavaraya had duly succeeded and was in possession, that the 1st defendant had been asserting that he himself had been appointed, and that for the past year they had both been litigating about this and incurring much expense and putting the institution to much inconvenience, and that in the interests of the institution they had both settled the matter amicably on the terms that Tandavaraya was to be the Pandarasannadhi with all the rights of the office and that the 1st defendant was to be the Chinnapattam or junior head and heir to Tandavaraya, and that during Tandavaraya's lifetime the 1st defendant was to enjoy certain specified properties belonging to the Mutt without interference, and that during his lifetime Tandavaraya was not to appoint any one as heir to the Chinnapattam (*sic*). Assuming what was conceded by the appellants in the lower Court for the purposes of the case that Tandavaraya had been duly appointed, but assuming nothing more, we have to deal with two questions: was this a good exercise by the holder of a public religious office of

the power vested in him by the usage of the institution to appoint a successor during his lifetime? and *secondly*, is it now not open to question as having been one of the conditions of a *bona fide* settlement of doubtful claims effected in the best interests of the institution? It will be convenient to deal with the latter question first, as it is contended that if the answer is in the affirmative it is conclusive. In matters like this, it is important to look at the substance rather than the form, and the first question is whether this was really a compromise of doubtful claims, or an exercise by Tandavaraya of his power of appointment in the 1st defendant's favour with a view of escaping the very serious difficulties with which he would be confronted if called upon to prove his own appointment in a Court of Law at the instance of the 1st defendant. That the 1st defendant's counterclaim by virtue of a prior appointment was of a most unsubstantial character appears from his cross examination on which the Subordinate Judge has commented and may be gathered from his written statement Exhibit E1 in a subsequent suit in which he executed his conduct in contesting the Will of the late Pandarasannadhi as due to bad advice, ill-feeling, and imperfect knowledge of the facts, and tacitly admitted that his own claim to the office under a prior appointment was without foundation. This claim of itself would never have caused Tandavaraya any uneasiness or afforded a ground for compromise, and on the most favourable view its abandonment formed a very small part of the consideration for the compromise. The substance of that compromise was that the 1st defendant was to abstain from putting Tandavaraya to the proof of his own appointment as Pandarasannadhi in consideration of being appointed his successor with immediate enjoyment of part of the Mutt properties. In consideration of a private advantage the first defendant was to resist from challenging as he had been doing till then Tandavaraya's claim to have been duly appointed to a public office of a religious character. The 1st defendant having practically no claim at all to this office and Tandavaraya having a claim which it is clear he would have had great difficulty in proving, they agreed to compromise their differences by dividing the enjoyment of the office on the terms the Tandavaraya was to hold it for life and the 1st defendant after him. It was in fact not a *bona fide* settlement of doubtful claims at all, but an arrangement of a very different character by which Tandavaraya agreed to exercise a power of appointment incident to the office which he claimed for the purpose of obtaining an advantage for himself. In *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (3) which is a case of the compromise of rival claims to succeed to a religious office the sole consideration on either side was the abandonment of a *bona fide* claim on the other side and it is necessary to consider it further. Much time has been spent on both sides in taking us through a great number of English and Irish cases to show what will and what will not be upheld as the valid exercise of a power, but it is unnecessary to go into them. I find as a fact for the reasons already given that the appointment of the 1st defendant was made by Tandavaraya not a *bona fide* settlement of rival claims, but in furtherance of his own interests; and that on that ground it was a bad appointment as held by their Lordships of the Judicial Committee in *Ramalingam Pillai* v. *Vythilingam Pillai* (4). In these circumstances I think it unnecessary to discuss the question how far such compromises can be supported. It is said and truly that this arrangement did not prevent other people from questioning Tandavaraya's right to the office and that the *Zemindar* of Sivaganga filed Original Suit No. 53 of 1895 in the Subordinate Judge's Court of Madura East contesting the validity of the appointment and claiming the right to appoint as on a vacancy, Exhibit E. The fact that Tandavaraya did not obtain complete security under this arrangement does not make it any the less objectionable. As a matter of fact the *zemindar* did not prosecute the suit possibly because his right to do so was questioned, Exhibit XXXII. There were not the same objections to a suit by the present 1st defendant as one of the Thambirans of the Mutt, and it was no doubt realized that it was of the first

(3) 23 C. 645; 12 Ind. Dec. (N. s.) 429.
(4) 16 M. 490; 20 I. A. 150; 6 Sar. P. C. J. 351; 17 Ind. Jur. 574; 5 Ind. Dec. (N. s.) 1048 (P. C.).

importance to buy off his opposition. Once this was done, opposition soon died down and Tandavaraya enjoyed the office for the rest of his days.

If this be the true nature of the transaction, it was of a highly objectionable character and the Court cannot countenance it even at this distance of time on the ground that it was considered to be for the benefit of the institution in the sense that it put an end to disputes between the rival Thambirans. It has also been contended that the compromise should be supported as a family settlement; as to this I cannot but think that agreements as to filling up a religious office of importance in the eyes of Hindu worshipers raise very different consideration and that the decisions as to family settlements are inapplicable. The question of limitation was not argued in the lower Court, but has been raised before us, and it has been contended that the suit is barred under Article 120 of the Indian Limitation Act. The position of the Chinnapattam is analogous to that of an ordinary reversioner with a mere *spes successionis* dependent on his surviving the Pandarasannadhi who appointed him. Until he succeeds to the office there can be no duty to question his right to succeed and any attempt to do so by a declaratory suit would probably fail. We accordingly modify the decree of the Temporary Subordinate Judge by declaring that the 1st defendant is not the lawful trustee of the Devasthanams and the endowments and removing him from their management, and by directing the Temporary Subordinate Judge to appoint fresh trustee of the Devasthanams, and by directing that the trustee so appointed be placed in possession. Costs of the plaintiffs in Appeal No. 317 of 1913 will come out of the Devasthanams estate throughout. There will be no order as to costs in Appeal No. 318 of 1913.

NAPIER, J.—These are appeals in respect to two suits tried in the Court of the Temporary Subordinate Judge of Ramnad. They were brought by two sets of plaintiffs and with the sanction of the Advocate-General. In Appeal No. 317 of 1913 the plaintiffs ask for a declaration that one Nataraja Thambiran the present holder of the office of Pandarasannadhi of the Thiruvannamalai Adhinam is not lawfully entitled to that office and also not entitled to be the trustee of the Anjukovil Devasthanam and the properties appertaining thereto. They, therefore, pray for his removal from these positions and the appointment of a new trustee for the administration of the trust. In Appeal No. 318 of 1913 the plaintiffs confine the relief which they asked for to a declaration and removal from the position of trustee of the Devasthanam and its properties. The suits were tried together in the Subordinate Judge's Court and a third suit, which is unfortunately not before us, was tried with them and evidence taken in all the three suits—a procedure that has given rise to certain difficulties which will be dealt with later on. The position taken up by the defendant Nataraja Thambiran is stated in paragraph 19 of his written statement and is that one Tandavaraya Desikar who was the lawful Pandarasannadhi of the Mutt nominated him as his successor to the Adhinam with appropriate initiation and ceremonies on the 9th July 1894, that the late Pandarasannadhi died on the 16th March 1902 and that he himself succeeded to the headship and trusteeship of the Devasthanam. He raises other defences also which can be dealt with later on. The plaintiffs do not deny the nomination and initiation of the defendant as Chinnapattam and successor by the late Pandarasannadhi, but plead that it was bad in law for the following reason, namely, that the appointment was not made with sole view to the benefit which would accrue to the Mutt and to the disciples but with the object of getting rid of an opponent who was at the time both setting up a claim to be the lawful Pandarasannadhi and challenging the truth of the appointment and initiation of Tandavaraya himself. A further contention is raised by the plaintiffs that apart from the intention with which the appointment was made, it is illegal in that no valid appointment can be made by compromise of conflicting claims. The Advocate-General who appears for the defendant has contended that as long as the person appointed belonged to the class from whom the Pandarasannadhi is

chosen, it is not for the Court to look into the circumstances of his selection. For this extreme proposition, there is no authority and it is clearly negatived by the decision of the Privy Council in *Ramalingam Pillai* v. *Vythillingam Pillai* (4). I am satisfied that it is our duty to examine the surrounding circumstances, not for the purpose of ascertaining the motive influencing the appointment, but to see whether the appointment was made with the object and intention of conferring a benefit on the Mutt and the disciples. The admitted facts are as follows: -one Chinna Arumuga Desikar was in the beginning of 1893 Pandarasannadhi of the Mutt. He died on the 23rd May of that year, and Tandavaraya Desikar at once claimed the succession, alleging that he had been initiated by the deceased on the day before his death and that the appointment had been confirmed by a Will made on the same date by the deceased. His claim, in turn, was at once challenged by Nataraja Thambiran on two grounds, (1) that he had himself been appointed, and (2) that the story of the initiation was false and the Will a forgery. Tandavaraya presented the Will for registration on the 23rd May 1893. The registration was opposed by Nataraja charging the forgery and making a further allegation that Tandavaraya had murdered the late Pandarasannadhi. An exhaustive enquiry was held by the Sub-Registrar who found the Will to be a forgery and his decision was confirmed by the District Registrar on the 30th April 1894. On the 9th July 1894 Tandavaraya nominated Nataraja to the post of Chinnapattam, a position which carried with it the right to succeed to the Pandarasannadhiship, and performed the necessary initiation ceremonies. It is argued by Mr. Krishnaswami Aiyar that the true inference to be drawn from these facts is that Tandavaraya felt himself in a position of grave danger in that the defendant might at any moment apply to the District Registrar for sanction to prosecute him for forgery and that the arrangement was one by which he bought off opposition to his claim, an opposition which had already acquired a very strong position. The Advocate-General has contended that this could not have been the intention because as well as Nataraja, he had a strong opponent in the *Zemindar* of Sivaganga who was, of course, not affected by these arrangements and he could not hope to stifle action by the *zemindar* and in fact did not do so, as the *zemindar* brought a suit against him in the following year challenging his claim to be lawfully appointed. Mr. Krishnaswami Aiyar relies on the terms of the agreement (Exhibit F) under which Nataraja was appointed Chinnapattam with unusual and special rights and privileges. Now Exhibit F is signed by both parties and it recites that Tandavaraya was duly appointed Pandarasannadhi by Arumuga Desikar, the late Pandarasannadhi, and has taken possession of the office and its dignities. It further recites that Nataraja had gone away to Madura and other places on account of ill-feeling but that he had returned in obedience to the order of the Pandarasannadhi and had been appointed Chinnapattam and received *abishegam* and now holds that office. It then provides that Tandavaraya is to remain in full possession and enjoyment of the office, and that Nataraja shall, as long as he holds the position of Chinnapattam, be entitled to the possession of the Matam at Kumbakonam and the Mattam at Mylapore attached to the Thiruvannamalai Adhinam and also to receive all the income of the villages mentioned in the schedule without any interference by the said Tandavaraya and that he shall manage the said Mattams and the charities connected therewith. Tandavaraya is to conduct all the Mattams attached to the said Adhinam other than those transferred to Nataraja without any kind of interference by the said Nataraja. And lastly Tandavaraya covenants not to appoint any one else to the office of Chinnapattam as he has agreed that Nataraja shall succeed him to the Pandarasannadhiship. Now it must be conceded that this is an unusual arrangement. It is true that Tandavaraya remains Pandarasannadhi, but it is clear on the language of this document that there was an actual division of the temporal rights and possession. The same language is used in the allocation of the properties to each and Tandavaraya reserves no more rights in the alienated properties than Nataraja has in the properties retained, so that it is not merely a case of grant of wide powers of management over certain selected Mutts and properties attached to

them. As a matter of fact, Nataraja retired at once to Mylapore and lived there managing the properties, and the Judge has found that he actually allowed some of the Mutt properties to be sold for debts incurred by him. Another somewhat suspicious circumstance is the haste with which this appointment was made. It is, of course, open to the Pandarasannadhi to appoint his successor at any time, but when the appointment is made little more than a year after the Pandarasannadhi succeeds to the office, that circumstance is one to be taken into consideration when the appointment is challenged to have been made with an improper object.

A considerable amount of oral evidence was let in on behalf of the plaintiffs to support their case and several witnesses speak to their own belief and to the rumours current that Tandavaraya was at the time in danger of prosecution. A good deal of it is, in my opinion, inadmissible. But plaintiffs' 6th witness speaks to something definite. He says that Tandavaraya asked him to compromise with Nataraja and stop the prosecution, that he went to Madura for this purpose, met Nataraja and asked him not to prosecute as it was a big matter and the prosecution would be a disgrace to both sides. He says that Nataraja agreed to drop the matter if he was appointed Chinnapattam and an agreement was made under which he would be irremoveable and have sufficient properties to maintain his position. As against this evidence there is the fact elicited from him in cross-examination that he did not himself effect the compromise and he admits that he never told any one about this matter. Plaintiffs' 18th witness too claims to have taken part in the preliminary negotiations, but as he was witness to the Will which was attacked as forgery, he is not perhaps a very reliable witness. Defendant's 6th witness makes an admission which is important considering that he was supporting the defendant. He states that Nataraja was disputing the Will as a forgery and that after the refusal to register it he was intending to adopt further proceedings, but that one Ramasam Aiyar brought Nataraja from Madura and settled the disputes between him and Tandavaraya. Nataraja gives evidence himself as defendant's 13th witness. He was in a somewhat difficult position because he could not admit that his claim was false and at the same time he had to try and to minimise the circumstances attending the arrangement. What he does is to throw the whole blame for the position on the *Zemindar* of Sivaganga and to deny any knowledge of an attempt to obtain sanction against Tandavaraya. He does, however, make one unguarded admission, which is as follows:—"My objections to the registration of the Will were all founded on facts." By the term "facts", he cannot, of course, mean anything else than that the Will was a forgery. That, coupled with his persistance in the witness box in adhering to the story of his own initiation and appointment, gives no room for doubt that if he had not been satisfied with the arrangement made, he would have persisted in his claim to the Pandarasannadhiship in his opposition to the Will as a forgery and even possibly in his charge of murder against Tandavaraya. I think it right to say here that there never was the slightest ground for suspicion of murder, but the attack on the Will was very serious indeed. We are bound to presume that the Registrars applied their minds to the case, and they had come to a conclusion which placed Tandavaraya in a very difficult position. The Will had been found against him in two exhaustive enquiries, in addition to which Nataraja was alleging an appointment in support of which he would doubtless be able to produce some evidence though I agree with the Subordinate Judge in his view that Nataraja's story of appointment is false. Nataraja in his written statement filed in the suit brought by the *Zemindar* of Sivaganga referred to above has endeavoured to evade responsibility. In that suit (Original Suit No. 53 of 1895 on the file of the Court of the Subordinate Judge of Madura East), the *zemindar* of Sivaganga claimed the right of appointment and asked for the removal both of Tandavaraya and Nataraja. Exhibit E1 is the written statement of Nataraja. He there relies on his appointment as Chinnapattam and states that he yielded to the instigation of the plaintiff (the *zemindar*) and that owing to his own imperfect knowledge of facts he made certain allegations impeaching the Will, but that when he understood the real facts and the bad

motives of his advisers, namely, the plaintiff and his officers, he re-joined the Mutt which he had left under evil advice and in the position of a *disciple* was duly appointed Chinnapattam. It is to be noted that he says not one word about his own appointment by Arumuga Desikar and admits that he was only a disciple at the time of his appointment by Tandavaraya. These facts and a number of circumstances of less importance have been examined before us by the learned Vakils and the inference sought to be drawn therefrom has been urged at great length and with great force by both sides. In the result I am satisfied that Tandavaraya would not have appointed Nataraja his opponent as his successor, were it not for his desire to secure himself from further opposition. In my opinion he did not appoint him in the true interests of the Mutt. He consented to an arrangement of an unusual character under which he parted with a considerable portion of his temporal rights with an eye solely to his own security, and under pressure of great danger to himself.

It remains to apply the law to this finding on facts. First as to the question of the compromise: admittedly it *was* one and admittedly the defendant's right to the Pandarasannadhiship owes its birth to that compromise. But is that fact alone sufficient to make the appointment bad? Mr. Krishaswami Aiyar relies strongly on a decision in *Sundarambal Ammal* v. *Yogavanagurukkal* (5). In that case, as appears from the judgment of Mr. Justice Sadasiva Aiyar, the Court was dealing with a suit in which the claim in the dispute was to one-half share of the *puja miras* of a certain temple. The *puja miras* involved certain religious duties and the holder was entitled to some emolument. A compromise was come to, which was found by the learned Judge to amount to an alienation of a portion of a religious office by one of the parties in favour of the other for a pecuniary benefit, and the learned Judge refused to allow the compromise on the ground that it was not a lawful agreement on which a decree could be passed. The proposition he lays down is as follows:—"There can be no lawful compromise made of a dispute in respect of a religious office, the proper performance of the duties of which concerns not merely the parties to the compromise but principally affects the religious trust itself and the Hindu public for whose benefit the religious trust exists." The chief authority relied on for this proposition was the well known case arising out of the dispute between the Rajah of Ramnad and certain Shanars, *Rajah M. Bhaskara Sethupathi* v. *Narayanasamy Gurukkal* (6). I do not think that this latter case supports the wide proposition laid down by the learned Judge. The view taken by the Judge in that case was that the so-called compromise was a betrayal of rights successfully established in one Court by the person who vindicated them. In another case, *Ravi Varma Rajah* v. *Ramasubramania Pattar* (7), the same learned Judge in dealing with a compromise with regard to property the subject of a religious trust and not with regard to the office itself uses language somewhat analogous but I do not think that that case helps us much. Reliance is placed on a case in *Mohammad Ibrahim Khan* v. *Ahmad Said Khan* (8), but the point decided there was much narrower, *viz*, that a dispute as to the right of succession to a *mutawalliship* could not be settled by arbitration so as to oust the jurisdiction of the Court. The Advocate-General contends that the right to compromise matters of dispute arising in religious and charitable trusts does exist and he relies on a decision of the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti* (9), but what was settled there was, however, merely an arrangement made by disputing parties for the due execution of the functions belonging to the office in turns or in some settled order and sequence. The case in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (10) is more in point, for there a dispute as to right to appoint between the heads of two different Mutts was compromised by an arrangement under which the persons holding office had their title recognised but the next Chinnapattam was to

(5) 23 Ind. Cas. 72; 38 M. 850; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276.

(6) 12 M. L. J. 360.

(7) 37 Ind. Cas. 692; 31 M. L. J. 733; (1916) 2 M. W. N. 312; 4 L. W. 576.

(8) 6 Ind. Cas. 219; 32 A. 503; 7 A. L. J. 761.

(9) 29 M. 282; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.)

(10) 10 M. 375; 3 Ind. Dec. (N. S.) 1015.

be selected from the rival Mutt. Another case, *Nilakandan* v. *Padmanabha* (11), is instructive because it went to the Privy Council. In that case disputes arose between certain parties as to the management of a temple in South Malabar which were temporarily set at rest by a compromise in 1845 and again in 1874, but the question was re-agitated 20 years latter and it was urged that the compromise was not binding. It is to be noted that although it was attacked on the ground that it created a new right and thereby varied the original trusts of the institution, it was not argued before the Board that the compromise was unlawful as relating to a religious trust [*vide Nilakandhen Nambudirapad* v. *Padmanabha Revi Varma* (12)]. *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (3) is a decision directly in point, for in that case a suit was brought on an *ekrar* executed by the priest of an idol for arrears of maintenance and the defence was raised that the agreement was without lawful consideration as it amounted to a bargaining for the public office of high priest of a public shrine. The Court found that the *ekrar* was entered into in consequence of attempts made both by the plaintiffs and the defendant to obtain the post of high priest on the death of the last holder of the office and that the dispute concerning this succession was settled by that compromise. The cases on the point were elaborately considered by the Court and the conclusion come to was that there was nothing contrary to public policy in the *fact* of the settlement of the dispute as to succession by a compromise. And lastly we have two recent decisions of this Court to both of which the learned Chief Justice was a party, in which this question was discussed. They are *Arunachellam Chettiar* v. *Velappa Thambiran* (13) and *Thiruvambala Desikar* v. *Chinna Pandaram* (14). The result of both these cases may be summed in the language of the Chief Justice in *Arunachellam Chettiar* v. *Velappa Thambiran* (13): "The better view appears to be that compromises of suits entered into by trustees of charitable endowments, are not necessarily void." And this doctrine would seem to have been applied both in that suit in which no question of title between disputing claimants was involved, as well as in the latter case in *Thiruvambala Desikar* v. *Chinna Pandaram* (14), where the right of a *mataadhipathi* to remove the junior was in question and a compromise decree had been passed recognising the position of the junior. On a consideration of all the authorities, I have come to the conclusion that a trustee of a religious and charitable trust has, in respect of a litigation not affecting the office, the same right of compromise as an ordinary trustee has, and that a compromise even of conflicting claims to an office is not necessarily unlawful or opposed to public policy but must be scrutinized by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trust of the institution, or affects adversely the interests of the religious public. That disposes of the first objection taken by Mr. Krishnaswami Aiyar.

The next objection is one which arises on the view of the law which I have just stated. Mr. Krishnaswami Aiyar has urged the broad proposition that where any benefit is reserved by or accrues to a party entitled to make the appointment, the appointment is bad whether it be by compromise or by agreement. He has relied strongly on the analogy of the exercise of the power of appointment by a donee of a power and has quoted a large number of English cases. The Advocate-General, on the contrary, has invited our attention to a number of cases in which a reservation of rights was not held to vitiate the appointment. In my opinion a great deal turns on the question whether the circumstances relied on to impeach the appointment, constitute a motive for the appointment or whether the appointment was made with the intention of securing a benefit. But I do not think it necessary to examine the cases as in my opinion, although the principles applied in these cases may be of some assistance, they have not sufficient bearing to require detailed consideration. The Advocate-General has relied on the principles by which an adoption agreement made by a Hindu widow under which she acquires a distinct benefit is not illegal and

(11) 14 M. 153; 5 Ind. Dec. (N. S.) 108.

(12) 18 M. 1; 21 I. A. 128; 4 M. L. J. 233; 6 Sar. P. C. J. 478; 6 Ind. Dec (N S) 351.

(13) 28 Ind. Cas. 337; 28 M. L. J. 410 at p. 419; 18 M. L. T. 135.

(14) 34 Ind. Cas. 57; 30 M. L. J. 274; (1916) 2 M. W. N. 43; 4 L. W. 306; 40 M. 177.

asks us to apply that rule. I think the analogy still more remote and I will not deal with the cases. I would adopt the language of the Chief Justice in *Arunachellam Chettiar* v. *Velappa Thambiran* (13) in respect of this very question of compromise by a Pandarasannadhi. In that case the position of a Pandarasannadhi as regards alienations had been compared to that of a Hindu widow and the learned Chief Justice in delivering the judgment of the Court said as follows:—"We agree with the observation of Sadasiva Aiyar, J., in *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (15), that it is dangerous to press these analogies too far." In the case of an incumbent of a religious office whose rights and duties are mainly governed by usage, and whose duties extend to a religious public that knows nothing of the arrangements under which he succeeds to the office, I would prefer to confine myself to the very simple test laid down by their Lordships of the Privy Council in *Ramalingam Pillai* v. *Vythilingam Pillai* (4). This decision was on an appeal from our own Court and the question to be determined was whether the appellant was the lawful Dharmakartha or trustee of the Rameswaram temple. On the 30th January 1894 the High Court removed one Ramanatha Pandaram from his office and on the same day he appointed the appellant as his successor purporting to make the appointment on a consideration of the fact that the appellant was a man of learning and of good character. The appointment was held to be bad, because Ramanatha Pandaram had already been removed and had, therefore, no power to appoint. But their Lordships further observed as follows:—"Another objection to the appointment of the appellant is that both Courts have found that it was not made *bona fide*. * * * The Judges of the High Court, referring to the proved facts, say:—'With these facts before us, we cannot say that the Subordinate Judge was not warranted in finding that the appellant's appointment was made by the former Pandaram *in furtherance of his own interests* and that it was not a *bona fide* exercise of his power, if any.' This finding of both Courts invalidates the whole appointment. It applies to the headship of the Mutt as well as the office of the Dharmakartha." In my opinion we have but to apply this language. The object in that case was certainly more grossly apparent than in this case, because the Pandaram had arranged for a personal allowance to himself after his dismissal, but the principle laid down by the Board seems to me to be of general application. On the conclusion that I have arrived at on the facts, *viz.*, that the appointment was not made with the intention of benefiting the institution but really to protect his own position which was in serious danger, I am of opinion that it is one which could not be upheld if attacked in the proper manner and at the proper time.

It remains now to consider certain objections raised by the Advocate-General to our exercise of the power of removing the defendant. The first objection is one of limitation. He contends that the Pandarasannadhiship to which the defendant succeeded in March 1902 was only the taking up of an office which necessarily vested in possession and that the right to succeed to it became vested in 1894, more than six years before the suit. In my opinion this contention cannot succeed. It is admitted that according to the usage of the Mutt, Chinnapattam can be removed for misconduct and so his right of succession is not absolute. Further the position of Chinnapattam is one of greatly inferior sanctity and importance and it might well be that the persons interested would consent to his holding that office, although they were not willing to allow him to become Pandarasannadhi. I am, therefore, of opinion on the application of Article 120 of the Indian Limitation Act that the right to sue to remove him from the office of Pandarasannadhi vested in persons entitled to sue on the occasion of his taking that office, although the right to sue to remove him from the office of Chinnapattam vested at the time of the appointment to that office. In this view I do not think it necessary to consider whether the right arises only on the sanction by the Advocate-General.

The next objection raised on behalf of the defendant is that by efflux of time the irregularity of the appointment is cured, and a number of English cases were brought to our notice. In my opinion, this is not a case of irregularity of appointment. It might

(15) 19 Ind. Cas. 694; 25 M. L. J. 393; 38 M. 356; 13 M. L. T. 498; (1913) M. W. N. 581.

be that if the qualification of a person appointed fell little short of those required by the usage and the appointment was otherwise unobjectionable and was made in the interests of the institution, the Court would not interfere. But here we have an appointment not made in the interests of the institution and the case is entirely different from those in which the appointment of a minister of religion not belonging to the particular sect of the founder, was upheld after it had existed for a considerable time.

I will now deal with two objections raised by the Advocate-General on procedure which, he claims, stand in the way of our giving effect to the view we take of the agreement and appointment. The first is that there was no issue raised in either of these suits as to the validity of the appointment. That is in fact so. But the allegation of invalidity was distinctly made in both plaints (*vide*, paragraph 13) and pleaded to in paragraph 9 and further the validity of the subsequent cancellation of the appointment was alleged in the plaint and denied in the written statement in paragraphs 13 and 20 respectively and an issue was framed on this. (Issue No. 16). When these suits came on for trial they were heard with another suit Original Suit No. 19 of 1912 which had been filed some years later. This suit was by a person who claimed the office by virtue of appointment by the Tambirans. The pleadings in that suit are not before us but the issues are and one of them (No. 4) is "whether the appointment of the defendant made by the late Thandavaraya was made *mala fide* and to serve his own purpose and, therefore, invalid." The whole of the evidence relating to the three suits was recorded by consent of parties in Original Suit No. 17, that is, Appeal No. 317 (*vide* judgment of lower Court page 52), and the Judge finds on the question of the validity of the appointment on issues Nos. 1 and 2 in the suits before us and on issues Nos. 3 to 5 in the other suit. I am satisfied that the matter was treated as in issue in the present suits and that the non-existence of a specific issue at the trial was not considered of any importance there being the issue in the other suit. At the worst it would only be necessary for us to frame the issue formally in these suits and that can, if necessary, be deemed to be done.

The next objection is more serious. It is contended that the Court has no power to remove the defendant in the present suits which are brought under section 92 with the consent of the Advocate-General. The learned Chief Justice has dealt with the history of these suits and I entirely agree with him in holding that it is not open to us to re-consider a decision already given in Appeal No. 317 of 1913. That decision is part of the judgment in this appeal and can only be questioned on appeal to the Privy Council. To the extent, therefore, of the relief claimed in Appeal No. 317 of 1913 to remove the defendant from the headship of the Mutt, the matter is already decided and the suit fails. I entirely agree, however, with the learned Chief Justice that as to the second relief in Appeal No. 317 of 1913 and the whole of the matter in issue in Appeal No. 318 of 1913, we are not prevented by the first decision or the above view from giving effect to our finding. It is our duty to remove a trustee whose appointment is bad and in my opinion the fact that the trusteeship vests *ex-officio* in the holder of an office which we cannot touch in this suit makes no difference whatsoever. The decrees will be as stated in the judgment of the learned Chief Justice.

*Appeal partly allowed;*
*Decree modified.*

V.R.P.

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PATNA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 79 OF 1915.
May 9, 1917.
*Present*:—Mr. Justice Sharfuddin and
Mr. Justice Roe.
BHIRUKHI OJHA—DEFENDANT No. 2—APPELLANT
*versus*
*Musammat* RAJBANSI KUER—PLAINTIFF,
RAMESHWAR PRASHAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Land revenue in Bengal and Bihar, date of payment of—Arrear, non-payment of, effect of—Sale of estate.*

BHIRUKHI OJHA *v.* RAJBANSI KUER.

In Bengal and Bihar the sum of land revenue due for *Chait-Baisakh kist* becomes payable on the last day of *Baisakh* (which ordinarily falls between the 1st and 15th of May), from which date it becomes an "arrear," and if this arrear is not paid by the date fixed by the Board of Revenue as the latest date of payment the estate becomes immediately liable to sale. [p. 640, col. 2.]

Appeal from a decision of the Subordinate Judge, first Court, Muzafferpur, dated the 30th January 1915.

Sir *Ali Imam* and Mr. *Sharoshi Charan Mitra*, for the Appellant.

Messrs. *Kulwant Sahay*, and *Harnandan Sahay* (Government Advocate to watch for the Board of Revenue), for the Respondents.

JUDGMENT.—The plaintiff in this case is *Musammat* Rajbansi Kuer. She holds a 9-annas share in *Touzi* Nos. 4543. The entire *mahal* was sold by auction for arrears of Government revenue for the June instalment on the 21st of September 1911 and was purchased by the defendant Bhirukhi Ojha for Rs. 5,750. An appeal was filed to the Commissioner. This appeal was dismissed on the 2nd of April 1912. On the 27th of February 1913 the plaintiff filed the present plaint asking that the sale be set aside on ten grounds as set forth in paragraph 6 of the plaint.

(1). The sale was a fraudulent sale brought about by her co-sharer Rameshar Prasad Singh for whom Bhirukhi Ojha is a mere *benamidar*.

(2). The account of the arrears as entered in the ledger is wrong.

(3). No notice under sections 6 and 7 was issued.

(4). The notice under section 6 was not properly prepared.

(5). The date of sale was not properly given in the notice.

(6). The name of the *mahal* is Chako Chapra Gangi Chapra but in the said notice only Chako Chapra was given.

(7). There are six proprietors but the name of one only was given in the notice.

(8). The amount of arrears as entered in the notice was wrong.

(9). The notice under section 7 was not served and was not in proper form.

(10). By reason of this fraud the *mahal* the fair value of which is Rs. 18,000 has been sold for Rs. 5,750.

Paragraph 7 of the plaint runs as follows:—

"That your petitioner also begs to submit that when the June instalment of 1911 had fallen into arrears, the said *mahal* ought not to have been sold by auction before the 28th September 1911, and the Revenue Officers had no power, according to the provisions of law, to sell the said *mahal* before the 28th September 1911. For the above reason also the said sale is entirely against law, null and void and ineffectual."

A written statement was filed and upon the pleadings the following issues were framed :—

1. Is the suit maintainable in its present form ?

2. Has the plaintiff any cause of action ?

3. Whether defendant No. 2 is a *furzidar* for defendant No. 1 ?

Whether defendant No. 2 was party to the fraud ? (Defendant No. 1 is Rameshar Prasad Singh. Defendant Nos. 2 is Bhirukhi Ojha).

4. Whether the sale is irregular and illegal and can it be set aside ? Whether the price is inadequate ?

5. What is the extent of the plaintiff's share in this *mahal* ? Can the plaintiff get his share re-conveyed from defendant No. 2. If so, on what term ?

6. Whether the amount of the arrears stated in the notice is correct ? Whether the account in the *tauzi* ledger of the Collector is correct ?

The learned Subordinate Judge found that there was no evidence to show that Bhirukhi Ojha was a *furzidar* for Rameshar Prasad. He found also that notices under sections 6 and 7 had been properly served and were in order: that the plaintiff had failed to prove that there was no arrear of revenue on the date of sale and that the amount shown in the notices as the arrears was correct and that no order could be made ordering the defendant No. 2 to re-convey 9 annas of the *mahal* to the plaintiff. But upon the ground that the sum due for the *kist* ending the 7th of June 1911 was not an arrear but a

sum to be paid as revenue for the June *kist*, he held, that under sections 2 and 3 of Act XI of 1859, that sum if not paid on the 7th of June would not become an arrear of revenue until the 1st of July and that the date of payment of that arrear would be the 28th of September 1911. On this reasoning he held that there were no arrears on the 21st of September 1911, the date of the sale, and that, therefore, the sale was *ab initio* void. He, therefore, gave the plaintiff a decree for the recovery of the *mahal* sold.

We have no hesitation in agreeing with the learned Subordinate Judge that there is no reliable evidence on the record to show that the defendant No. 2 is *farzidar* for the defendant No. 1. There is no real attempt to show any connection between them. There is a considerable body of evidence to show that Bhirukhi Ojha has since the sale, been in actual possession of the estate. We have also no hesitation in saying that the plaintiff has entirely failed to prove that the notices under section 6 and section 7 were not served. It is clear that a receipt for these notices was signed by Fauzdar Lal. The learned Subordinate Judge has shown clearly that the evidence given by Fauzdar Lal that he did not receive this notice is entirely false. There is also no reason for supposing that the use of the term Chako Chapra in the notice was not a completely adequate description. In the register D the village is known as Chako Chapra and the omission of the words Gangi Chapra could not mislead any body desirous of bidding at the sale. The only point upon which the plaintiff can succeed is the point taken by the learned Subordinate Judge.

As we understand the framing of the issues the plaintiff was not serious in the suggestion made in paragraph 7 of his plaint. If indeed there was anything in the suggestion that the arrears of revenue the latest date for payment of which has been fixed as the 7th of June, were not really arrears until the 1st of July, every revenue sale held in Bengal and Bihar during the last fifty years would be void. The learned Subordinate Judge seems to us to have fallen into this error that he has regarded the revenue *kist* as falling due on the 7th of June whereas the fact is that the 7th of June is the latest date of payment for previous arrears. We have been shown papers to prove that the *kists* in which the revenue of this particular *mahal* is paid are as follows:—

| | | Rs. | as. | p. |
|---|---|---|---|---|
| For *Chait Baisakh* | ... | 68 | 12 | 0 |
| For *Jeth, Asharah Shraban* | ... | 80 | 6 | 5 |
| For *Asin, Kartik, Aghan* | ... | 34 | 6 | 0 |
| For *Pus, Magh, Phagun* | ... | 85 | 15 | 0 |

The *Chait-Baisakh kist* becomes payable on the last day of *Baisakh* which ordinarily falls between the 1st and 15th of May, and in the year 1911 did fall on the 29th of April. Therefore, the sum due for the *Chait-Baisakh kist* became an arrear on the 1st of May, and if this arrear was not paid by the date fixed by the Board of Revenue as the latest date of payment, the 7th of June, the estate became immediately liable to sale. But of these facts, there is upon the record no evidence and the question is whether we shall be exercising a wise discretion in allowing the appellant to bring this evidence upon the record at the appellate stage. We feel bound to say that the view taken by the learned Subordinate Judge was a view which the defendants to the suit could hardly anticipate. There was no indication in the framing of the issues that the case would be fought upon this basis. There was no suggestion in the grounds of appeal taken before the Commissioner that this was the origin of the plaintiff's assertion that the estate was not in arrears at the date of the sale. We feel that for the ends of justice an opportunity must be given to the defendant to bring upon the record, the necessary evidence to show that the *kist* for payment of which the latest date fixed is the 7th of June is the *Chait Baisakh kist* and that the sum due thereunder became an arrear of revenue on the last day of *Baisakh*. We, therefore, remit the record to the learned Subordinate Judge with instructions that he take evidence upon this point and submit the evidence to this Court before the 1st of July. Let the record be sent down at once.

*Case sent back.*

GOBIND DAS *v.* BISHAMBHAR DAS.

## PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 23, 1917.

*Present*:—Viscount Haldane, Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

GOBIND DAS—PLAINTIFF—APPELLANT

*versus*

BISHAMBHAR DAS—DEFENDANT—RESPONDENT.

*Libel—Caste dispute*—Panchayat, *resolution of, publication of—Privilege, whether destroyed by irregularity in passing resolution—Jurisdiction of caste* panchayat, *whether subject to control of Civil Courts.*

*B.*, the *chowdhri* or chairman of a caste *panchayat*, circulated to the other members of the caste a resolution of the *panchayat* suspending social relations with *G.*'s family. In an action for libel brought by *G.* against *B.* it was contended that *G.* had no proper notice of the meeting of the *panchayat* and that in consequence the passing of the resolution was contrary to natural justice, and *B.* was not privileged in publishing it. It was found that the notice was duly given:

*Held*, that *B.*'s privilege was not affected or rebutted by any defect in the notice to *G.* [p. 646, col. 1.]

To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous. [p. 645, col. 1.]

[The question of the power of the Civil Courts to control the jurisdiction of caste bodies purporting to excommunicate or censure caste offenders discussed but not decided.]

Appeal from a decree of the Allahabad, High Court (Tudball and Rafique, JJ.), dated March 16th, 1914, reported as 23 Ind. Cas. 301, reversing the decree of the Subordinate Judge, Benares.

FACTS of the case sufficiently appear from their Lordships' judgment.

Sir *H. Erle Richards, K. C.*, and Mr. *Dube*, for the Appellant, submitted that the occasion was not privileged because the resolution was not passed regularly but contrary to natural justice, there being a neglect of the requirement that the accused should be present or be given an opportunity of being present. Alternatively, there is evidence of malice. It is true the defendant was an agent of the *panchayat*, but if the principal is not privileged then the agent is not privileged.

Plaintiff had no notice of the meeting of the *panchayat*. At the meeting the members present knew that he was at Calcutta. It is made a charge against him that he had not signed a certain *chittha*; he never had the chance of signing it. It is also charged that he did not attend the *panchayat*. How could he when he was at Calcutta and had no notice?

[LORD ATKINSON referred to *Chamberlain* v. *Boyd*].

[VISCOUNT HALDANE.—I should like an authority for the proposition that the Court has power to restrain a *panchayat* from excluding a man from caste. My difficulty is that what was said was true.]

I concede that a domestic tribunal may outcaste a man, and may declare its decision to the members of the caste: Odgers' Law of Libel and Slander, 5th edition, page 287 (Chapter 10, Qualified Privilege), but I submit that if the outcasting itself is invalid, the declaration is not privileged.

Caste meetings must observe the requirements of natural justice: *Krishnasami Chetti* v. *Virasami Chetti* (2). When this was not done a declaration that a man was outcasted was held to be illegal, and he was given damages for libel: *Vallabha* v. *Madusudanan* (3).

It would have been a complete answer in the latter case to say that the man was in fact outcasted; but it was decided that defendant could not rely upon that fact, because the outcasting was contrary to natural justice. That case was accepted as an authority in *Keshavlal* v. *Bai Girja* (4), where it was laid down that the right to outcaste must be properly exercised. That case recognises that if the decision to outcaste is improperly obtained, a statement of the outcasting is actionable.

The rules of natural justice in these matters are summarised in Pollock on Torts, page 125

[VISCOUNT HALDANE.—Is not the right of the Court to interfere as to voluntary associations limited to cases where a right of property is involved?]

Under the conditions which prevail in India, a man has such a right in the maintenance of his caste that the Court will take cognisance of the matter though no question of property is directly involved: *Cuppusawmi Chetty* v. *Doraisawmy Chetty* (5), *Jagannath*

(1) (1883) 11 Q. B. D. 407; 52 L. J. Q. B. 277; 43 L. T. 328; 31 W. R. 572; 47 J. P. 372.

(2) 10 M. 133; 3 Ind. Dec. (N. S.) 843.

(3) 12 M. 495; 4 Ind. Dec. (N. S.) 694.

(4) 24 B. 13 at p. 21; 1 Bom L. R. 478; 12 Ind. Dec. (N. S.) 545.

(5) 3 Ind. Cas. 955; 33 M. 67; 6 M. L. T. 290; 19 M. L. J. 714.

GOBIND DAS *v.* BISHAMBHAR DAS.

*Churn* v. *Akali Dassia* (6), *Advocate-General, Bombay* v. *David Haim Devaker* (7), *Appaya* v. *Padappa* (8), *Ram Kant* v. *Ram Lochum* (9).

The Courts in India regard the caste interest as of so great value that they specially protect it; and these cases show that they will intervene on behalf of those expelled from caste on grounds contrary to natural justice.

[VISCOUNT HALDANE asked Mr. Dunne whether he justified.]

[Mr. *Dunne.*—Their case throughout was that the *panchayat* was a bogus one; that was the issue. Both Courts have held that it was not.]

[VISCOUNT HALDANE.—It would have been much better if the English practice had been followed: innuendo, that plaintiff had been outcasted: plea of justification.]

The words of the resolution suggested that plaintiff had refused to accept a reasonable opportunity to appear and clear up his position.

[LORD ATKINSON.—You are driven to say that such a publication would be untrue unless the expulsion were legal and valid.]

I present the case on the ground that the *pancahyat* have no right to pronounce a decision contrary to natural justice. The issue as to notice the High Court has found against me. I submit the Subordinate Judge was right in holding that the notice was not sufficient, and also that there was malice on the defendant's part in procuring the passing of the resolution.

The libel is a communication to the *pachhaitar* telling them to have no dealings with plaintiff. It is defamatory and actionable. The defence may be privilege, but that can only be if they have acted properly; the statement was not made honestly, in the sense that the plaintiff had no opportunity of appearing.

[LORD ATKINSON.—There is nothing against natural justice in the publication. Your objection is to the way the decision was arrived at.]

Mr. *Dube*, followed: Both the Courts below have found the statements are defamatory. There is no analogy between a voluntary association, like a club, and a caste. Outcasting in India is far more than turning a man out of a club: many of the man's rights are affected by it. Hence to say a man is an outcaste is *per se* defamatory.

Whether there was privilege depends on two things:

(1) Had the *panchayat* jurisdiction?

(2) If they had, did they exercise it according to the rules of natural justice?

As far back as 1848 suits were entertained for re-instatement to caste. In that year it was decided in express terms that a Muhammadan who had been improperly expelled should be restored to caste: *Sonaullah Khan's* case (10).

This was followed in 1859 in the case of a Hindu Brahman, the acts charged against whom were not such as to justify expulsion. The Court went into the merits and held the man was entitled to re-instatement: *Ram Kant v. Ram Lochum* (9).

[VISCOUNT HALDANE.—Was the question of jurisdiction raised? No one seems to have thought of it.]

[MR. AMEER ALI.—Was the suit here brought on those lines?]

No: It has been the custom in India to sue for defamation.

[VISCOUNT HALDANE.—You have some authority for saying that the Courts in India have dealt with cases on these lines: but how can the Courts here go into questions of this kind?]

The question is whether the *panches* had jurisdiction. The High Court held they had. I contend they had not.

[Mr. *Dunne.*—This issue of jurisdiction has never been raised before.]

It was, because it was raised that the question of sea voyage was gone into. The Courts should have framed an issue whether the ground alleged was one for which a man could be outcasted.

[LORD ATKINSON.—To say the alleged cause was no adequate cause is making us a Court of Appeal.]

[Mr. *Dunne.*—It has never been suggested that the *panchayat* was not a perfectly proper tribunal to decide the point.]

(6) 21 C. 463; 10 Ind. Dec. (N. S.) 938.
(7) 11 B. 185; 6 Ind. Dec. (N. S.) 122.
(8) 23 B. 122; 12 Ind. Dec. (N. S.) 81.
(9) (1859) S. D. A. 535.
(10) (1848) S. D. A. 541.

GOBIND DAS *v.* BISHAMBHAR DAS.

The Civil Courts ought to consider whether what a member did involves loss of caste. You have to decide on evidence what the rules of the caste are: *Venkatachalapati v. Subbarayadu* (11).

Reference was also made to the Bengal, N.-W. P. and Assam Civil Courts Act, 1887, section 37.

Mr. *A. M. Dunne*, for the respondent, was not called upon.

JUDGMENT.

Mr. AMEER ALI.—This appeal arises out of an action for libel brought by the plaintiff in the Court of the Subordinate Judge of Benares, where the parties reside and carry on business. Both belong to the Agarwala Vaishya caste of Hindus, and both appear to occupy an influential position in their community.

The Agarwalas of Benares are divided into two *tarsor* sections, one called the *purbia* or "Eastern," the other *pachhain* or "Western;" but in doctrinal matters and caste observances there seems to be no difference between them. The inter-communal government of each section is vested in a *panchayat* composed of the general body of its members, which, so far as appears on the record, has the authority to enforce the due observance of the caste rules. In this connection it should be mentioned that there are numbers of Agarwalas in the neighbouring towns of Mirzapore and Chunar with whom the Benares Agarwalas maintain close social relations.

The proceedings in this case show that many of the Agarwalas of Benares take a much stricter view of the doctrines of their religion than most of their fellow-castemen, especially in Western India; and in no respect is the difference more pronounced than on the question of a sea voyage undertaken by a Hindu. Whilst other Hindus, including Agarwalas, hold that a purification ceremony technically called *prayaschitta* absolves the sin incurred by a voyage across the seas, the Benares Agarwala holds firmly to the doctrine that the taint the offender contracts is beyond absolution. In recent years, however, a strong body of public opinion has been growing up which considers this extreme view to be not only illiberal and opposed to the spirit of the times, but also as unwarranted by the *Shastras*. The plaintiff seems to be the protagonist of this school of thought. The controversy between what may be called for the purposes of this judgment the orthodox section and the comparatively smaller body of reformers assumed an acute character with the return to India in May 1910 of one Babu Laksmi Chand, also an Agarwala belonging to the "Western" section. He appears to have been sent to England as a Government scholar, and to have had in this country a meritorious career. On his arrival, however, at home he was promptly put out of the caste by the *panchayat* of his section. His academical distinctions in England were appreciated by the advanced and liberal-minded people of his community, who received him with marks of esteem and respect; and after he had gone through the *prayaschitta* ceremony they gave a dinner in his honour, at which several of the younger members of the plaintiff's family are said to have been present. This seems to have offended the religious feelings of the orthodox; a *chittha*, or "declaration of faith," was drawn up, it is said, at the instance of the defendant (whose position in the *pachayat* will be explained later on) and circulated for signature among the members of the caste. It is alleged by the defence, but denied by the plaintiff, that this document was presented to him, and that he declined to attach his name to it. On his side, he issued to his caste-people and others a public appeal, in which he pleaded for toleration and a more liberal interpretation of the religious doctrines of the sect. In this leaflet he also gave expression to certain strictures on other members of the caste, apparently to show the inconsistency of their attitude towards moral delinquency. This was regarded by a majority of the caste-people as implying a reflection on them, and they decided on holding a meeting of the *panchayat* to consider the matter in relation to the plaintiff and his brother Bhagwan Das. The meeting was accordingly held on the 19th June 1910; whether it was convened in accordance with the rules of the *panchayat*, and whether plaintiff had notice

(11) 13 M. 293; 4 Ind. Dec. (N. S.) 916.

of the meeting will be discussed shortly. The sitting of the *panchayat* is said to have lasted from eight in the evening until next morning; so the debate must have been prolonged, and it may fairly be presumed that persons interested in the proceedings had ample opportunity to put in an appearance. Finally, as the plaintiff was in Calcutta and could not attend, and his brother Bhagwan Das did not or would not do so, the *panchayat* passed a resolution, the publication of which forms the libel charged against the defendant in this action.

The resolution is in these terms:—

"It was settled by the '*panches*' that since B. Gobind Das and B. Bhagwan Das publicly circulated among the '*bradris*,' and the non-'*bradris*' a pamphlet about the '*bradri*' against the practices of the '*bradri*' and did not attend the '*panchayat*' on being called to do so, these facts show that these gentlemen circulated the pamphlet simply to disgrace the '*bradri*,' and their not signing the '*chittha*' shows that their views are against the '*panchayat*'; therefore, it is ordered that until B. Gobind Das and B. Bhagwan Das clear themselves, the family of B. Madho Das be '*baratao-bund*.'"

In the plaint the order recorded by the defendant is given more briefly. Whether the whole resolution or only the substance as given in the plaint was communicated, the kernel of the publication was the decision to suspend social relations with the plaintiff. The communication was made by the defendant Bishmabhur Das in his capacity of *chowdhri* or chairman of the *purbia panchayat* to the 'Western' section, who were, it is not disputed, interested in the result of the proceedings, and to other members of the caste in Benares, Mirzapore and Chunar. The plaintiff on his return from Calcutta sent a registered letter to the defendant asking for particulars regarding the resolution and the facts on which it purported to be based. This letter was submitted to a smaller gathering of the community called a *baithak*, which apparently deals with minor matters affecting the caste; and it was decided to give no reply.

On the 24th August 1910 the plaintiff brought the present suit. The main allegations on which the action is based are that the meeting of the *panchayat* at which the resolution was adopted was not held in "good faith;" that it was composed of defendant's friends, "who were under his influence," and in effect it was a sham meeting; that no opportunity was given to him "to get up a defence;" and that in sending the resolution to the *chowdhri* of the *pachhain* section and the caste-people generally the defendant was actuated by malice and ill-will. The plaintiff further alleged that by this act of the defendant, which virtually declares him to be an "outcaste," he has been disgraced and humiliated in the eyes of the members of the caste as well as the public at large and prejudicially affected in his religious and communal rights and that he has also suffered mentally; and he claimed Rs. 11,000 as damages for the injury caused to him.

The defendant joined issue on all the material allegations; he alleged that the meeting was regularly held, that the proceedings were *bona fide*, that due notice in accordance with the rules of the *panchayat* was given to the plaintiff and the other members of his family; he further pleaded privilege, alleging that in sending a copy of the resolution to the *pachhain panchayat* and others he acted in discharge of his duty; and he denied that his action was the outcome of malice or ill-will.

The Subordinate Judge held that a meeting of the *panchayat* was in fact held on the 19th June 1910 and that the defendant was "as much liable for the resolution passed at that meeting as any other member" of the *panchayat*. He held further that the conduct of the defendant (in publishing the resolution) was not privileged, inasmuch as "no notice of the meeting was given to the plaintiff, nor was he told with what offence he was charged. The defendant, therefore, has done an act which constitutes malicious defamation of the plaintiff." In another part of his judgment he says as follows:—

"It was the duty of the *chowdhri* to publish the resolution complained of, and there is no malice in such publication. The legal malice consisted in not giving opportunity to the plaintiff to defend himself, and in passing that order behind his back.

The publication of the order cannot be called malicious."

Their Lordships have referred to these findings of the Trial Judge, as they form the sheet-anchor of the plaintiff's case on this appeal.

Proceeding on these grounds, and after an elaborate exposition of the Hindu doctrines relating to the lawfulness of sea voyages, he made a decree in favour of the plaintiff, awarding him a small sum as damages, as he considered he had merely a sentimental cause of action.

The defendant appealed to the High Court of Allahabad, which reversed the decree of the Subordinate Judge and dismissed the action, holding that the communication made by the defendant was privileged, and that there was no evidence of express malice.

On the present appeal, which is by the plaintiff to His Majesty in Council, the arguments have travelled over a rather wide area. In their Lordships' opinion, however, upon the facts proved or admitted in the case, the only points for determination are those on which the High Court proceeded, namely, whether the occasion on which the communication was made by the defendant to the *chowdhri* of the *pachhain* section and members of the caste interested in the matter was privileged; and if it was, whether he has forfeited it by reason of the fact that in making the communication he was actuated by what is called in law express malice. The onus of establishing this fact that his conduct was the outcome of some improper motive or private spite rests on the plaintiff.

The principles relating to both these questions are well settled and require no examination. Their Lordships need only refer to *Toogood* v. *Spyring* (12), in which Baron Parke enunciated the rule as to privilege which has been accepted in subsequent cases as furnishing the guiding principle on the subject; and to the case of the *London Association for the Protection of Trade* v. *Greenlands Limited* (13) and the recent case of *Adams* v. *Ward* in the House of Lords, not yet reported.

(12) (1834) 1 C. M. & R. 181; 4 Tyr. 582; 3 L. J. Ex. 347; 149 E. R. 1044; 40 R. R. 523.

(13) (1916) 2 A. C. 15; 85 L. J. K. B. 698.

The allegation of the plaintiff that the meeting at which the resolution was passed was not a *bona fide* meeting of the *panchayat* has been clearly disproved; the High Court has expressly found that the *panchayat* was regularly convened, and that the proceedings were in conformity with its rules, and there is nothing in the Subordinate Judge's judgment to suggest or support a contrary view. The defendant, it is proved, is one of the two *chowdhris* of the *panchayat*. Their Lordships gather that he is the principal *chowdhri*; anyhow, it is his duty to give effect to the decisions of the *panchayat*, and to communicate the result of its proceedings to parties interested in the same. Along with the general body of the caste, the *pachhain* section was interested in the decision of the *purbia panchayat* as it might seriously affect their own attitude with regard to the controversy. The resolution suspends provisionally social relations of the caste-people with the plaintiff and his family. The defendant denies that this amounts to "outcasting" the plaintiff; but assuming that it conveys the innuendo he charges, their Lordships are clearly of opinion that the defendant acted in discharge of the duty imposed on him in making the communication to the *chowdhri* of the other section, and to the caste-people generally, and that the occasion was privileged.

The plaintiff's case, both in his plaint and on the evidence, was that the action of the defendant was the outcome of private spite. Again, the High Court has found that the defendant acted in good faith in the execution of his duty, and that it was not shown that he was "actuated by ill-will or ulterior or improper motive," nor does the Subordinate Judge hold the contrary. The Trial Judge inferred what he calls "legal malice" from the failure of the defendant to give a sufficient personal notice to the plaintiff. Their Lordships do not understand what the learned Judge means by legal malice. To defeat or rebut privilege, the law does not recognise anything short of actual or express malice in the publication of the matter which is charged to be libellous. They find no ground for supposing there was any duty imposed on the defendant beyond properly and duly giving effect to the rules of the *panchayat*; the in-

ference of "legal" malice from his not doing something more seems to their Lordships quite unwarranted.

But it has been contended that the absence of proper notice to enable the plaintiff to attend the meeting and exculpate himself, being contrary to the principles of natural justice, vitiates the whole proceeding and affects the *bona fides* of the defendant's action. This contention seems to confuse two distinct considerations. Whatever may be the effect of the absence of such a notice with regard to the adjudication of the matter, unless it can be shown that the defendant was bound to examine into the regularity and correctness of the *panchayat's* decision before issuing a copy of the resolution to parties interested in the question, it would be absurd to say that the privilege is affected or rebutted by want of notice.

It is clear, however, that a notice in accordance with the rules and practice of the *panchayat* was given in fact to the plaintiff's family, and at the family residence standing in the *panchayat* register. He no doubt was absent in Calcutta, but the question that was to be debated affected all the members of the family, and any one of them could have attended, if not to answer the charge, at least to ask for an adjournment.

The finding of the Subordinate Judge on this point is distinct. He says:—

"The defendant gave notice to the plaintiff in the usual manner, namely, by sending the barber to the *kothi* house in the city. It is not denied that the barber gave notice of the meeting to the plaintiff's *gumashta* Debi Parsad. For all ordinary *panchayat* purposes such notice would have been enough. No notice ever was given by the plaintiff to the defendant that the four brothers are separated, and that in the *panchayat* register, instead of one name, four names should be entered, and that in future all notices should be sent to the different residential houses of the plaintiff and his brothers, and not to their joint house in the city."

Their Lordships are of opinion that this appeal fails; they will accordingly humbly advise His Majesty that it should be dismissed with costs.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

RULE *Nisi* No. 947 OF 1916.

February 26, 1917.

*Present*:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

HARIDAS DATTA—DEFENDANT—PETITIONER

*versus*

BAIDYA NATH GHOSE AND ANOTHER—PLAINTIFFS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), Sch. II, paras. 4, 15—Arbitration and award—Arbitrator giving evidence before his colleagues, effect of—Majority award, validity of—Party deliberately absenting himself—Misconduct of arbitrators.*

The mere fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. [p. 647, col. 1.]

A majority award by the arbitrators is not bad, merely because the reference to arbitration did not provide that the opinion of the majority should prevail, where the application to Court for reference contained a provision to that effect. [p. 647, col. 2.]

Where one of the parties to an arbitration deliberately absents himself from the hearing, the award concluded on the hearing of the arbitration in his absence is not bad. [p. 647, col. 2.]

Civil Rule against the order of the Munsif, 2nd Court, Krishnagar, dated the 17th August 1916.

Babu *Surendra Kumar Bose*, for the Petitioner.

Babu *Gurudas Sinha*, for the Opposite Party.

JUDGMENT.

BEACHCROFT, J.—This is a Rule calling upon the opposite party to show cause why the objection to the award of the arbitrators should not be upheld and the order of the Munsif confirming it set aside; or why such other order should not be passed as to this Court may seem fit and proper. The petitioner is the defendant in a suit which was pending before the Munsif of Krishnagar. An application was made to the Munsif to appoint three gentlemen as arbitrators. One of these gentlemen Jogendra Nath Bhattacharjee was a witness for the plaintiff. Another of them Lakhi Kanta Dey was a witness for the defendant. Both of them had appeared in Court. The third arbitrator nominated was Gokul Chandra Bandopadhya. During the course of the arbitration Jogendra Nath Bhattacharjee gave his evidence before the other arbitrators. The arbitration was not finished on that day and

it was postponed till the next day, when the petitioner put in an application before the arbitrators objecting to their going on with the arbitration and saying that he would not put any evidence before them. Two of the arbitrators, namely, Jogendra Nath Bhattacharjee and Gokul Chandra Bandopadhya made an award in favour of the plaintiff. The third arbitrator Lakhi Kant Dey made an award in favour of the defendant. An application was made to the Munsif to set aside the award of the majority of the arbitrators but the application was rejected.

The first point taken before us is that there was misconduct on the part of the arbitrators in that Jogendra Nath Bhattacharjee gave evidence and the argument is put as high as this, that the mere fact of giving evidence constitutes misconduct. We are not told what the nature of that evidence was. For ought we know it may have been of a purely formal character. It is argued that the arbitrator is on the same footing as a Judge, who cannot give evidence in a case before himself. As regards the capacity of a Judge to give evidence in a case before himself there have been many decisions by the Courts, and the view has been taken that a Judge is a competent witness where his evidence has to be submitted to the independent judgment of other persons who are sitting with himself to try the case; such as a Jury or Assessors. But it seems to me that the considerations, which apply to the case of a Judge, are beside the point in the present case. It is conceded that the arbitrator would have been guilty of still greater misconduct if he had concealed facts which were within his knowledge, and obviously it would be so, because in that case his award might be based on knowledge of his own in which his fellow-arbitrators did not share. But in the present case, the parties knowingly appointed two gentlemen as arbitrators who were witnesses in the case; and if they with that knowledge appointed the arbitrators, it appears to me to be idle for the defendant now to suggest that the arbitrator should not have acted as such because he had knowledge of the facts of the case, or should not have placed his knowledge at the disposal of his fellow-arbitrators. The petition shows that he was examined at the instance of the party.

The second ground taken is that the reference to arbitration did not provide that the opinion of the majority should prevail and, therefore, the award is bad. The reference, it is true, does not in so many words provide for this, but the application for reference to arbitration contained a provision that the opinion of the majority should prevail. It is argued that inspite of that the award is bad in the absence of such provision in the reference itself. It seems to me that there is no substance in this ground. The authority of the Court to make a reference to arbitration depends upon the application of the parties. If the Court had made an order that there must be unanimity in the award, it is conceded that the reference would have been bad because it went beyond the intention of the parties. It is conceded that the only order which the Court could make in accordance with the intention of the parties on the point was that the award should follow the opinion of the majority. It seems to me that we ought not to give effect to the argument that because the Court did not in fact make the only order which it could have made, the award must be set aside although it is made in accordance with the agreement of the parties.

The third point taken is that the award is bad because it was concluded in the absence of the defendant. I have already stated that an application was made to the arbitrators on the second day of the hearing stating that the defendant withdrew from the arbitration and would not call any witness. No authority has been shown to us to support the suggestion that a party to an arbitration can at will retire from the arbitration. Reference was made to some observations of Mr. Justice Mahmood in the case of *Ganga Sahai* v. *Lekhraj Singh* (1). Those observations have no application to the present case. Here the defendant deliberately absented himself from the hearing. To my mind on the attitude taken by the defendant the arbitrators were perfectly justified in continuing the hearing and giving their award. For these reasons I consider that this Rule should be discharged

(1) 9 A. 253; 5 Ind. Dec. (N. S.) 604.

with costs. We assess the hearing fee at two gold *mohurs*.

WALMSLEY, J.—I agree.

*Rule discharged.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2731 OF 1915.

April 24, 1917.

*Present*:—Justice Sir William Chitty, KT., and Mr. Justice Beachcroft.

DENIBESWAR SARMA BARA THAKUR —DEFENDANT—APPELLANT

*versus*

BETHORAM SAIKIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Evidence Act (I of 1872), s 116—Estoppel - Mortgage—Redemption—Mortgagee in possession, whether estopped from denying right of purchaser of mortgaged property to redeem*

Property belonging to a lunatic was usufructuarily mortgaged by his brother, who was his guardian, to the defendant. On the death of the lunatic the property was sold by the brother to the plaintiff, who thereupon brought a suit for redemption of the mortgage against the defendant:

*Held*, that section 116 of the Evidence Act did not estop the defendant, who was placed in possession of the land as a mortgagee, from requiring the plaintiff to make out his title to redeem the mortgaged property by virtue of his purchase. [p. 649, col. 2.]

Appeal against the decree of the District Judge, Assam Valley District, dated the 31st May 1915, affirming that of the Munsif, Jorhat, dated the 27th November 1913.

FACTS of the case are briefly as follows:—

One Brojonath as guardian of Kaliprosad, who it is alleged was a lunatic, executed an usufructuary mortgage of Kaliprosad's property against the defendant-appellant. Kaliprosad died leaving sons and daughters, and after his death, Brajonath sold the mortgaged property together with the equity of redemption to the present plaintiff, and the plaintiff as purchaser of the equity of redemption instituted the suit out of which this appeal has arisen to redeem the mortgage. The case for the defence was that there was no valid legal mortgage, that Brojonath was no heir to Kaliprosad, and hence he could not confer any title on his vendor (the plaintiff), that the plaintiff was not entitled to redeem the mortgage, that the mortgage being a void transaction the defendant-appellant had acquired by virtue of his possession for more than 12 years a title by adverse possession. The Munsif gave a decree for redemption, and on appeal, the lower Appellate Court affirmed the decision of the first Court by a judgment which was very short and abrupt and which did not decide all the points necessary for the decision of the appeal. Hence this second appeal by the defendant.

The judgment of the lower Appellate Court was as follows:—

"This appeal arises out of a suit brought by the plaintiff-respondent for redemption. The plaintiff's case was that the land in suit belonged to one Kaliprosad who was a lunatic; that the latter's guardian Brojonath mortgaged the land to defendant No. 1 for a sum of Rs. 400 by a registered deed of mortgage (Exhibit 4); that defendant No. 1 is still in possession as mortgagee, and that after Kaliprasad's death the land passed to his brother the aforesaid Brojonath, who sold the equity of redemption to the plaintiff.

The defendant filed an evasive written statement in which he took up a number of technical objections. The lower Court held that these were without any substance and gave a decree.

The point for determination is whether the suit has been rightly decreed. In my opinion the answer to this is in the affirmative. The main point involved is whether the appellant having accepted the mortgage is entitled to raise the plea that Brojonath had no right to mortgage the land. In my opinion he cannot do so.

Section 116 of the Evidence Act lays down that no person, who comes upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Here the mortgagee came upon the land by license of the mortgagor and he cannot now be heard to deny the title of the mortgagor.

The same principle is enacted in section 117 of the Evidence Act. I hold, therefore, that the suit has been rightly decreed. The appeal is accordingly dismissed with costs."

DENIBESWAR SARMA BARA THAKUR *v.* BETHORAM SAIKIA.

Babu *Hiralal Sanyal* (with him Babu *Narendra Kumar Basu*), for the Appellant.—The learned Judge holds that the decree of the primary Court should be affirmed but he does not clearly state his reasons for so holding. He has neither entered into the details of the case, nor has he given any reason for his decision on the issues he has considered. He ought to have decided all the issues necessary for the decision of the appeal and assigned some reasons for his decision, and under Order XLI, rule 31, of the Civil Procedure Code of 1908 he is bound to do so. The learned Judge says that under section 116 of the Evidence Act the defendant is estopped from questioning the title of his mortgagor. But the learned Judge has overlooked the fact that the defendant is not questioning the title of his mortgagor. He is disputing the title of the plaintiff who has derived his title from Brojonath, who, the defendant says, had no right or authority to confer any title on the plaintiff, inasmuch as Brojonath was not the heir or legal representative of Kaliprosad. But the learned Judge has not at all touched the question of the validity of title of the plaintiff, although he should have done so.

Then again the appellant also contended in the lower Courts that he was entitled to add to his mortgage money the sum of money he had spent in the shape of payment of Government revenue and other public demands. But the learned Judge is silent on that point also. On the whole the judgment of the lower Appellate Court is very unsatisfactory and it has been given in contravention of the provisions of Order XLI, rule 31, Civil Procedure Code.

Babu *Satindra Nath Mukerjee* (with him Babu *Manmatha Nath Mukherji*), for the Respondents.—The judgment of the lower Appellate Court is a judgment of affirmance and the learned Judge has considered that the decision of the primary Court should be upheld for reasons stated in the judgment of the Munsif. So the defendant has not in any way been prejudiced by the fact that the learned Judge has not assigned any reason for his decision. He considers that the reasons set forth in the judgment of the Munsif are sufficient, and having accepted them he dispensed with the repetition of these reasons in his judgment. It is only in a judgment of reversal that it is necessary for the Judge to state the reasons for his decision, but in affirming the judgment of the lower Court the Appellate Court may adopt the reasons set forth in its judgment as sufficient, and need not always repeat them. I submit that the objections taken by the defendant are frivolous, and the lower Appellate Court is quite right in holding that the defendant is estopped from taking such objections.

JUDGMENT.—In this case we are of opinion that the judgment of the lower Appellate Court is not in accordance with law. In stating the point for determination the learned District Judge remarked that it was whether the suit had been rightly decreed and gave his opinion that the answer to this was in the affirmative. He then deals with the question of estoppel under section 116 of the Evidence Act, which does not arise in the way in which he has dealt with it. The issues raised in the first Court were quite explicit and showed what the real points at issue between the parties were. Section 116 of the Evidence Act would have no application to the point whether the plaintiff has made out his title to redeem this land by virtue of his purchase from Brojonath. The other points have not been touched by the learned District Judge, *first*, whether the mortgage was valid and, if not, what would be the rights of the parties; *secondly*, whether Kaliprosad was a lunatic and Brojonath could act as his guardian, and *thirdly*, whether Brojonath was the brother and the heir of Kaliprosad or not. There admittedly were other points raised by the appellant into which the Court of First Instance also did not go.

We think that the judgment and decree of the lower Appellate Court must be set aside and the appeal re-heard, the whole matter being open to the Judge who hears the appeal. Costs of this appeal will abide the result.

*Decree set aside; Case remanded.*

BALAKRISHNA UDAYAR *v.* VASUDEVA AIYAR.

## PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 21, 1917.

*Present*:—Viscount Haldane, Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

T. A. BALAKRISHNA UDAYAR—APPELLANT

*versus*

VASUDEVA AIYAR—RESPONDENT.

*Religious Endowments Act* (*XX of* 1863), *ss.* 7, 8, 9, 10, 14—*Religious Endowments—Appointment of member of Committee—Appointment by Civil Court, whether administrative or judicial act—Civil Procedure Code* (*Act V of* 1908), *s.* 115—*High Court, revisional powers of, extent of—"Case," meaning of.*

Section 10 of the Religious Endowments Act, 1863, does not appear to empower a Civil Court to direct the remaining members of a Committee appointed under that Act, when they have failed to hold an election for the choice of a new member, to hold such an election. It can direct them to fill up the vacancy, but such filling up is then their own act. [p. 654, cols. 1 & 2.]

A proceeding of the Civil Court under this section is a judicial and not merely an administrative or ministerial act. In such matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal Tribunal. [p. 653, cols. 1 & 2.]

Section 115 of the Code of Civil Procedure enables the High Court, in a case in which no appeal lies, to call for the record and to pass such an order in the case as the Court may think fit. The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it or the illegal assumption of it, it is not directed against conclusions of law or fact in which jurisdiction is not involved. [p. 652, col. 2; p. 653, col. 1.]

The word "case" is not defined in the Code. It cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court, and includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. It includes, therefore, proceedings under section 10 of Act XX of 1863. [p. 653, col. 2.]

Appeal against an order of the High Court of Madras, reversing that of the District Judge, Tanjore.

FACTS of the case are sufficiently stated in their Lordships' judgment.

Messrs. *De Gruyther*, *K. C.*, and *J. H. C. Sproule*, for the Appellant.—The whole scheme of Act XX of 1863 is that the persons interested in a religious endowment should have, in the first place at all events, the right to elect when there is a vacancy in the Managing Committee. Section 10 is imperative: the new member "shall be elected." I submit the District Judge has power to make the Committee hold an election to do what they ought to have done.

*Secondly*, I submit that the District Judge's order was not a judicial proceeding and hence was not triable in revision by the High Court under section 115 of the Civil Procedure Code: *Minakshi Naidu* v. *Subramanya Sastri* (1).

This is not a "case" which has been "decided" within the meaning of section 115. "Case" means "suit" or proceeding in a suit: *Subbier* v. *Abboy Naidu* (2).

Mr. *Sproule*, followed :- The first order of the District Judge was merely a direction to "fill up" the vacancy. There is no reason why the Committee should not hold an election first and co-opt in accordance with it; it is they who "fill up" the vacancy.

Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*, for the Respondent, were not called upon.

### JUDGMENT.

LORD ATKINSON.—This is an appeal from a judgment and order of the High Court of Madras, dated the 23rd September 1913, setting aside an order of the District Judge of Tanjore, dated the 19th July 1913, by which the appellant was appointed a life member of the Devasthanam (Temple) Committee of Negapatam. This order of the District Judge purports to have been made, in the events which had happened, in exercise of the powers conferred upon him by section 10 of Act XX of 1863, The Bengal and Madras Native Religious Endowments Act.

That section runs as follows :—

"Whenever any vacancy shall occur among the members of a Committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the Committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested as above provided,

(1) 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18.

(2) 31 Ind. Cas. 502; 29 M. L. J. 671; 18 M. L. T. 469; 2 L. W. 1099.

under rules for elections which shall be framed by the Local Government, and whoever shall be then elected, under the said rules, shall be a member of the Committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the Committee, with which order it shall then be the duty of such remaining members to comply, and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy."

By the second section the words "Civil Court" and "Court" are defined to mean "the Principal Court of Original Civil Jurisdiction in the district in which the mosque, temple, or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act." It would appear that, if the endowments of the temple be situate in districts other than that in which the temple or religious establishment is itself situated, different Courts may in relation to it and its affairs be Civil Courts within the meaning of this definition. Moreover, it is to the Civil Court and not to an individual Judge who may preside in, or constitute the Civil Court that jurisdiction is given.

A vacancy occurred in the above-mentioned Committee by the death, on the 3rd May 1912, of the Hon'ble Dewan Bahadur R. Raghunatha Rao, C. S. I. The Committee did not hold any election of a member to fill this vacancy. On the contrary, they on the 20th June 1912 directed their managing member to request the then District Judge of Tanjore, Mr. A. F. G. Moscardi, to nominate, in exercise of the powers conferred upon him by the above-mentioned section, a person to serve upon the Committee. That request was duly made by the managing member by letter addressed to the District Judge on the 16th July following.

The District Judge, having considered this letter, made an order on the 1st October 1912, requesting the managing member to report "if there was any reason why the Court should not order that the vacancy should be filled up by election, as provided in section 10 of the Act." It is clear from this letter that the District Judge considered he had under the Statute jurisdiction to order the Committee to hold an election of a member in order to fill the vacancy; and though an order which he subsequently made upon the 6th January 1913, is very guarded in its terms it has been assumed that he meant to exercise this jurisdiction.

On the 21st October 1912, the managing member replied to the District Judge's communication of the 1st October 1912, forwarding a copy of a resolution passed by the Committee in the previous June to the effect that they would not hold an election, and renewing the request to the Judge to nominate a member. On the 2nd January 1913, the present respondent, in the character of a person interested, filed a petition in the District Court praying the Court to fill up the vacancy in the Committee by nomination, on the ground that the list of voters was stale, and that delay would occur in preparing a new list. The same District Judge, Mr. Moscardi, made on this petition the order already referred to of the 6th January 1913. On the face of the order it is set forth that it was argued —

"that the intention of the Legislature in section 10 of the Act was clearly that such vacancies should be filled by the Committee by election, and only in the last resort by the Court."

It is also pointed out that—

"the Committee had a voters' list drawn up so recently as 1909; that there was no reason why an election should not be held in this case... ..and no.....reason was urged why the provisions of section 10 of the Act should not govern this case."

The last paragraph of the order runs thus:—

"It is clear to me that it is the duty of the Committee to fill up the vacancy by election, and that there is no obstacle preventing them from doing so. I, therefore, order that the vacancy be forthwith filled up by the remaining members of the Committee. Time, three months."

It will be observed that it is not stated explicitly in this order by what process the Committee are to fill up the vacancy, whether by election or by nomination or co-option. The members of the Committee, however, owing possibly to the matters already referred to set forth on the face of the order, came to the conclusion that by it they were directed to hold an election which, on the 24th Mach 1913, they accordingly did The appellant was the only candidate; 1,745 votes were recorded for him. The Committee thereupon declared him duly elected and reported the result to the District Court.

About this time a new Judge, Mr. C. G. Spencer, was appointed to the District of Tanjore, and during the months of April and June certain applications were made to him with which it is quite unnecessary to deal.

Four petitions were then presented to the District Court, one bearing date the 23rd June 1913 by the present appellant, praying that it might be declared that his election was valid, and that he might be permitted to perform his duties; one of the same date by the present respondent, alleging that the election was void, and praying that the Court might, by its own nomination, fill the vacancy, and two bearing the respective dates of the 17th May 1913 and 18th July 1913, by one Dakshinamoorthi Pillai, praying that the election might be declared void for several reasons, including amongst others the alleged defective nature of the voters' lists.

On the 19th July 1913 the District Judge, Mr. C. G. Spencer, dealt by one order of that date with the matters of these four petitions, and decided that the election of the present appellant was regular, and accepted him as a member of the Committee, on the ground that upon the true construction of the 10th section of the aforesaid Act of 1863, the words, "or may order that the vacancy be forthwith filled up by the remaining members of the Committee," must be taken to mean by implication "filled up by the members of the Committee by election," since that is the mode prescribed in the earlier portion of the section for filling up a vacancy by them. It will be observed that this order is based upon the assumption that the earlier order of Mr. A. F. G. Moscardi of the 6th January 1913 was in effect an order directing the Committee to fill up the vacancy by holding an election, and that it was understood and acted upon by them as such.

The present respondent upon the 6th August 1913 presented a petition to the High Court asking for a revision of this order under the 115th section of the Code of Civil Procedure, to which he made the present appellant and the Temple Committee respondents. On the application coming on for hearing, a preliminary objection was raised that a petition for revision of the adjudication of the District Court did not, on the legal construction of the Statute in such a matter as that dealt with in section 10 of the Act of 1863, lie.

The High Court held that this objection failed, and proceeded to deal with the merits of the application. In reference to them they held that, according to the true construction of the 10th section, the District Court had no jurisdiction whatever to order the remaining members of the Committee (as it was taken it had ordered them) to fill up the vacancy by means of an election, or to validate the filling up of it by these means in obedience to such an order, and ordered that the order of the District Judge, Mr. Spencer, dated the 19th July 1913, should be set aside, as made without jurisdiction, and that the case should be sent back to be dealt with by the District Court by the light of this judgment.

On the hearing of this appeal both these points have been raised and argued. In their Lordships' view the decision of the High Court was on both points right, and they fully concur in and approve of it.

As to the preliminary objection. The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity, and further

enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie.

The act of the District Court complained of in the present case was an adjudication by it that the present appellant having been elected in pursuance of an order of the Court was a member of the Committee. The words of the Statute are: "And whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy." If the election be valid and regular, the person elected becomes a member of the Committee without any consent or approval being given by the District Court. It is contended, however, that the making of this order, necessarily involving, as it does, the construction of the Statute a pure matter of law—is not a judicial, but merely an administrative or ministerial act. A key, it would appear to their Lordships, as to the true position of the Civil Court under this 10th section may be found by referring to the position it occupies under the immediately preceding and some of the succeeding sections of the Act. Section 9 provides that every member of a Committee appointed under sections 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court. Surely in such a question as the amotion of an officer from his office for misconduct or unfitness, the Court which makes the order removing him is exercising judicial functions? Any order made in such a matter in disregard of the requirements of natural justice, such, for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself, would clearly be voidable or void.

Again, under section 14, any person may sue in this Civil Court the manager or superintendent of the mosque or the members of this very Committee for breach of trust or misfeasance. And the Court might decree specific performance of any acts to be done by either of these functionaries, might award damages against him, or might remove him from office. Under section 16 the Court, in a suit pending before it, might refer the matter to arbitration.

It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal Tribunal.

It was next contended that the matter of the four petitions in which the order of the 19th July 1913, (was passed *sic.*) did not constitute a "case" within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word "case." It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th section of the Code.

The case of *Minakshi Naidu* v. *Subramanya Sastri* (1) decided by this Board is wholly different from the present. There the District Judge had, under this section 10, by his order appointed the appellant to fill a vacancy in the Temple Committee. An appeal was taken from this order, on the ground of the appellant's unfitness for the post by reason of his religious belief. The question of the jurisdiction of the Civil Court to make the order was not raised. It was not pretended that a right of appeal—which, if given at all, must be

given by Statute—was given by Act XX of 1863; but it was contended that it was given by the 540th section of Act X of 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction. The definition of the word "decree" given in this Act is modified by Act XII of 1879, and, as modified, runs as follows:—

"'Decree' means a formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court where such adjudication decides the suit or the appeal."

Well, it is obvious that an order made by the Civil Court on an application which may be made by "any person whatever," appointing a particular man to fill a vacancy on a Committee, is not a "decree" within the meaning of this definition. The Board, on that occasion, carefully abstained from expressing any opinion upon the question whether proceedings, somewhat in the nature of *quo warranto*, could be taken to remove a person improperly appointed.

On the point of substance on the merits it was next contended that when a vacancy amongst the members of a Committee occurs the Statute imposes upon the remaining members a statutory duty to hold, within three months from the date of the vacancy, an election in the manner provided by the rules for the choice of a new member to fill this vacancy, and that if these members fail to discharge this statutory duty the jurisdiction of the Court is in the first instance confined to either itself appointing a person to fill the vacancy, or to making an order, somewhat in the nature of a *mandamus*, to compel them to perform their statutory duty. Well, in the first place it is admitted that the section does not expressly provide anything of the kind, and in the next place some of its provisions make it impossible to imply anything of the kind.

In the case of an election, public notice must be given as soon as possible after the occurrence of the vacancy, and the election must be held within three months after that date; but the order of the Court requiring the remaining members of the Committee to forthwith fill up the vacancy may not be made till long after this period of three months has elapsed. It would in such a case be impossible to fulfil the statutory condition as to the time for holding the election. Again, the order is to be to the effect that these members shall forthwith fill up the vacancy, which seems to exclude all the delays contemplated where an election is held; and again where an election is held the remaining members of the Committee merely act as the returning officer. They do not in any sense fill up the vacancy. The electors elect a person to be the new member, and upon his election by them he, according to the Statute, "shall be a member of the Committee to fill the vacancy." If in such a case the vacancy can properly be said to be filled up by anybody, it is by the electors rather than by the remaining members of the Committee that this is done, whereas the order to be made in case of their default contemplates, and indeed directs, that these members themselves are to fill up the vacancy. The filling of it up is to be their act. It is to be done by them forthwith, without the aid or intervention of any electors or other persons, and it would appear to their Lordships it must be an act kindred in character to that which the Court itself may do, namely, appoint a person to fill the vacancy. It was also urged that if this construction of the section be adopted it would enable the remaining members of the Committee, by their own default, practically to disfranchise the electors, and at the discretion of the Court possibly procure the patronage for themselves. That no doubt is so, and before a legislative body empowered to amend the Statute, it might furnish a powerful argument for its amendment; but the function of this Board is to declare the law, not to alter it, and the argument cannot, therefore, here avail. In addition it is to be remembered that where the Civil Court appoints, the electors are by and through the same default of the same members of the Committee equally disfranchised, yet that is expressly authorised by the Statute. The Court must be trusted not to confer upon these members by its order the power to appoint where the nature and circumstances of their default show that they are unworthy

of being trusted with the privilege of appointing a member. Their Lordships are for these reasons of opinion that the decision appealed from was right, that the appeal fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

*Appeal dismissed.*

Solicitor for the Appellant : Mr. *O. A. Cayley.*

Solicitor for the Respondent : Mr. *Douglas Grant.*

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 78 OF 1915.

March 9, 1917.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

JHARU CHARAN MAITY—PLAINTIFF—APPELLANT

*versus*

SRIDAM CHANDRA MAHAPATRA—DEFENDANT—RESPONDENT.

*Landlord and tenant—Tenant paying rent to landlord after interest transferred—Bengal Tenancy Act (VIII B. C. of 1885), s. 72—Transfer of Property Act (IV of 1882), s. 50.*

A payment of rent by a tenant to his landlord after the latter's interest has been transferred is valid as against the transferee, unless the transferee has before the payment given notice of the transfer to the tenant, even though such payment is not made in good faith within the meaning of section 50 of the Transfer of Property Act.

Appeal against the decree of Mr. Justice Newbould, dated the 23rd April 1915, in Appeal from Appellate Decree No. 1983 of 1913.

Babus *Mohendra Nath Roy* and *Surendra Nath Guha*, for the Appellant.

Babu *Gour Mohan Dutt*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould in a suit for arrears for rent. The plaintiff-appellant is the usufructuary mortgagee from the second defendant, and is, under the terms of the mortgage contract dated the 5th July 1910, entitled to possession. The first defendant is the actual cultivator who holds under the second defendant under a lease dated the 2nd May 1904. The plaintiff brought this suit to recover from the first defendant arrears of rent which had accrued due after the date of the mortgage. The first defendant pleaded that he had paid the rent to his landlord, the mortgagor second defendant. The Court of First Instance decreed the suit. The District Judge has reversed that decision and dismissed the suit; his decree has been affirmed on second appeal to this Court. It is plain that in view of the provisions of section 72 of the Bengal Tenancy Act, the plaintiff is not entitled to succeed. Under sub-clause (1) of that section a tenant shall not, when his landlord's interest is transferred, be liable to the transferee for rent which became due after the transfer and was paid to the landlord whose interest was so transferred, unless the transferee has before the payment given notice of the transfer to the tenant. It has been found that the plaintiff did not give the requisite notice to the tenant in the case before us; there is thus a complete answer to the claim and we need not consider whether the first defendant paid the arrears of rent to the second defendant in good faith within the meaning of section 50 of the Transfer of Property Act.

The result is that this appeal is dismissed with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1431 OF 1915.

February 22, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

VEMA RANGIAH CHETTY—DEFENDANT—APPELLANT

*versus*

V. M. VAJRAVELU MUDALIAR—PLAINTIFF—RESPONDENT.

*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 7—'Apportionment of rent', meaning of—Suit for apportioned rent on fraction of demised premises—Jurisdiction of Small Cause Court—Transfer of lessor's interest, effect of—Right to rent after transfer, when amount payable on fixed dates—Transfer of Property Act (IV of 1882), ss. 36, 2 (d)—High Court—Civil Procedure Code (Act V of 1908), s. 102—Appeal, second.*

Per *Sadasiva Aiyar, J.*—A suit for arrears of rent due under a lease after an apportionment has been

made, in consequence of the interest of the lessor having been transferred in portions of the demised premises, either by simultaneous agreement between the parties or by one party with the consent of the other, is not a suit for apportionment coming under clause 7 of Schedule II of the Provincial Small Cause Courts Act. [p. 658, col. 2.]

Even if the apportionment was made only by the plaintiff and he alleges it to be an equitable apportionment binding on the defendant, a suit which prays for the recovery of a definite sum cannot be called a suit for an apportionment of rent. [p. 658, col. 2.]

The nature of the plaintiff's suit has to be found from the relief claimed by him and the fact that the Court may have to give findings as to the proper apportionment of rent does not alter its character. [p. 659, col. 1.]

Where the apportioned rent claimed is below Rs. 500 there is no right of second appeal. [p. 659, col. 1.]

Per *Spencer, J.*, (dissenting.)—Article 7 of Schedule II of the Provincial Small Cause Courts Act takes it out of the power of a Small Cause Court to adjudicate upon a question of what is a fair and equitable rent to be paid by a tenant to his landlord, having regard to the yield, fertility and extent of a holding and similar considerations, which is rather within the province of a Revenue Court for estates or a Court of original jurisdiction in other cases. [p. 657, col. 2.]

A decision on what would be a fair and proper proportion out of a whole rent to a fraction of demised premises in consequence of the lessor ceasing to have an interest in the remainder is beyond the cognizance of the Small Cause Court. [p. 657, col. 2.]

All rents are, upon the transfer of the interest of the lessor, to be deemed to accrue due from day to day. [p. 657, col. 2; p. 658, col. 1.]

Where, before the date on which the rent becomes payable, the lessor ceases to have an interest in the land leased, he has no claim for rent subsequent to that date as there is no privity of interest between himself and the tenant. [p. 658, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 142 of 1914 (Appeal Suit No. 342 of 1914 on the file of the District Court of North Arcot), preferred against that of the District Munsif, Sholinghur, in Original Suit No 140 of 1913.

FACTS of the case appear from the judgment.

Mr. *K. V. Adiga* for Mr. *K. P. Lakshmana Rao*, for the Respondent, took an objection that the suit was of a Small Cause nature and no second appeal lay.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.—The lease amount is for three years of the two villages. One of the villages did not belong to the lessor. Suit is to recover the rateable amount due on the other village. The suit is for an apportionment of rent and is, therefore, not cognizable by a Small Cause Court under clause 7 of Act IX of 1887.

[SPENCER, J.—How does it alter the fact that it is rent?]

This is in effect a suit for an apportionment. Clause 7, Schedule II, clearly provides for it. *Gopee Nath Ghose* v. *Kedar Nath Chuckerbutty* (1). Lease was from 1901 to 1911. In 1907 lands passed out of the lessor's possession. He claims rent for the other village decreed to him.

[SPENCER, J.—Apportionment means permanent apportionment and not merely fixing the amount.]

In respect of his claim of a particular year when the High Court found that he is entitled to a portion of the year, he cannot claim an apportionment under section 36 of the Transfer of Property Act. And section 2 of the Transfer of Property Act excludes its applicability to transfers by Court sales.

Mr. *K. V. Adiga*.—In *Gopee Nath Ghose* v. *Kedar Nath Chuckerbutty* (1) the suit itself was for apportionment.

[SPENCER, J.—How can he get his recovery without an apportionment?]

The nature of the suit must be determined from the plaint. Section 36 of the Transfer of Property Act has no reference to one between landlord and rent.

Mr. *T. Muthukrishna Aiyar*.—Here the apportionment is between two villages. Last two instalments fell due on 15th February 1908 and 5th October 1908.

Sale takes effect from that date. *Satyendra Nath Thakur* v. *Nilkantha Singha* (2), *Mathewson* v. *Shyam Sunder Singa* (3).

Section 2, clause (*d*), does not apply.

Mr. *K. V. Adiga*.—In section 36, Transfer of Property Act, there is a clear apportionment of rent day by day and, therefore, it is apportioned from day to day.

[SADASIVA AIYAR, J.—The term apportionment is generally used in connection with the fixing of rent for all time to come. Here you claim a particular sum of money

(1) 23 W. R 426.
(2) 21 C. 383; 10 Ind. Dec. (N. S.) 886.
(3) 33 C. 786.

due for a particular period. The suit is, therefore, not one for an apportionment and, therefore, not excluded from the jurisdiction of the Small Cause Court.

Mr. *K. Y. Adiga*.—The nature of relief is to be found from the terms of the plaint. *Vira Pillai* v. *Rangasami Pillai* (4), *Chilukuri Sitaramayya* v. *Venkata Rangayya Appa Rao* (5) are clearly in my favour.

Mr. *T. V. Muthukrishna Aiyar*.—Clause 7 is intended to decide questions as between landlord and tenant and has no application to cases arising under a lease like this. The rent is here due upon a lease and if the landlord ceases to have an interest in a particular year, he is entitled to claim a proportionate share in the rent.

JUDGMENT.

SPENCER, J.—This suit was brought to recover the lease amount of fruit trees in certain forests. A preliminary objection has been raised that no second appeal lies, as the suit is of a small cause nature. The appellant's Vakil answers this objection by a reference to Article 7 of the Second Schedule of the Provincial Small Cause Courts Act, which exempts suits for the assessment, enhancement, abatement, or apportionment of the rent of immoveable property. From the definition of "rent" in section 105 of the Transfer of Property Act and from the definition of "immoveable property" in the General Clauses Act, and from the use of the word "apportionment" in section 36 of the former Act, I have little hesitation in thinking that the Article in question covers a suit of this nature. Where, as here, there has been a transfer of a part of the lessor's interest through a decree of Court, the application of section 36 is excluded by section 2 (*d*) of the same Act [*vide Mathewson* v. *Shyam Sunder Sinha* (3)]. But in order to determine what legal significance should be given to the word "apportionment," we may look to the section and see in what sense the word is used where it occurs in other enactments.

Where a definite extent of land is leased for a certain term upon a rent for a fixed sum and the lessor brings a suit upon his contract, I do not think that the jurisdiction of the Small Cause Court would be taken away by Article 7, merely because the liabilities of more parties than one would have to be adjusted by an arithmetical calculation before the Court could arrive at a decision in the suit. But from the whole tenor of Article 7, I think it was intended to take it out of the power of a Small Cause Court to adjudicate upon a question of what is a fair and equitable rent to be paid by a tenant to his landlord, having regard to the yield, fertility and extent of a holding and similar considerations, as that is rather within the province of a Revenue Court for Estates or a Court of Original Jurisdiction in other cases [*vide Gopee Nath Ghose* v. *Kedar Nath Chuckerbutty* (1)]. Now in the present case, the original lease covered the forest produce of two villages, Maharajapuram and Nissangadurgam. By a decree in another suit the plaintiff lost his title to Nissangadurgam, and, therefore, in this suit the District Munsif had to decide under the first issue what would be a fair and proper proportion out of the whole rent to be allotted for the produce of the Maharajapuram forests, when the relative value of the produce of the trees in each village had not been ascertained. He decided that the plaintiff's demand for one-third of the whole rent was not excessive under the circumstances.

In doing so he went further than a Small Cause Court having pecuniary jurisdiction over the suit could have gone. I would, therefore, disallow the respondent's objection.

I proceed then to the merits of this appeal.

On the admissions and findings of fact it appears that the lease was for ten years from 1901, that the year began on February 27th and ran till February 26th of the next calendar year, that rent was payable in three instalments each year, *viz.*, on May 15th, November 15th and February 15th, and that the plaintiff's title to the village of Maharajapuram was determined by the confirmation in December 1907 of the sale in Court auction in execution of a decree.

I consider that the Subordinate Judge was right in his view that all rents are

(4) 22 M. 149; 8 Ind. Dec. (N. S.) 106.
(5) 31 Ind. Cas. 871.

upon the transfer of the interest of the lessor, to be deemed to accrue due from day to day. *Vide Lakshminaranappa* v. *Melothraman Nair* (6) and *Randipurazil Kunhisow* v. *Alukandiyil Parkum Mulloli Chathu* (7).

No doubt in a suit between the lessor and the assignee of his interest, the lessor would be entitled to have the rent apportioned between them according to the duration of their respective titles, irrespective of the dates when the rent became payable by the tenant. But the lessee was under his contract not liable to pay the instalments before the dates appointed for the payment thereof. Therefore the plaintiff was by his contract entitled to collect the instalments which fell due on May 15th and November 15th, 1907. But as his ownership ceased in December, there was no privity of estate between him and the lessee thereafter. Accordingly he was not entitled to recover from the lessee the amount which fell due on February 15th, 1908, and the lessee, who produced a receipt (Exhibit I) for the rent of *Fasli* 1317 paid to the purchaser at the Court sale, could claim that he had a good discharge for the third instalment of the year 1907-1908.

I need not discuss the other contentions of the appellant as they must fail on the findings of fact of the lower Courts.

In the result I hold, that instead of the plaintiff getting a decree for 10/12ths of the rent for 1907-1908, which amounts to 10/12ths of Rs. 116-10-6 or Rs. 97-3-0, and interest thereon, he should for that year be given a decree for the first two instalments, that is, twice Rs. 38-14-2 or Rs. 77-2-4 and interest at the rate allowed in the lower Court.

SADASIVA AIYAR, J.—I regret that on the question of the nature of the suit as one of a Small Cause nature, I find myself unable to agree with the judgment just now pronounced by my learned brother.

I shall quote portions of the plaint to establish what I consider to be the nature of the suit.

"5. It was decided in Original Suit No. 131 of 1901 on the file of the District Munsif's Court of Sholinghur that the plaintiff has no right to Nisangadurgam village and forest included in the aforesaid properties. By virtue of the said decision, the plaintiff claims only a rateable amount, *viz.*, one-third of the lease amount, *i.e.*, Rs. 116-10-8 for Damodara Maharajapuram village enjoyed by the defendant's father."

"7. Ramaswami Chetty, the defendant's father, settled the lease amounts up to 1904" (at the above rate of Rs. 116-10-8 per year) "in respect of Damodara Maharajapuram village enjoyed by him." "Therefore the plaintiff prays that the Court may be pleased to pass a decree for the amount of Rs. 319-4-3" made up of the instalments of rent due in 1906 1907 and 1908 with interest.

Now it seems to me clear from the plaint that the plaintiff's contention was that the proper apportionment of rent of the Damodara Maharajapuram village was Rs. 116-10-8 per year, that the defendant's father accepted that as the proper apportionment and that he paid rent for Damodara Maharajapuram village and forest at the rate of Rs. 116-10-8 from 1901 (the date of the rent deed Exhibit A) till 1904. I am, therefore, unable to hold that this is a suit for apportionment coming under clause 7 of the second Schedule of the Provincial Small Cause Courts Act. It is really a suit for arrears of rent due after the apportionment had been made either by simultaneous agreement between both parties or by one party with the consent of the other. Even if it was an apportionment which was made only by the plaintiff but which the plaintiff alleges to be an equitable apportionment binding on the defendant, still the suit is only a suit for recovery of the arrears of such apportioned rent and not for apportionment. Apportionment may be (*a*) as regards rents of different periods of time or (*b*) as regards rents due by portions or fractions of the demises. But whatever be the share of the original rent which would be due by the defendant on an equitable apportionment, a suit which prays for the relief of the recovery of a definite sum as the share of arrears of such rent due to the plaintiff cannot be called a suit for an apportionment of the rent. In

(6) 26 M. 540.
(7) 17 Ind. Cas. 933; 38 M. 86; 23 M. L. T. 695.

JATINDAR NATH BOSE *v.* MAHAMMAD MALLIK.

*Vira Pillai* v. *Rangasami Pillai* (4), a suit for the recovery of rent at an enhanced rate from a tenant holding over (the enhanced rate having been fixed by the plaintiff himself as damages for use and occupation) was held not to be a suit for assessment or enhancement of rent falling under clause 7. The nature of the plaintiff's suit has to be found from the relief prayed for by him, and the only relief prayed for in the present suit is the recovery of a sum of money claimed to be due as rent to the plaintiff. Even if the Court has to give findings as to the proper apportionment of rent to be paid for the plaint land, still it is a suit for the recovery of such a rent. As pointed out in *Chilukuri Sitaramayya* v. *Venkata Rangayya Appa Rao* (5), a suit for enhancement of rent seems to mean a suit for a "declaration by the Court as to what the proper rent is, payable by the tenant in all years to come." In that case, it was held that a suit for enhanced *kattubadi* was not a suit for enhanced rent under clause 7 of the 2nd Schedule of the Provincial Small Cause Courts Act and that hence no second appeal lay when the claim was below Rs. 500. I think the above decision is a direct authority on the present question. The Court's duty to pronounce incidental findings on questions *which* a Small Cause Court cannot finally determine has never been held to change the character of the suit, if the substantial relief prayed for makes the suit one of a Small Cause nature. In the result, I would hold that no second appeal lay and I would accordingly dismiss the second appeal. Even if we allow the second appeal to be amended as a revision petition under section 115 of the Civil Procedure Code, such revision petition would also have to be dismissed with costs, no question of jurisdiction or acting illegally or with material irregularity being involved. I shall not express any final opinion on the difficult question whether plaintiff is legally entitled to ten-twelfths or only two-thirds share of the rent claimed.

BY THE COURT.—Under section 98 of the Civil Procedure Code the second appeal is dismissed with costs.

*Appeal dismissed.*

V.R.P.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2648 OF 1915.

June 7, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

JATINDRA NATH BOSE AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

MAHAMMAD MALLIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 11—*Estoppel—Landlord and tenant—Decision in rent suit that there is no relationship of landlord and tenant—Suit for* khas *possession by landlord*—Res judicata.

In a suit for rent in which the only issue was whether the relationship of landlord and tenant subsisted between the parties, it was found that the plaintiff had failed to prove such relationship. Thereupon the plaintiff brought a suit to recover possession of the land from the defendant on the allegation that the defendant having in the previous rent suit denied the relationship of landlord and tenant, the plaintiff was entitled to recover *khas* possession:

*Held*, that the Court was precluded by the estoppel created by the decision in the rent suit, from finding that the plaintiff was the landlord, so that the plaintiff's suit for *khas* possession must fail. [p. 660, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Nadia, dated the 12th July 1915, affirming that of the Munsif, Ranaghat, dated the 4th June 1914.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"This appeal arises out of a suit for declaration of title and *khas* possession of a plot of land or in the alternative to assess fair and equitable rent. The plaintiffs allege that the land formed part of the *jama* belonging to Roslat and Moslat, two brothers. Plaintiffs are the sons of Roslat while Moslat's heirs were made *pro forma* defendants in the suit. The *jama* was sold in auction and purchased by one Dwarika Bose who again sold it by a *kobala* to Roslat and his brother in *Bhadra* 1275. That the disputed $1\frac{1}{2}$ *bighas* of land was taken settlement by Baranashi Bose, the predecessor of the defendants from plaintiff's predecessor Roslat at a *jama* of Re 1-8-0 per annum. That subsequently the plaintiffs brought a rent suit against the defendants for their half share of the rent of this land, in which the latter denied the relationship of landlord and tenant. So the rent suit was dismissed, hence the plaintiffs

cause of action arose. The defence is that the land is *khas* land of the defendants who are the landlords, that no settlement was taken by the predecessor of Baranashi from Roslat and no rent was realized by him or the plaintiffs and that the suit is barred by limitation.

The Court below found that the plaintiffs have got title to the land, which was let out to defendants' predecessor by plaintiffs' predecessor, so it decreed the suit but disallowed the prayer for *khas* possession. It ordered that the plaintiffs are entitled to receive 12 annas rent from the defendants in their 8-annas share.

The defendants, therefore, preferred this appeal.

The points for determination are:—

1. Have the plaintiffs title to the land in suit?

2. Is the suit barred by limitation?

* * * * *

So I find agreeing with the learned Munsif that the plaintiffs' title to the land is clear.

Conceding for argument's sake that there was non-payment of rent by the defendants to the plaintiffs, when once their predecessor admitted the tenancy by *Chit* Exhibit 2, it will not be extinguished. There is the well known principle of law that once a tenant always a tenant and this will stare in the face of such a contention. So I find that the suit is not barred by limitation by adverse possession.

There was an objection taken by the appellant's Pleader, and perhaps for the first time in this Court, that the decision in the rent suit is *res judicata* in the present suit. I am of opinion that it will not be so and the reason is very clear for the issues involved in that suit and the present suit are distinct.

The result, therefore, is that the appeal be dismissed with costs."

Dr. *Dwarka Nath Mitra*, for the Appellants.—On the findings of the lower Courts the present suit is barred by limitation.

Then the question of the relationship of landlord and tenant is barred by *res judicata*. Relying on the same title the defendants denied in the previous suit for rent brought by the plaintiffs the relationship of landlord and tenant, and the question was thoroughly gone into in the previous rent suit between the parties and was decided in that suit. The identical question decided in this suit was directly in issue in the previous rent suit, and the decision on this point was final and cannot be re-opened again. The case of *Ekabar Sheikh* v. *Hara Bewa* (1) is directly in point. *Murlidhar Supal* v. *Narsingh Das* (2) also supports my contention.

JUDGMENT.—This is an appeal against a decision of the learned Additional Subordinate Judge of Nadia, dated the 12th July 1915, affirming a decision of the Munsif of Ranaghat. The plaintiffs brought a suit to recover possession from the defendants of $1\frac{1}{2}$ *bighas* of land, alleging that they and the *pro forma* defendants were the landlords and that as in a previous rent suit the defendants had denied the fact that the plaintiffs were the landlords, the plaintiffs were entitled to recover possession. In this case the learned Subordinate Judge has found that the plaintiffs were the landlords. Against that Dr. Dwarka Nath Mitra says that in the former suit in which the plaintiffs sued for rent the defendants raised one and only one issue, namely, whether the relationship of landlord and tenant existed between the plaintiffs and the defendants. It was found in that case that the plaintiffs had failed to prove such relationship. It is said, therefore, that it was not competent to the learned Subordinate Judge to find in this case that the plaintiffs were the landlords, because he was precluded from doing so by the estoppel created by the decision in the former rent suit. That statement seems to be well founded. The present case is on all fours with the decision of this Court in the case of *Ekabar Sheikh* v. *Hara Bewa* (1). We follow that decision which is binding on us, and reverse the decision of the lower Courts and direct that the plaintiffs' suit be dismissed with costs in all the Courts.

*Appeal dismissed.*

(1) 8 Ind. Cas. 660; 13 C. L. J. 1; 15 C. W. N. 335.
(2) 10 Ind. Cas. 359; 15 C. L. J. 453; 17 C.W.N. 359.

ANAGRAHIT RAM *v.* SITARAM DAS.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 892 OF 1916.

June 8, 1917.

*Present*:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

ANGRAHIT RAM AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Sri Mahant* SITARAM DAS—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 3—Limitation, question of, whether can be raised at any stage—Court, duty of.*

The question of limitation can by law be raised at any stage of the proceedings and it is always a Court's duty, whether it is raised or not, to see whether the claim is barred. [p. 661, col. 2.]

Appeal from a decision of the District Judge, Shahabad, Arrah.

Messrs. *Fakhruddin* and *Amir Hossain*, for the Appellants.

Messrs. *Raghunath Singh* and *Rajendra Prasad*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit instituted against the appellants who carry on a *gola* business, for money deposited on foot of Sarkhats and which now amounts to a total sum of Rs. 1399-15.

The Subordinate Judge dismissed the suit on the ground that it was not maintainable, the defendants having been adjudicated insolvents under the Presidency Towns Insolvency Act (Act III of 1909).

The plaintiff then preferred an appeal to the District Judge, who found that the insolvency order had been annulled and that the suit was maintainable. He accordingly made a decree for Rs. 1,227-13 against the defendants, and declined to go into the question of limitation. It was contended before him by the defendants that the suit came under Article 59 of the 1st Schedule of the Limitation Act, and that the period of limitation was three years from the date of the loan and that a part of the loan at least, namely that part which was prior to the 4th of August 1911, was barred by limitation.

The plaintiff on the other hand argued that the case came under Article 60 and that the money had been deposited with the defendants as bankers.

The learned District Judge declined to go into the question of limitation, because he said that it had not been raised in the Court below and no cross appeal had been preferred before him. In this he was clearly in error. The point was raised in the written statement. Moreover the question of limitation can by law be raised at any stage of the proceedings and it is always the Court's duty, whether it is raised or not, to see whether the claim is barred. We accordingly when the second appeal first came before us remanded the case to the District Judge to consider the question of limitation, and he has now returned a finding in a judgment dated 7th February 1917, in which he expresses the clear opinion that the account between the plaintiff and the defendants was an account between a customer and his banker and that the deposit was not in the nature of a loan which would come under Article 59. This is a finding of fact which would seem to conclude the case.

But the learned Vakil for the appellants before us submits that the learned District Judge has not directed his mind to the evidence in the case but has merely come to his finding upon the document itself. We cannot assume that the learned District Judge has been entirely unmindful of the evidence in the case. There is nothing to show that he arrived at his finding merely upon the perusal of the Sarkhat. The parties were represented before him by Pleaders and it must be presumed that they placed all the relevant evidence before the learned District Judge.

In these circumstances we do not think we ought to go behind the finding of the learned District Judge and make a fresh remand in order that the evidence in the case may be re-considered. It is found as a fact that receipts and payments were given and made between the plaintiff and the defendants in the capacity of customer and banker till the 19th April 1911, and as the suit was filed on the 17th April 1914 no part of the claim is barred.

The plaintiff is entitled to a decree for interest at the rate of 6 per cent. from the date of the suit till the date of the decree and 6 per cent. thereafter till the date of realization.

The result is that the appeal is dismissed and the cross-objection is decreed. The appellants will pay the respondent the costs of the cross-appeal.

*Appeal dismissed;*
*Cross-objection allowed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1853 OF 1914.

June 19, 1917.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

ABDUL MAJID MIAN AND ANOTHER—DEFENDANTS NOS. 14 AND 15—APPELLANTS

*versus*

BAKSHA ALI AND OTHERS—PLAINTIFFS, *Srimaty* HALIMANNESSA CHOWDHURANI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 138—Possession, suit for, by execution purchaser—Land purchased in possession of third persons—Limitation.*

The purchaser of a land at a sale in execution of a decree cannot, by bringing a suit for its possession within twelve years from the date of sale, save his claim from the bar of limitation, where the land purchased has been in the possession, not of the judgment-debtor, but of the defendants, from before the date of the sale and for a period of more than twelve years under an independent title.

Appeal against the decree of the District Judge, Noakhali, dated the 2nd April 1914, reversing that of the Munsif, Lakhipur, dated the 30th May 1913.

Mr. *A. K. Fuzlul Huq*, for Mr. *Muhammad Mustapha Khan*, and Babu *Atendra Nath Mookherjee*, for the Appellants.

Babu *Ramesh Chandra Sen*, for the Respondents.

JUDGMENT.—The question involved in this appeal is whether the lower Appellate Court was right in holding that the suit was not barred by limitation.

The plaintiff purchased the land in suit in the year 1901 and obtained symbolical possession in 1907. The present suit was instituted on the 18th May 1912. The defendants Nos. 14 and 15 who are the appellants in this Court pleaded that they had obtained a settlement of the land from the landlord in the year 1898 and had been in possession of the land ever since in their own right.



The Court of first instance found that the plaintiff was never in possession and dismissed the suit. On appeal the learned District Judge was of opinion that the suit was not barred by limitation because it was instituted within twelve years of the date of the confirmation of sale.

But if, as the defendants allege, they were in possession of the land from before the date of the sale and for a period of twelve years under an independent title, the plaintiff's claim cannot be saved from limitation merely because he brought the suit within twelve years of the date of the sale. Article 138 of the Limitation Act prescribes a period of twelve years from the date of the sale for a suit by a purchaser of land at a sale in execution of a decree for possession of the purchased land when the judgment-debtor was in possession at the date of the sale. It is necessary, therefore, to find whether the judgment-debtors whose interest the plaintiff purchased at the execution sale was in possession, or whether the defendants Nos. 14 and 15 were in possession from before the date of the sale under an independent title.

The decree of the lower Appellate Court must be set aside and the case sent back to that Court in order that the question may be decided in the light of the observations made above and the appeal disposed of accordingly. Costs will abide the result.

*Decree set aside; Case remanded.*

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## PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 48 OF 1917.

May 18, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

AKHOURI PREM NARAIN AND ANOTHER—APPELLANTS

*versus*

*Musammat* FAHIMUNNISSA AND OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 174, order under—Appeal, whether lies—Dispute between parties to suit.*

Where a decree-holder himself is the auction-purchaser an appeal lies from an order dismissing an application of the judgment-debtor under section 174 of the Bengal Tenancy Act seeking to deposit the money due under the decree. [p. 664, col. 1.]

AKHOURI PREM NARAIN *v.* FAHIMUNNISSA.

Appeal against the decision of the District Judge, Gaya, dated the 7th December 1916, reversing that of the Subordinate Judge, Gaya, dated the 30th August 1916.

Mr. *Kailaspati*, for the Appellants.

Mr. *Mahomed Tahir* for Mr. *Muhammad Mustapha Khan*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This miscellaneous appeal comes before us from a decision of the District Judge of Gaya. The facts are shortly as follows:—

The plaintiff obtained as against the appellant a decree for rent, the relationship of landlord and tenant existing between the plaintiff and the defendant. The holding of the tenant judgment-debtor out of which the arrear of rent was due was put up for sale and the plaintiff purchased it at the sale and became a decree-holder auction-purchaser. The tenant admittedly within the time limited by section 174 of the Bengal Tenancy Act deposited in Court the amount due on foot of the decree, together with the other necessary charges, to satisfy the decree-holder's claim. The defendant applied to the learned Munsif to set aside the sale which had already been held. The Munsif declined to set aside the sale on the ground that the judgment-debtor had not lodged a sufficient amount by way of deposit in Court to satisfy the amount of the decree together with other charges. From the decision of the Munsif there was an appeal to the District Judge of Gaya. The learned Judge found as a question of fact that the amount deposited in Court by the judgment-debtor was ample and sufficient, and that in fact the amount deposited was in excess of the actual amount due under the decree plus other charges to the extent of Rs. 4-12-0. We think the learned Judge was entitled to examine the figures and test whether the calculation made by an officer of the Munsif's Court was correct for the purpose of ascertaining what was the proper sum to be deposited. The learned Judge did examine the figures and he found that the judgment-debtor had discharged and satisfied the obligation imposed upon him by section 174 of the Bengal Tenancy Act.

The second matter which was raised both in the lower Appellate Court and here was the question as to whether an appeal lay from the order of the learned Munsif, refusing to set aside the sale under section 174 consequential upon the deposit made under that section. The learned District Judge held on the authority of the case reported as *Raghubar Dayal Sukul* v. *Jadu Nandan Missir* (1) that an appeal did lie; and accordingly he reversed the order of the learned Munsif, set aside the sale and restored the judgment-debtor to possession of the property.

We have been pressed with the argument that no appeal lies from an order dismissing an application under section 174 of the Bengal Tenancy Act. There is some conflict on the authorities, but the general principle deducible appears to be from the more recent current of decision in the Calcutta High Court that as between a decree-holder and judgment-debtor when the decree-holder becomes the purchaser of the property offered for sale, that then the case is one arising between the parties to the suit and, therefore, an appeal lies under section 47 of the Code of Civil Procedure from an order made under section 174 of the Bengal Tenancy Act. Section 143 of the Bengal Tenancy Act applies in express terms the provisions of the Civil Procedure Code to the special procedure provided for the recovery of rent as between landlord and tenant under the Bengal Tenancy Act, except in so far as the provisions of the Civil Procedure Code may be modified by express rule or the same are otherwise inconsistent with the provisions of the Act itself. Section 43 lays down the procedure that is required to be followed for the recovery of rent and the obtaining of a rent-decree. No doubt as I have said there is some conflict on the authorities touching the question raised for our decision, but I think the law as stated by us is consistent with the principle underlying the current of modern decisions in Calcutta.

Mr. Justice Mullick in this Court in a case reported as *Razi-ud-Din Hossain* v. *Bendeshri Prasad Singh* (2) laid down as follows:—

(1) 13 Ind. Cas. 365; 15 C. L. J. 89; 16 C. W. N. 736.

(2) 36 Ind. Cas. 769.

KANDASAMI NAICKEN v. IRUSAPPA NAICKEN.

"If the application is one entertainable under section 174 of the Bengal Tenancy Act, there is no appeal at all."

That case, however, is distinguishable in its facts from the present case inasmuch as the auction-purchaser was a stranger and not a party to the suit; and clearly we think all the authorities recognise and decide that in a case where an auction-purchaser is not a party to a suit then no appeal lies against an order under section 174, but if he is a party to the suit and is a decree-holder in fact that then section 47 comes into play and an appeal lies, it being a matter arising between the parties to the suit touching the execution, satisfaction or discharge of the decree. Therefore the case decided by Mr. Justice Mullick is distinguishable in its features from the present case. The present case is one as between the decree-holder purchaser and the judgment-debtor. The case reported as *Raghubar Dayal Sukul* v. *Jadu Nandan Missir* (1) expressly decided the point which we have now raised for our decision. The learned Judges in that case at page 92* say: "It was pointed out by this Court in the case reported as *Joytara* v. *Ram Krishna* (3) that the answer to the question whether an order in execution proceedings is within the scope of section 47 of the Code of 1908 must depend upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree and if the decision has been given between parties to the suit, or their representatives-in-interest, the order of the Court falls within the scope of section 47 and is a decree within the meaning of section 2."

The same point was considered in a case reported as *Sital Rai* v. *Nandalal* (4), and the importance of this decision is that it states what the law was with reference to orders made under section 310 (*a*) of the old Code of Civil Procedure, and applies the same principle in the application of the law to orders made under section 174 of the Bengal Tenancy Act. The head-note accurately interprets the effect of the decision as follows:—

"It cannot be affirmed as a general proposition of law either that an order under section 174 of the Bengal Tenancy Act or under section 310 (*a*) of the Civil Procedure Code is or is not appealable. The test is whether the question raised in the proceedings is one relating to execution, satisfaction or discharge of the decree and if the question is of this description, whether it arises between the parties to the suit or their representatives. If it so arises, the order is appealable."

Thus we think that in this case as the matter arose between the parties to the suit, an appeal did lie by reason of the application of the provisions of section 47 of the Code of Civil Procedure to a proceeding under section 174 of the Bengal Tenancy Act. The cases of *Kishori Mohun Roy* v. *Sarodamani Dasi* (5) and *Subh Narain Lall* v. *Goroke Prosad* (6) are no doubt inconsistent with and contrary to the decision arrived at by us in this case, but it undoubtedly appears that both these rulings have been dissented from and overruled by the case reported in 13 Calcutta Weekly Notes 591 [*Sital Rai* v. *Nandalal* (4)], which corresponds with the case cited above in 11 Calcutta Law Journal 202.

We think that the learned Judge was quite right in entertaining the appeal and that he had jurisdiction to do so. We accordingly dismiss this action with costs.

CHAPMAN, J.—I agree.

*Appeal dismissed.*

(3) 7 Ind. Cas. 769; 13 C. L. J. 257; 15 C. W. N. 512.
(4) 1 Ind. Cas. 304; 11 C. L. J. 202; 13 C. W. N. 591.
(5) 1 C. W. N. 30.
(6) 3 C. W. N. 314.

*Page of 15 C. L. J.—*Ed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 954 OF 1915.

January 23, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KANDASAMI NAICKEN—DEFENDANT No. 1—APPELLANT

*versus*

IRUSAPPA NAICKEN AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

*Limitation Act (IX of 1908), ss. 6, 7, 28, Sch. I, Arts. 44, 144—Guardian and ward—Alienation by guardian, suit for cancellation of, and possession—Article applicable to suit—Statutory bar, effect of—Extinction of right—Bar against adult brother, when affects minor under disability—Scope and applicability of s. 7—Alienee, claim of prescriptive title by—Child in womb, rights of—Hindu Law—Civil Procedure Code (Act V of 1908)*

KANDASAMI NAICKEN *v.* IRUSAPPA NAICKEN.

*O. I, r. 1—Non-joinder of minor brother in suit to set aside alienation, effect of.*

An alienation by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in Article 44 of the Limitation Act and till it is so set aside, the title vests in the alienee. [p. 666, col. 2.]

Though Article 44 describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained and is in possession and the ward has, therefore, to add a prayer for possession, Article 44 alone still applies to the suit, though it is brought for both reliefs. [p. 666, col. 2.]

On failure of the ward to sue to set aside the alienation within 3 years of his attaining majority under Article 44 of the Limitation Act, his right to the property is wholly extinguished under section 28 of the Act and title vests exclusively in the alienee from that date. [p. 666, col. 2.]

A person whose right to set aside an alienation is barred under Article 44 cannot avoid it as defendant by denouncing it in a suit for possession brought by the alienee. [p. 666, col. 2.]

Section 7 of the Limitation Act contemplates the existence in two or more persons of a joint right and a joint cause or causes of action in support of a single suit. Where two brothers have got the same cause of action (that is, where all the material allegations giving rise to a right of suit are the same), where the whole right litigated and the nature of the entire claim litigated are the same, and where, under such circumstances, the elder brother could institute a suit for himself and his younger brother on that joint right and joint cause of action, section 7 would become applicable and would bar the younger brother's right when the elder brother's became barred. The mere fact, however, that, under Order I, rule 1, Civil Procedure Code, a person suing for himself and praying for one particular remedy could have joined in that suit another cause of action vesting in his minor brother for whom he could have acted as next friend will not bring the suit within the ambit of the section. [p. 667, col. 2; p. 668, col. 1.]

*Doraisami Serumadan* v. *Nondisami Saluvan*, 21 Ind. Cas. 410; 38 M. 118; 25 M. L. J. 405; 14 M. L. T. 401, explained.

Plaintiff purchased certain lands from the mother of defendants Nos. 2 and 3 in 1893. The vendor described herself in the sale-deed as the guardian of the 2nd defendant alone, who was then 8 years old. The 3rd defendant was in her womb at the time. The 2nd defendant sold the same lands to the 1st defendant in 1908 himself and as guardian of his minor brother, the 3rd defendant. The plaintiff was in possession till 1909, when he was forcibly ejected by the 1st defendant. Plaintiff brought the present suit in July 1912 for recovery of the properties from 1st defendant. The 2nd defendant attained majority in 1903 and the 3rd defendant attained majority about the end of 1911:

*Held*, (1) that as the 2nd defendant's right to sue to set aside the alienation by his mother became barred in 1906, the title vested in the plaintiff and 1st defendant, who acquired no title by *his* purchase, could not oust the plaintiff and that plaintiff was entitled to 2nd defendant's share in the property; [p. 666, col. 2; p. 668, col. 2.]

(2) that as the 3rd defendant was in his mother's womb at the date of sale to plaintiff and the mother did not act as his guardian, the 3rd defendant's rights were not transferred to plaintiff, who could not claim a title by adverse possession; [p. 667, col. 1; p. 668; col. 2.]

(3) that 3rd defendant's right to the property was not extinguished by reason of the 2nd defendant having been barred under section 7 of the Limitation Act, as the interests of the 2nd and 3rd defendants were split up by the sale to plaintiff and were not identical. [p. 668, cols. 1 & 2.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 269 of 1914, preferred against that of the Additional District Munsif, Chingleput, in Original Suit No. 317 of 1913.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Narayanaswami Aiyar*, for the Appellant.

Mr. *K. Bashyam Aiyangar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The 1st defendant is the appellant. The plaintiff sued in ejectment basing his title on a sale-deed of 1893 (Exhibit A) executed to him by the mother of the defendants Nos. 2 and 3. The plaintiff was in possession till 1909, when he was ejected forcibly by the 1st defendant who had obtained a sale-deed from the 2nd defendant in 1908 (Exhibit II). The sale-deed (Exhibit II) was executed by the 2nd defendant for himself and also for the 3rd defendant who was then a minor. The 2nd defendant attained majority in 1903, while the 3rd defendant attained majority about the end of 1911 or the beginning of 1912. The suit was brought in July 1912.

The sale-deed by the mother of the defendants Nos. 2 and 3 to the plaintiff was executed by her as guardian of the 2nd defendant alone, the 3rd defendant (the posthumous son of his father) not having been born then. The statement of the District Judge in paragraph 2 of his judgment that the plaintiff's sale-deed was executed by the mother of the defendants Nos. 2 and 3 *acting as the guardian of both* is clearly an error.

Both the lower Courts have found that the sale-deed of 1893 in favour of the plaintiff was executed for no consideration and that the minor 2nd defendant as

whose guardian his mother executed it got no benefit under it. The District Munsif dismissed the plaintiff's suit.

On appeal the learned District Judge has given a decree in plaintiff's favour on the following reasoning, as I understand his judgment :—

(*a*) The 2nd defendant did not sue to set aside his mother's sale-deed of 1893 within three years of his attaining majority. (The said three years expired in 1906.) Both the defendants Nos. 2 and 3 ought to have sued to set aside such sale within 1906. As they did not do so, they are barred under Article 44 of the Limitation Act from questioning the sale.

(*b*) Even if Article 44 did not apply, Article 144 would have applied to a hypothetical suit for possession if it had been brought by the defendants Nos. 2 and 3 just before the plaintiff was forcibly dispossessed in 1909. Such a suit would have been dismissed as barred, as at that time the plaintiff had been in possession for 16 years. (The District Judge gives the figure 18.) Hence the plaintiff had obtained title by adverse possession against the defendants Nos. 2 and 3 on the date when he was dispossessed in 1909. The plaintiff basing his right on his title, so perfected by adverse possession, is entitled to sue in ejectment the 1st defendant, who claims from the defendants Nos. 2 and 3.

Mr. Ananthakrishna Aiyar, the appellant's learned Vakil, argued as follows: —

(*a*) That even though a suit by a ward who has attained majority to set aside his guardian's alienation may be barred under Article 44, he can avoid it as defendant by denouncing it in the suit for possession brought by the alienee.

(*b*) That the lower Appellate Court was wrong in holding that the plaintiff was in adverse possession of the land as against the defendants Nos. 2 and 3 between 1893 and 1909, as his possession between 1893 and 1903 at least (when the 2nd defendant attained majority) must have been as agent of the defendants Nos. 2 and 3.

(*c*) That the sale-deed of 1893 was executed by the mother, not as guardian of both the defendants Nos. 2 and 3 as mistakenly supposed by the lower Appellate Court, but as guardian of the 2nd defendant alone. The 3rd defendant was, therefore, not bound to have it set aside so far as his interest in the property is concerned. The plaintiff also could not have acquired the 3rd defendant's undivided interest by adverse possession, as the 3rd defendant had three years from his attaining majority (that is, till the end of 1914) to sue to recover possession of his interest and as the 1st defendant had recovered possession in 1909 itself of 3rd defendant's said interest before 3rd defendant's right to recover possession from plaintiff had become barred.

It is clear from *Madugula Latchiah* v. *Pally Mukkalinga* (1), that the sale-deed executed by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in Article 44 and that till it is so set aside, the title vests in the alienee. It is also established by that decision that, though Article 44 described the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee had obtained and is in possession and the ward has, therefore, to add a prayer for the relief of possession, Article 44 al ne still applies to the suit though brought for both the reliefs. Section 28 of the Limitation Act says that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. As the 2nd defendant's right to institute a suit under Article 44 for setting aside the sale of 1893 and for possession of the property from the plaintiff became barred in 1906, his right to such property became extinguished under section 28 of the Limitation Act and the plaintiff became the owner of the 2nd defendant's interest in the property in 1906. As he has brought the suit in 1912 and as his title to the 2nd defendant's interest of which he became the owner in 1906 subsisted at the date of the suit, his claim for possession of such interest has to be decreed. I must, therefore, reject the contention (*a*) put forward by Mr. Ananthakrishna Aiyar.

(1) 30 M. 393; 2 M. L. T. 351; 17 M. L. J. 220.

Coming to his contention (*b*), I am unable to accept Mr. Ananthakrishna Aiyar's argument that the agency power given to the plaintiff by the 2nd defendant's mother under Exhibit I was a general power-of-attorney which made him the 2nd defendant's agent as regards the management of the plaint property also, which had been alienated by the 2nd defendant's mother on the day previous to the execution of the agency deed. It seems to me clear that the plaint property was excluded from the agency and I am unable to differ from the finding of fact arrived at by the lower Appellate Court that the plaintiff's possession between 1893 and 1909 was adverse to the defendants Nos. 2 and 3.

Coming to the last contention (*c*), it is clear from the wording of Exhibit A that the sale-deed was executed by the 2nd defendant's mother as guardian of the 2nd defendant alone. Plaintiff-respondent's learned Vakil asked us to presume in the plaintiff's favour that the 2nd defendant's mother intended to execute it in the exercise of all the powers to alienate which she possessed, though she may not have known that she had the power to execute it also as guardian of the child then in her womb. I do not think that a Court is bound to stretch any point in favour of a person like the plaintiff who took advantage of the helplessness of his mother-in-law (2nd and 3rd defendants' mother) to obtain a sale-deed without consideration in fraud of his brother-in-law from her. The sale-deed, therefore, did not affect the 3rd defendant's undivided interest in the plaint properties. He was hence not bound to have it set aside under Article 44. As against his interest, the plaintiff could rely only upon adverse possession under Article 144. But as Article 144 read with sections 6 and 28 of the Limitation Act did not bar the 3rd defendant's rights or confer title on the plaintiff as regards 3rd defendant's rights before the plaintiff was dispossessed in 1909, the plaintiff cannot claim any title to the 3rd defendant's interest in the properties. (It is unnecessary to consider whether the 3rd defendant's interest has passed to the 1st defendant in this case owing to the sale-deed executed by the 2nd defendant in the 1st defendant's favour in 1908.) The contention (*c*) has, therefore, to be upheld.

Mr. K. Bashyam Aiyangar next contends for the plaintiff that as the 2nd defendant could have, when suing on his own behalf (in the suit governed by Article 44) to set aside the sale by his mother of his undivided interest also, joined in that suit a cause of action as the next friend of the 3rd defendant (or as managing member of the undivided family consisting of himself or of the 3rd defendant) to recover possession of the 3rd defendant's interests also in that same suit, the principle of the Full Bench decision in *Doraisami Sirumadan* v. *Nondisami Saluvan* (2) applied and that, therefore, the 3rd defendant has also become barred in 1906 from claiming title to his undivided share. I think that, that decision gave as wide an effect to section 8 of Act XV of 1877 (corresponding to section 7 of the present Act) as possible and that it is wholly undesirable to extend the scope of that section further. When two brothers have got the same cause of action (that is, where all the material allegations and giving rise to a right of suit are the same), where the whole right litigated and the nature of the entire claim litigated are the same and where under such circumstances the elder brother could institute a suit for himself and his younger brother on that joint right and joint cause of action, section 7 would become applicable according to the Full Bench decision and would bar the younger brother's right when the elder brother's became barred. But in this case the 2nd defendant's cause of action and his right to bring a suit depend upon the fact of his mother's execution of Exhibit A and a suit on such right of his is governed by Article 44, whereas the 3rd defendant's right of suit has nothing to do with Exhibit A or with Article 44 and his suit would have been governed by Article 144. The mere fact that under Order I, rule 1, Civil Procedure Code, the 2nd defendant suing for himself and praying for one particular remedy could have joined in that same suit another cause of action vesting in the 3rd defendant for whom he could have acted as next friend

(2) 21 Ind. Cas. 410; 38 M. 118; 25 M. L. J. 405; 14 M. L. T. 401.

will not bring such a suit within the ambit of section 7 of the Limitation Act, which contemplates the existence in two or more persons of a joint right and a joint cause or joint causes of action in support of a single suit.

In the result the lower Appellate Court's decree will be modified and a preliminary decree for partition of the plaint properties into two equal shares will be passed. The plaintiff's right to recover from the 1st defendant mesne profits on the said half share from *Fasli* 1319 is also declared. Final decree will be passed (after taking the necessary steps contemplated by law) by the District Munsif as regards possession to plaintiff of the particular land which might fall to his half share in division and in respect of the sum due to him for value of mesne profits.

The plaintiff must pay the 1st defendant's costs on half the value of the plaintiff's claim throughout and bear his own costs. (The right to the other half share as between the defendants Nos. 1 and 3 is not decided in this suit).

SPENCER, J.—The plaintiff obtained a sale-deed in respect of the suit properties in 1893 from the mother of defendants Nos. 2 and 3. In this document (Exhibit A) she described herself as the wife of her deceased husband and as the mother and protecting guardian of 2nd defendant. The statement of the District Judge that she acted as guardian of 2nd and 3rd defendants in this transaction is incorrect. In the plaint it was stated that she acted in the capacity of guardian of the 2nd defendant alone, and for the purpose of this second appeal it may be taken that the 3rd defendant was in his mother's womb on the date of sale.

Accepting the finding of the Judge that the possession by the plaintiff of the plaint lands, which are not included in the lands entrusted under Exhibit I to his management as an agent of the family, was adverse, it is clear that unless the time be extended under section 6 of the Limitation Act, his title must have been perfected by prescription before the 1st defendant obtained a conveyance of them from the 2nd defendant in 1908.

The 2nd defendant being 8 years old in 1893, as stated in Exhibit A, must have attained his majority in 1902 or at least by 1903.

His title to his share of the ancestral property alienated became extinguished in 1906, when for three years after attaining majority, he failed to set aside the transfer made by his guardian during his minority (*vide* sections 6 and 28 of the Limitation Act), and, therefore, he had no interest of his own to convey to his transferee (1st defendant) in 1908, when he executed Exhibit II on behalf of himself and his minor brother.

But in 1893 there was not any alienation of the 3rd defendant's share in the property of the Hindu joint family to which he belonged at his conception.

Both the lower Courts have found that the sale in 1893, regarded as an alienation of ancestral property, was without consideration and for no justifiable necessity. Third defendant attained majority less than three years before the institution of this suit.

Hence the title of the 3rd defendant, which was not alienated in 1893 and was kept alive by his legal disability up to the date of this suit (section 6 of the Limitation Act), does not stand on the same footing with the title of the 2nd defendant which was alienated in 1893 and became extinguished by limitation in 1906.

The District Judge without making any distinction has treated the title of both these defendants as extinguished.

It is now argued in support of his judgment that time should be calculated under section 7 of the Limitation Act as running against both, on the ground that they were jointly entitled to institute a suit to recover their property and that one could give a valid discharge without the concurrence of the other.

I consider that section 7 of the Limitation Act does not apply to the circumstances of this case. Owing to their interests having become split up, 2nd and 3rd defendants were not joint in estate in respect of this particular property after the execution of Exhibit A.

The cause of action for the 2nd defendant to set aside the alienation made by his guardian is not identical with the cause of action for the 3rd defendant or his representative-in-interest to obtain a partition of

his share of family property upon a subsisting title from a third party who was in wrongful possession thereof. When the 2nd defendant attained majority, he was not competent to give a lawful discharge of the 3rd defendant's claim under the circumstances found to have existed in this case.

Thus this case is distinguishable from the case of *Doraisami Sirumadan v. Nondisami Saluvan* (2). I agree that the appellant is entitled to succeed in respect of 3rd defendant's undivided moiety of the suit property and that he must fail as regards the 2nd defendant's moiety and that costs should be awarded as stated in my learned brother's judgment.

*Appeal partly allowed.*

V. R. P.

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## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 299 OF 1914.

June 27, 1916.

*Present*:—Mr. Justice Fletcher and Mr. Justice Teunon.

*Srimati* BHUBANESWARI DEBI, WIDWO OF BHUBANESWAR BHATTACHARJYA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

HARADHAN BHATTACHARJYA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Alienation by widow—Reversioners, consent by - Deed, recital in—Estoppel.*

The plaintiffs, who were consenting parties to a deed of sale by a Hindu widow in favour of the defendants purporting to be for legal necessity and which contained inaccurate recitals not known to the defendants to be such, induced the defendants, their nephews, by their conduct to lay out money for the erection of permanent buildings upon the lands purchased by them, and on their succession as reversioners after the death of the widow, brought a suit to recover possession of the lands sold on the ground that there was no legal necessity for the sale:

*Held*, that there was a clear case of estoppel by conduct against the plaintiffs and the mere fact that at the time when the plaintiffs induced their nephews to lay out their money, there was a mere *spes successionis* was not a sufficient ground why they should not be bound by the sale. [p. 670, col. 1]

No person who is a party to the putting forward of a recital in a deed by another and induces a third person to act on it can afterwards be heard to say that that recital is not accurate. [p. 669, col. 2; p. 670, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 30th March 1914.

Babu *Baidyanath Dutt* and Babu *Sarat Coomer Mitter*, (for Babu *Soroshi Charan Mitter*), for the Appellants.

Babu *Amarendranath Bose*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs Nos. 1 and 2 against the judgment and decree of the learned District Judge of Burdwan, dated the 30th March 1914. The suit was brought by the plaintiffs to recover certain land on which buildings had been erected by the defendants, the plaintiffs being the reversioners on the death of a Hindu woman whose name was Kumud Kanvini Debi. The plaintiffs are the uncles of the defendants. They now come forward and say that the defendants at the time they acquired the property were of the age of about 18 and 23 years and that they have got no title to the property. The learned Judge of the Court below has found as a fact that there was no legal necessity for the sale. It may be that, on a more careful view of the evidence, that finding may be challenged. He has also found that the recitals in the *kobala* were not true. He has further found that the plaintiffs were consenting parties to the sale and that they also by their conduct induced the defendants to spend the whole of their fortune upon the erection of the buildings that have been erected on this portion of the land. The only question that we have got to consider in this case, the findings have not been challenged, is whether the view that the learned Judge took is correct. There is one matter that is worthy of consideration and that is this: Although the learned Judge has found that there was no legal necessity, that the recitals in the deed of conveyance were not accurate and that the plaintiffs were consenting parties to the sale, he has not found that the defendants knew that these recitals in the deed were not accurate, and, therefore, *prima facie*, it must be taken that the plaintiffs, being consenting parties to the sale, were parties who induced the defendants to act upon those recitals in the conveyance as being true and accurate statements. Of course, that would be a clear case of estoppel by conduct. No person who

is a party to the putting forward of a recital in a deed and induces another person to act on it can afterwards be heard to say that that recital is not accurate.

The other portion of the finding is that these uncles actually supervised the construction of the buildings that were erected by the two defendants who were then young men. They watched the building from day to day and from time to time. The money of their nephews was being deliberately laid out on these permanent buildings and they having stood by and seen their nephews so wasting their money, for them now to come to Court and say that those nephews were throwing away their money is not a story that one should readily believe. The case is a novel case and a case that has not ever been set up in a Court of Justice with success, and this is not going to be the first case in which such a statement shall be received by the Court as an accurate statement. I find nothing to suggest that this is so. I think the plaintiffs are bound by their own act. The mere fact that there was at that time a mere *spes successionis* when they induced their nephews to lay out their money is not a sufficient ground why they should not be bound by the sale; and if such a case is allowed to stand, it would not be giving full effect to the doctrine of estoppel in cases in India. I think this inducing of the defendants to lay out their money was quite sufficient to warrant the learned Judge of the Court below to arrive at the conclusion he came to.

Then a question has been raised as to the two smaller pieces of land which, it is said, stand on an altogether different footing. From the findings of the learned Judge, one gathers that these two small pieces of land adjoin the house that has been erected on the other portion of the land. These two pieces of land are probably curtilages and hold along with the house. The defendants, according to the view of the learned Judge, parted with the money by which they purchased these pieces of land on similar representations to those on which they purchased the former piece of land on which the buildings stands. It is quite true that as regards this piece of land, the case is not so strong as with respect to the piece of land on which the house has been built, but there is nothing before us to show why we should not give full effect to the view taken by the learned Judge with regard to these two plots of land. To cut off these pieces of land from the other piece of land may cause serious damage to the house that has been erected by the defendants. I agree with the view arrived at by the learned Judge of the Court below. The present appeal, therefore, fails and must be dismissed with costs—Rs. 200.

TEUNON, J.—I agree.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 718 AND 993 OF 1916.

April 16, 1917.

*Present*:—Mr. Justice Seshagiri Aiyar.

P. R. SRINIVASA AIYANGAR—
DEFENDANT—PETITIONER

*versus*

M. D. NARAYANA AIYANGAR—
PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 8, 44, O. XXI, rr. 4, 22—Presidency Small Cause Courts Act (XV of 1882), ss. 13, 35—Foreign Courts, decrees of, whether executable by Presidency Small Cause Courts—Registrar, power of, to issue process—Jurisdiction—Arrest without notice under O. XXI r. 22, legality of.*

A Judge of a Presidency Small Cause Court has jurisdiction to execute the decree of a foreign Court transmitted to it under section 44, Civil Procedure Code. [p. 671, col. 2.]

But the Registrar of a Presidency Small Cause Court has no power, under section 13 or 35 of the Presidency Small Cause Courts Act, to issue processes in execution of a foreign decree. [p. 672, col. 1.]

A decree transmitted for execution does not become the decree of the Court to which it is transmitted, although its powers of execution are similar to the powers conferred on it in respect of the execution of its own decrees. [p. 672, col. 1.]

Order XXI, rule 4, Civil Procedure Code, is not restricted in its application to decrees of British Courts, it applies equally to decrees of foreign Courts. [p. 671, col. 2.]

Sub-clause (1) of Order XXI, rule 22, Civil Procedure Code, is imperative and must be followed, unless notice prior to arrest is dispensed with under sub-clause (2), in which case the Court should definitely record its reasons for doing so. [p. 672, col. 2.]

Petition No. 718 of 1916 under section 115 of Act V of 1908, and section 15 of the Charter Act, praying the High Court to revise the order of the Court of Small Causes, Madras, in Original Suit No. 437

of 1906-07 on the file of the Court of the Principal District Munsif, Mysore.

Mr. *K. V. L. Narasimham*, for the Petitioner.

Messrs. *C. Venkatasubbaramiah* and *Alasingra Chariar*, for the Respondent.

Petition No. 993 of 916 under section 115 of Act V of 1908, and section 15 of the Charter Act, praying the High Court to revise the order of the Court of Small Causes, Madras, in Execution Petition No. 14377 of 1915, in Original Suit No. 437 of 1906-07 on the file of the Court of the Principal District Munsif, Mysore.

Mr. *K. V. L. Narasimham*, for the Petitioner.

JUDGMENT.—So far as I am able to see, there are no merits in these cases. But I have to deal with the question of law which is one of considerable importance argued before me: My conclusion is that the Registrar of the Court of Small Causes had no jurisdiction to order execution of the decree, and also that he acted illegally in the exercise of his jurisdiction by directing a warrant to issue without giving the petitioner previous notice of the application. The facts necessary for the disposal of these two petitions are these. A decree was obtained in the District Munsif's Court of Mysore in 1908. It was transferred for execution to the Small Cause Court of Madras in October 1915. As the decree-holder did not take steps, his first application was dismissed in November 1915. A second application was presented on the 13th December 1915 and without notice to the petitioner, the arrest of the petitioner (judgment-debtor) was ordered on the 21st December 1915: Thereupon he paid the amount of the decree into Court and asked the Registrar to re-consider his order directing his arrest and also to pay him back the money which he had deposited. The Registrar refused the application and hence these petitions in this Court. I may also say that on the refusal of the Registrar to re-consider his order, an application was made to the Full Bench of the Small Cause Court. The learned Judges who constituted the Bench held that they had no power to interfere with the order of the Registrar.

The first point argued by the learned Counsel for the petitioner is that the Presidency Small Cause Court has no jurisdiction to entertain applications for the execution of the decrees passed by a foreign Court, and still less the Registrar of that Court. As regards the first of these contentions, I am unable to accept it.

Under section 44, Civil Procedure Code, the decrees passed by the Courts of a Native Prince or State in alliance with his Majesty may be executed in British India as if they had been passed by the Courts of British India. Under Order XXI, rule 4, if a decree is passed outside the ordinary original civil jurisdiction of the High Court, the execution of that decree within the city of Madras must be by the Presidency Court of Small Causes. It was argued before me that that provision applies only to the decrees of British Courts. But the language of section 44 makes it clear that no distinction is drawn in this respect between the decree of British Courts and the decrees of foreign Courts. My attention was drawn to section 8 of the Civil Procedure Code and it was contended that as section 44 of the Code is not included among the provisions made applicable to the Presidency Small Cause Court, that Court has no jurisdiction to receive applications for execution from foreign Courts. Section 8 is intended to be supplementary to the rules of procedure provided by the Small Cause Court Act and the rules framed thereunder. Section 8 does not prescribe by implication the entertainment of applications for execution in respect of the decrees of foreign Courts by the Small Cause Court. I am, therefore, of opinion that if the decree had been put in motion by a Judge of the Presidency Small Cause Court there could have been no objection to its execution. I have, however, reluctantly come to the conclusion that the Registrar has no power to issue processes in execution of a foreign decree. He is not ordinarily a Court. He is invested with the powers of a Court only for certain purposes and unless either under the sections of the Small Cause Courts Act or under the rules framed under those sections, the power to execute the decree of a foreign Court can be spelled out, I must hold that the

Registrar of the Small Cause Court has no jurisdiction to execute the decrees. Section 35 of the Presidency Small Cause Courts Act speaks of the execution of decrees passed by the Court of Small Causes and not by the Courts of Native States in alliance with His Majesty. Under Order XII, only certain judicial powers are delegated to the Registrar and the power to execute the decrees of foreign Courts is not among them. Section 13 gives the Registrar the power to do certain ministerial acts and the power to direct the arrest of a judgment-debtor in execution cannot be regarded as a ministerial act. Consequently, the Registrar of the Small Cause Court has no power to execute the decree of a foreign Court. The learned Vakil who appeared for the counter-petitioner suggested that the moment the decree was sent from Mysore to the Presidency Small Cause Court, it must be deemed to have become the decree of the Presidency Small Cause Court and that section 35 of the Presidency Small Cause Court Act applies. I am unable to agree with him. The decree that is transmitted for execution does not become the decree of the Court to which it is transmitted, although its powers of execution are similar to the powers conferred on it in respect of the execution of its own decrees. I must, therefore, hold that the Registrar had no jurisdiction to execute the decree and that the warrant which he issued for the arrest of the petitioner was *ultra vires*.

One other contention of the learned Vakil for the petitioner may also be mentioned and that is that the Registrar acted illegally in the exercise of his jurisdiction by directing a warrant to issue without giving notice to the petitioner. As I mentioned before, the first application was dismissed in November 1915. The present application was presented on the 13th December 1915 and on the 21st of that month, the order to arrest the petitioner was made. No notice was given to the petitioner on this application. Order XXI, rule 22, in its proviso to sub-clause (1) says, that no notice shall be necessary in consequence of more than one year having elapsed if the application is made within one year from the date of the last order against the party against whom execution is applied for. In this case, there was no order made against the judgment-debtor by the Registrar or the Court of Small Causes within a year of the 21st December 1915. Consequently, the operative portion of sub-clause (1) applies; and it was incumbent upon the Registrar to have issued the notice to the petitioner before directing his arrest. The learned Vakil for the counter-petitioner said that the order was competent under sub clause (2), but that sub-clause requires that the Court should be satisfied that in the interests of justice, an order should be made without notice to the other side. The Registrar has recorded no reasons for holding that it was absolutely necessary in the interest of justice. that the arrest of the petitioner should be ordered at once. My attention was drawn also to a case decided by Ayling and Srinivasa Aiyangar, JJ., where they hold that if there are no merits, the Court is not bound to interfere under section 115, Civil Procedure Code. But the order made by the Registrar goes to the very root of his jurisdiction. I am not prepared to condone the manifest illegality by saying that the petitioner has no merits. I must set aside his order; the money in deposit should be paid over to the petitioner. I make no order as to costs.

*Petition allowed.*

V. R. P.

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## PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 10 OF 1916.

May 31, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

BIBI SOGRA—PLAINTIFF—APPELLANT

*versus*

MOHAMMAD SAYEED—DEFENDANT—RESPONDENT.

*Muhammadan Law—Dower—Discord between husband and wife—Dissolution of marriage at instance of wife—Court, whether can decrease or increase contracted amount—Divorce, effect of.*

Per *Sharfuddin, J.*—A Court of Law has no power to decrease or increase the contracted amount of dower. [p. 673, col. 2.]

BIBI SOGRA *v.* MOHAMMAD SAYEED.

Where there has been a divorce it is immaterial whether the dower was prompt or deferred, as after the cessation of the relationship of husband and wife either by death or divorce, the dower, if not already paid, becomes due. [p. 673, col. 2.]

Per *Roe, J.*—Under the Muhammadan Law when discords originate between married parties or when the wife herself is anxious to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage. [p. 674, col. 2.]

Appeal from a decision of the Subordinate Judge, 1st Court, Shahabad, Arrah, dated the 31st July 1916.

Messrs. *A. K. Roy* and *Tarakeswar Pal Choudhry*, for the Appellant.

Mr. *Muhammad Hossan Jan*, for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal in a dower suit instituted by an old lady named Bibi Sogra against her husband named Mohammad Sayeed. The plaintiff's case is that she was married to the defendant in 1875 on a dower of Rs. 40,000 and two gold *mohurs* and the whole of that amount she alleges to be prompt. She has brought this suit only for Rs. 20,000 and alleges that her husband in 1905 having married the daughter of a hawker began to ill-treat her and practically stopped maintaining her, and that only occasionally he used to give her Rs. 5 to Rs. 10. On the 12th April 1914, she says she went to her husband and demanded money for her maintenance. On this demand he got so enraged that he divorced her by uttering three times in Hindustani "*Ham tumke talak dia.*" This, as already observed, happened on the 12th of April 1914. On the 23rd April, *i.e.*, 10 or 11 days after the divorce the present suit was instituted.

On behalf of the defendant it is alleged that the dower fixed at the time of the marriage was not Rs. 40,000 and two gold *mohurs* but only 500 *dinars* which is equivalent to Rs. 160 or so, and that this was a deferred dower. Then he further said that on the date of the alleged *talak* he was at Gya. The Subordinate Judge who tried the suit gave a decree to the plaintiff for a sum of Rs. 6,000 and this he did on a consideration of the position in life of the parties concerned. The Subordinate Judge's decree of Rs. 6,000 cannot stand. The Courts of Law have no power to increase or decrease a contracted amount. There is an Act in Oudh no doubt, under which such a thing is possible, but that Act is not in force in this Province. If the case was proved, the Subordinate Judge should have given a full decree. If it was not proved he should have dismissed the suit.

The plaintiff's case depends on two facts:—*Firstly*, what was the amount of the dower and whether it was prompt or deferred. If it was prompt, it becomes due on demand; and if it was deferred, it becomes due on the death of either of the parties or on a divorce; *secondly*, whether or not there was a divorce by the husband on the 12th April. Because, if there was a divorce, it was immaterial for the purpose of the present suit whether the dower was prompt or deferred, as after the cessation of the relationship of husband and wife either by death or divorce, the dower, if not already paid, becomes due.

I propose to take the question as to the nature of the dower. According to the plaintiff's case, a sum of Rs. 40,000 and two gold *mohurs* were fixed as a prompt dower. Her case is that the husband has always been ill-treating her and that the ill-treatment came to a climax when he married the other girl in 1905. It is surprising that although the plaintiff had been ill-treated for so many years she never made a demand for payment of the dower, because if it was prompt, she could have made the demand at any time she liked, but that she waited for being divorced in order to be able to make the demand. In her evidence during the trial she says: "I was waiting for the *talak* to institute the suit, as people had told me that it could not be instituted without *talak*." That statement clearly indicates that the dower could not have been prompt, because if it had been prompt, she need not have waited until the divorce. The evidence on that point is also meagre.

I now come to the question of *talak*. The *talak* has been attempted to be proved by the evidence of the plaintiff herself, her maid servant named Monghlanian and a relation named Mohiban. The plaintiff herself appears to be a very

GILLI v. HIRA LAL.

excitable woman. She brought the suit in *forma pauperis* and in the earlier proceedings she was examined as a witness and in that statement of hers she said that the *talak* was pronounced three times by the husband in the presence of Monghlanian, Wajid, Gaffur and Kaiyaum and several others. She did not name Mohiban in this connection when she was examined at the earlier stage. Mohiban was examined during the trial and she says: "I did not see any male in the *angina*. I cannot say whether any came outside. I know the plaintiff's brother Wajid. I cannot say whether it is true or false that Wajid was also present at the time of the *talak*." If Wajid was present he would no doubt on hearing the words *talak* would begin to remonstrate with his brother in-law or at least take some part in the affair but it is surprising that Monghlanian does not at all remember whether Wajid was or was not present at the time. Mohiban is a relation of the defendant. She says she was present but she does not say that she heard the husband pronouncing the *talak* three times successively. So her evidence is of no value. I do not think, therefore, that *talak* had been proved.

It has been urged on behalf of the lady that it is very improbable that an old and respectable lady would bring a false suit against her husband alleging that she had been divorced by her husband. That is true, but at the same time it is also very improbable that an old man in the position of the defendant Mohammad Sayeed, who was a Sub-Registrar, would ever think of demeaning himself by a conduct which is never approved of in a decent society in this Province. What seems to me to have been the case is that the lady Bibi Sogra was incensed at the conduct of her husband in his bringing into the house a co-wife and since then disagreement commenced. The second wife has given a son and a daughter to the old man and the apprehension on the part of the first wife and her friends and advisers was that inasmuch as since the second marriage of her husband the plaintiff had been more or less discarded, it was probable that whatever estate the defendant was possessed of may be given by the defendant to the second wife and the children by her and she, therefore, went to the husband to make a demand of her dower and to bring about a *talak* if that was possible. Although I do not believe that the *talak* took place it is quite possible that she may have gone for that purpose in order that she may institute a suit for the payment of the dower. The present appeal by the plaintiff has been brought against the deduction of her claim from Rs. 20,000 to 6,000 by the Subordinate Judge. There is also a cross-objection on behalf of the defendant against the decree awarded by the Subordinate Judge to the plaintiff for Rs. 6,000 and the result of the present appeal is that the appeal is dismissed. Cross-objection allowed.

ROE, J.—I agree. I see from the book in Muhammadan Law by Mr. Ameer Ali that when a discord originates between married parties with the wife, or when she herself is anxious to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage. In the case before us although the lady says that she had been habitually ill-treated there is no real indication of this on the record. Discord seems to have originated in the husband's love for the younger and comelier woman. It was natural, therefore, that the lady would take steps to get a divorce and would be prone to imagine that she had succeeded in getting a divorce.

I entirely agree with my learned brother that there was no such divorce. The plaintiff's suit should have been dismissed. I agree that it be now dismissed with costs here and in the lower Court.

*Appeal dismissed:*
*Cross-objection allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 116 OF 1916.

July 17, 1916.

*Present:*—Mr. Stuart, J. C.

*Musammat* GILLI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

HIRA LAL—PLAINTIFF—RESPONDENT.

*Restitution of conjugal rights, suit for—Legal cruelty—Liquor, use of.*

HARI CHAND *v.* MAGHI MAL..

Where it was found that a husband was addicted to the use of alcohol and that *occasionally* he beat his wife when he was the worse for liquor:

*Held*, that these facts fell short of establishing legal cruelty, so as to debar him from suing successfully to obtain a decree for restitution of conjugal rights.

Appeal from the decree of the District Judge, Lucknow, dated the 22nd January 1916, confirming the order of the Munsif, South Unao, dated the 23rd June 1915.

Mr. *Fakhruddin Hasan*, for the Appellants.

JUDGMENT.—The sole question for decision in this appeal is whether it is established on the findings of fact of the lower Court that legal cruelty has been committed by the plaintiff-respondent of such a nature as to debar him from suing successfully to obtain a decree for restitution of conjugal rights. In order to establish legal cruelty it is necessary to establish actual violence of such a character as to endanger personal health or safety, or to establish the existence of a reasonable apprehension that such violence will be committed. On the facts before me it is established that the plaintiff-respondent is addicted to the use of alcohol and that he is occasionally the worse for liquor. When he is the worse for liquor he has been known to beat his wife. But it is not established that he is habitually the worse for liquor, that he habitually beats his wife or that he has ever assaulted her with brutality. While on the one hand it is very necessary that a woman should be protected against a brutal or dangerous husband, Court should not deprive a husband of the society of his wife on the ground of occasional lapses and unless something more than occasional lapses is established, or unless it is established that there has been grave injury or any real danger, a Court cannot find that cruelty in the legal sense exists. In this particular case the evidence falls far short of establishing legal cruelty.

I dismiss this appeal. The appellants will pay their own costs and those of the respondent.

*Appeal dismissed.*

## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 326 OF 1915.

April 2, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

HARI CHAND—PLAINTIFF—APPELLANT

*versus*

MAGHI MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Registration Act* (*XVI of* 1908), *s.* 17 (b)—Tasfianama *praying for decree in accordance therewith, whether compulsorily registrable—Intention—Civil Procedure Code* (*Act V of* 1908), *O. XXIII, r.* 3—*Agreement dealing with matters not included in claim, whether lawful.*

Where a document stamped with an eight-annas Court-fee stamp headed "*tasfianama ba adalat* District Judge, Ludhiana," commenced by describing the parties in detail and saying that they had various disputes between themselves and that certain property in the possession of the defendants shall be given to the plaintiff and concluded with a prayer to the Court that a decree to that effect may be passed in favour of the plaintiff:

*Held*, that the intention of the parties was that the document should be presented to the Court in order that a decree should be passed by the Court in accordance therewith, and that, therefore, it was a petition addressed to the Court and as such did not require registration. [p. 677, col. 1.]

A compromise is not unlawful within the meaning of Order XXIII, rule 3, Civil Procedure Code, merely because it deals with matters not included in the claim. In such a case the Court should see how far it relates to the matters in suit and should pass a decree in regard to those matters. [p. 677, col. 1.]

First appeal from the order of the Subordinate Judge, first Class, Ludhiana, dated the 22nd January 1915.

Mr. *Kirkpatrick*, for the Appellant.

Rai Sahib Lala *Moti Sagar* and Lala *Kanshi Ram*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge, 1st Class, Ludhiana, refusing to record an agreement of compromise and to pass a decree thereon under the provisions of Order XXIII, rule 3 of the Civil Procedure Code. Hari Chand, plaintiff-appellant, brought a suit for possession of property on the ground that he was the adopted son of Jiwan Mal, deceased, and the 16th November 1914 was fixed by the Court for recording evidence; but on the 23rd of October an official of the Zira Tahsil in the Ferozepore District produced in the Court a *razinama* said to have been attested by the parties in the presence of the

*Tahsildar* of Zira which he said he had been ordered by the said *Tahsildar* to produce. One of the parties to this document, *viz.*, Chiman Lal defendant was not present on that day, but he appeared subsequently and said that he had signed the compromise under undue influence. He made other objections also and the Court framed the following issues :—

1. Did the defendant sign the *razinama* under undue influence ?

2. If not, should it be considered defective in any other way?

The Court after recording evidence held that the defendant had not established the plea of undue influence, but refused to act on the compromise on two grounds ; (1), that it had not been presented by the parties in Court in the first instance but had been presented to the *Tahsildar* who forwarded it to the Court; and (2) that the document required registration. As the document had not been registered the Court held that it was not a lawful agreement within the meaning of Order XXIII, rule 3, Civil Procedure Code. With regard to the first ground mentioned above, it is now admitted that the mere fact that the document was sent to the Court by the *Tahsildar* makes no difference. The document was actually received by the lower Court which proceeded to enquire into its validity. All the parties admitted having executed the agreement, although Chiman Lal defendant pleaded undue influence and raised various other objections which were said to render the agreement unlawful. The lower Court says that it bases its view as to whether the document required registration upon the principles discussed in *Murli Dhar* v. *Gobind Ram* (1) and *Khair-ul-Nisa* v. *Bahadur Ali* (2). In the latter case the compromise affected immoveable property over Rs. 100 in value, was signed by the parties, attested by witnesses and stamped with an eight-annas Court-fee stamp and addressed to the Court setting forth the names of the parties and the nature of the claim and was filed in Court. The Court thereupon examined the parties, who repeated in full detail all that was set forth in the document and concluded by expressly requesting it to dismiss the suit in accordance with the terms of the document. The Court accordingly wrote an order reciting the said terms and dismissed the suit as prayed. It was held that this document did not require registration under section 17 (*b*) of the Registration Act and was admissible in evidence; because (*a*) it was a mere application to the Court informing it of the terms of the agreement entered into by the parties out of Court and as such neither created nor declared rights so as to require registration, and (*b*) it was submitted to and acted upon judicially by the Court and was in itself a step of judicial procedure not requiring registration. This ruling was followed in *Murli Dhar* v. *Gobind Ram* (1). In the present case the document in question is stamped with an eight-annas Court-fee stamp and is headed *tasfianama ba adalat* District Judge, Ludhiana. It commences by describing the parties in detail and saying that they had various disputes between themselves and that certain property in the possession of Maghi Mal and Chiman Lal defendants, shall be given to Hari Chand plaintiff. It then goes on to deal with several matters such as the realization of the outstanding debts, etc., and concludes with the following words : *Lihaza yeh tasfianama likh diya keh bamujab iske digri bahaq Hari Chand mudai barkhilaf Maghi Mal wa Chiman Lal muda alehien jaidad mundarja bala ki jiski tashrih Hari Chand mudai ko deni ki upar karigai hai bila kharcha adalat dijawe.*

In our opinion this document was clearly intended to be of the nature of a petition addressed to the Court which set forth the terms of the agreement come to between the parties and was to be presented in Court in order that a decree should be passed in Hari Chand's favour against Maghi Mal and Chiman Lal in regard to certain properties specified therein. In the case reported as *Khair-ul-Nisa* v. *Bahadur Ali* (2), the terms of the document then in dispute were set forth and there was then also no distinct prayer to the Court to dismiss the suit. It is not necessary that

(1) 20 Ind. Cas. 817; 20 P. R. 1914; 306 P. L. R. 1913; 205 P. W. R. 1913.

(2) 27 P. R. 1906; 11 P. L. R. 1906.

there should be a distinct prayer to this effect. All that is necessary to state is what the intention of the parties to the deed is. In our opinion there can be no doubt that in the present case the intention was that the document should be presented in the Court and that a decree should be passed by the Court in accordance therewith. We, therefore, hold that the document was a petition addressed to the Court and as such does not require registration.

In regard to undue influence, the decision of the Subordinate Judge is somewhat summary and other objections as to the compromise having been unlawful have not been disposed of. One point urged before us by Lala Kanshi Ram, Counsel for the respondents, was that the compromise was unlawful because it dealt with matters not included in the claim. Rule 3 of Order XXIII expressly provides for such a case, for it lays down that the Court on being satisfied that there has been a lawful agreement shall pass a decree in accordance therewith *so far as it relates to the suit*. What the Court then would have to do would be to see how far the compromise relates to the matters in suit. It can then pass a decree in regard to those matters and should not pass a decree in regard to anything else. The main question for decision is whether Chiman Lal consented to the compromise and if so is it for any other reason unlawful.

We accordingly accept the appeal and setting aside the order of the lower Court remand the case thereto for re-decision of the above question after consideration of the evidence on the record and the objections put in by Chiman Lal. We note that the parties closed their evidence in the lower Court and we see no reason why they should be allowed now to produce further evidence. At the same time we think that the *Tahsildar* who is said to have received the *razinama* and forwarded it to the Court should be examined as to what took place in his presence. We direct accordingly that his evidence should be recorded provided that either of the parties desires that this should be done. Costs of this Court will be costs in the case.

*Appeal accepted.*

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 220 OF 1916.

March 19, 1917.

*Present*:—Mr. Rigg, A. C.

NGA MEIK AND ANOTHER—PLAINTIFFS—APPELLANTS.

*versus*

NGA GYI— DEFENDANT – RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 80, 2 (2), 97—Suit against public servant—Notice, necessity of —Preliminary decree, what is—Appeal.*

Plaintiffs sued defendant, the Bench Clerk of a Sub-Divisional Judge, for the recovery of a sum of money which they alleged had been lost through his carelessness in losing or concealing an application for the execution of a decree, which became time-barred through the loss:

*Held*, that the suit could not be instituted without giving the defendant a notice under section 80 of the Civil Procedure Code. [p. 678, col 2.]

The adjudication referred to in the definition of a decree in section 2 (2) of the Civil Procedure Code is an adjudication granting or refusing any of the reliefs claimed in the plaint and embodied in a formal declaration. [p. 678, col. 2 ]

The decision in a suit that a notice under section 80 of the Civil Procedure Code was necessary before the institution of the suit does not amount to a preliminary decree, where the plaintiff alleges that he has given notice, and the decision is not, therefore, appealable. [p. 678, col. 2.]

Mr. *C. J. S. Pillay*, for the Appellants.

Mr. *S. Mukerjee*, for the Respondent.

JUDGMENT.– The respondent, Maung Gyi, was the Bench Clerk of the Sub-Divisional Judge, Yamethin. The appellants sued him for the recovery of a sum of money they alleged they had lost through his carelessness in losing or concealing an application for an execution of a decree, which became time barred through the loss. They asserted in the plaint that about the 10th February 1915 they sent the defendant, Maung Gyi, a notice under section 80, Code of Civil Procedure, but denied that any notice was necessary. The receipt of the notice was not admitted, and a preliminary issue was fixed as to whether such notice was necessary or not. The Sub-Divisional Judge decided that it was and on appeal the decision was upheld. The date of the decision of the Sub-Divisional Judge was the 19th January, and the 7th February was fixed for the hearing of evidence. On the 5th February, the appeal was filed and was decided the same day. On the 7th, the appellant failed to produce any evidence and their

suit was dismissed under Order XVII, rule 3. The final order was one rejecting the plaint under Order VII, rule 11 (*d*). The rule did not apply to the case, as there was no statement in the plaint from which it appeared that the suit was barred by law. The District Court dismissed the appeal. In his judgment the District Judge pointed out that Order XVII, rule 3, had no application to the case as the hearing had not been adjourned at the instance of the appellants, but at the same time he said that the appellants had no valid excuse for not producing their evidence on the date fixed for hearing.

The appellants appeal to this Court on the ground that there has been a substantial error in the procedure of the Sub-Divisional Court in not granting an adjournment on payment of costs for the issue of subpœnas to their witnesses after the dismissal of the appeal on the 5th February. Two other points have been argued at the hearing: (1) whether notice was necessary to Maung Gyi under section 80, Code of Civil Procedure, and (2) whether the lower Appellate Court had power to decide the point, as the decision of the preliminary issue was not, it is contended, a decree. As regards the latter points, I am of opinion that the lower Appellate Court erred in entertaining the first appeal.

Decree is defined in section 2 (2), Code of Civil Procedure, as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and the decree may be either preliminary or final. In the present case there was no formal expression of adjudication, and none was ever asked for and refused. Undoubtedly if the expression "matters in controversy" be interpreted in its widest sense, it would include every question in dispute between the parties. The result of such an interpretation would be that the parties would be bound to appeal under section 97 of the Code against every issue that was decided against them in the course of the trial, and litigation would be prolonged indefinitely. Order XV, rule 3, provides that where the parties are at issue on some question of law or fact and issues have been framed, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly whether the summons has been issued for the settlement of issues only, or the final disposal of the case, provided that where the summons has been issued for the settlement of issues only, the parties or their Pleaders are present and none of them objects. Under section 33, a decree must follow on the judgment. A decree of this kind may be either a final or preliminary decree: it is based on some preliminary point or points that are held to govern the whole case. Besides this Order XXI, rules 12-18, specify cases where a preliminary decree can be passed. If these provisions are borne in mind, it will be seen that the adjudication referred to in the definition of a decree is an adjudication granting or refusing any of the reliefs claimed in the plaint, and embodied in a formal declaration. All that the decision of the Sub-Divisional Judge amounted to was to declare that the notice was necessary. The appellants said that notice had been given, and an appeal against the Sub-Divisional Judge's decision was clearly premature.

With reference to the necessity of notice, I have no doubt that the Courts below were right in affirming it. Maung Gyi is a public officer and he received the application for execution in that capacity. In the absence of the Judge, paragraph 554, Upper Burma Courts Manual, provides that applications shall be received by a clerk, whose duty it is to note on the application the date of receipt.

There is certainly no proof on the record that notice was ever sent to Maung Gyi of the suit. The question is whether the lower Courts were right in dismissing the suit without giving the appellants a further opportunity for calling evidence. The only excuse given for failing to apply for summonses for witnesses is that the plaintiffs

appellants were appealing to the District Court. They did not ask the Sub-Divisional Judge to stay the case pending the result of the appeal, which was only filed two days before the case came on for hearing, and was summarily rejected. I am of opinion that the excuse was a very weak one and that the appellants ought to have had their witnesses in attendance. They had ample time for applying for the issue of summons. The appeal is dismissed with costs.

*Appeal dismissed.*

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PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 753 OF 1916.

May 17, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

JAI PANDE—DEFENDANT—APPELLANT

*versus*

JALDHARI RAUT—PLAINTIFF—RESPONDENT.

*Malicious search, damages for, suit for—Complaint to Magistrate—Search by Police—Complainant, liability of.*

Where a certain result is the inevitable consequence of a certain action, the party guilty of the action is responsible for the result. A complaint of theft to responsible authority must inevitably result in the search of the house of the person accused of the offence. A search caused by a malicious complaint is, therefore, a malicious search. The party responsible for a malicious complaint is responsible for damages resulting from the malicious search.

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 15th March 1916.

Mr. *A. K. Roy*, for the Appellant.

Mr. *Ganesh Dutta Singh*, for the Respondent.

JUDGMENT.—In this case it has been found as a fact that the appellant without probable or reasonable cause informed a Magistrate that the respondent had committed theft in his house. In consequence of that information an enquiry was made by the Police. The respondent's house was searched and the case was reported by the Police to be untrue as against the respondents. The Courts below have awarded the respondent Rs. 20 as damages for the injury caused by the house search. Against this decision the defendant appeals,

It is urged that inasmuch as no summons or warrant was issued to the respondents they suffered no damage in that no proceedings were actually instituted against them and in support of this view the case of *Golap Jan* v. *Bhola Nath Khetry* (1) is quoted. It is to be noted that in that case reference is made to cases in which there has been malicious arrest and malicious search. It is argued for the appellant in this case that there was no malicious search. There is no evidence on the record to show that the appellant asked the Police to search the respondent's house, but it is a common rule of law that where a certain result is the inevitable consequence of a certain action, the party guilty of the action is responsible for the result. A complaint of theft to responsible authority must inevitably result in the search of the house of the person accused of the offence. A search caused by a malicious complaint is, therefore, a malicious search. The party responsible for the malicious complaint is responsible for damages resulting from the malicious search.

The appeal on the main ground, therefore, fails.

The learned Vakil for the appellant next urges that the Munsif has erred in giving the plaintiff costs on the full amount claimed that is Rs. 280 when the damages actually awarded were Rs. 20 only. In view of the fact that the defendant maintained throughout the proceedings that complaint was true, there is clearly nothing improper in the exercise of the Munsif's discretion with regard to costs. The appeal fails in this respect also.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N, 917

APPALA RAJA v. RANGAPPA NAICKER.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 2358 OF 1916.

February 13, 1917.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

APPALA RAJA AND OTHERS—RESPONDENTS NOS. 1 TO 3—PETITIONERS

*versus*

RANGAPPA NAICKER AND OTHERS—APPELLANTS AND RESPONDENT NO. 4—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 109, 110, O. XLV, r. 3—Privy Council, appeal to—Certificate, conditions for grant of—Easement, decree as to, rights of—Value of subject-matter—Value of claims or right affected—'Substantial question of law,' meaning of—'Property' in section 110, para. 2, meaning of.*

Where the subject-matter of a suit is an alleged easement right, which is negatived by the final decree of the High Court, the real value of that right, for the purpose of an appeal to the Privy Council under the first paragraph of section 110, Civil Procedure Code, can be properly ascertained only on the basis of the detriment or injury which the party claiming the right would sustain by its being negatived. And where the actual detriment or injury caused does not amount to Rs. 10,000, it is not a fit case for the grant of a certificate under paragraph 1 of section 110, Civil Procedure Code [p. 681, col. 1.]

Paragraph 2 of section 110, Civil Procedure Code, is intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which *rights and claims* are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards. [p. 681, cols. 1 & 2.]

Under paragraph 3 of section 110, the case must involve a question of law of general interest or importance, and not the application of the law to the particular facts of the case. [p. 681, col. 2.]

Per *Sadasiva Aiyar, J.*—The word 'property' in the second paragraph of section 110, Civil Procedure Code, means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. [p. 681, col. 1.]

Per *Spencer, J.*—When some subsidiary interest, such as an easement of inconsiderable value attached to property of great value, is in dispute, the value of the property affected rather than the value of the subject-matter of the suit should determine the right of appeal. The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value. [p. 682, col. 2.]

Petition, presented under Order XLV, rule 3 of the Code of Civil Procedure, praying for the grant of a certificate enabling the petitioners to appeal to His Majesty in Council, against the decree of the High Court in Second Appeal No. 1198 of 1913, preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Appeal Suit No. 891 of 1911, Original Suit No. 24 of 1909, on the file of the Court of the District Munsif, Srivilluputtur.

Messrs. *T. R. Venkatarama Sastri* and *M. S. Vaidyanadha Aiyar*, for the Appellants.

Messrs. *V. Ramesam* and *A. S. Viswanadha*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This is an application by the plaintiffs (who were respondents before us in Second Appeal No. 1198 of 1913) for leave to appeal to the Privy Council against the judgment of this Court which reversed the decision of the Subordinate Judge of Sivaganga and dismissed the plaintiffs' suit. The application for leave is based on the ground that the decree of this Court relates to a subject-matter whose value was Rs. 10,000 or upwards, in the Court of first instance and the subject-matter in dispute on appeal to His Majesty in Council is also of the same value and that, therefore, the application fulfils the requirements of the first paragraph of section 110, Civil Procedure Code. It is further alleged that the decree involves directly or indirectly some claim or question to or respecting property of like amount or value, and hence it further or in the alternative, satisfies the requirement of the second paragraph of section 110, Civil Procedure Code. It is finally contended that even if neither of the above requirements is fulfilled, the application satisfies the conditions of paragraph 3 of section 110 Civil Procedure Code, namely, that there is a substantial question of law involved in the suit on which it is advisable that there should be a pronouncement by their Lordships of the Privy Council.

It may be remarked that in the plaint, the subject-matter in dispute in the suit is valued at Rs. 300 for purposes of jurisdiction. The Court-fee paid on the plaint is Rs. 11 8 0 which would cover a subject-matter of a value of about Rs. 140 only. No doubt, the value for the purpose of calculation of Court-fees and the value fixed for the purpose of jurisdiction in respect of claims for declarations and injunctions do not afford in all cases the proper criteria for finding out the value of

the subject-matter in dispute for purposes of ascertaining whether the requirements of the first paragraph of section 110 are satisfied. Now the subject-matter in dispute, in this case is the right of the plaintiffs to have the water of the Thalaigidanga pond and of the channel B for the irrigation of their fields. The real value of that right can be properly ascertained only on the basis of the detriment or injury which the plaintiffs would suffer if that right is negatived as it has been. The affidavit in support of the application for leave mentions in paragraphs 14, 15 and 16, that the plaintiffs have suffered (either by the decreased value of the lands or by the decrease of the annual average income) an injury whose pecuniary equivalent amounted to very much more than Rs. 10,000, But the finding of the District Munsif to whom this question was referred by this Court for his opinion which we accept) is that the actual detriment or injury caused to the plaintiffs does not amount to Rs. 10,000 and is negligible so far as pecuniary value is concerned. It seems to me, therefore, that so far as the first paragraph of section 110 is concerned, this case does not fulfil the requirements thereof.

Then Mr. Venkatarama Sastriar argued that the requirements of the second paragraph are fulfilled because though the subject-matter of the suit and the subject-matter in dispute on appeal to His Majesty in Council may be less than Rs. 10,000 in value, the decree of this Court involves a claim "respecting" irrigation of lands which lands are worth more than a lakh of rupees. If the word 'property' in the second paragraph of section 110 be given the widest meaning and if the word 'respecting' is also given a very wide interpretation, the above argument has no doubt much force. But in construing the word 'property' in the second paragraph, we cannot lose sight of the first paragraph of section 110 to which the second is an alternative. I think 'property' in the second paragraph of section 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. Hence the second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards. I am fortified in this view by the decision of Sir Lawrence Jenkins, C. J. and Mr. Justice Russel in *De Silva* v. *De Silva*(1). The case in *Ajuas Kooer* v. *Musammat Luteefa* (2) also lends support to this view as being the only reasonable view of the law on this point. No doubt the provisions of the second paragraph of section 110 had not been enacted on the date of that decision, but I think the second paragraph only intended to extend the privilege given by the first paragraph (in so far as it enabled an appeal to be filed even though the dispute directly involved in the litigation sought to be taken up to the Privy Council was less than Rs. 10,000) only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved *indirectly*, though not *directly*. Whether directly or indirectly involved, on the question, however, as to what is the thing which should be Rs. 10,000 or upwards in value so as to justify an appeal to the Privy Council, I think that the case in *Ajuas Kooer* v. *Musammat Luteefa* (2) furnishes an authority which is entitled to great respect.

Coming to the third paragraph of section 110, I have considered in the case in *Ayya Raghunatha* v. *Thirumalai Echambadi* (3) the question as to what should be the nature of the substantial point of law of general interest involved which would justify a certificate being granted under Order XLV, rule 3, last clause of sub-section 1 read with section 109, clause (*c*) and the last paragraph of section 110. In this case, the only questions of law really involved seem to come under a few heads, one of them being whether Oldfield, J., and myself were right in stating in our first judgment in this case that no plea of lost grant was put forward by the plaintiffs. The other questions as to the extent of the right of the Government to regulate the flow of water for irrigation and as to whether the plaintiffs are entitled to a prescriptive right by sufficiently long enjoyment are questions which (so far as they involve questions of law) have been considered in several cases both by the Privy Council

(1) 6 Bom. L. R. 403 at p. 406.
(2) 18 W. R. 21.
(3) 31 Ind. Cas. 46; 2 L. W. 992; 18 M. L. T. 366; (1915) M, W. N, 916.

and by this High Court and I do not think that any new question is involved in this case which makes it desirable to have a fresh pronouncement from their Lordships of the Privy Council.

Mr. Venkatarama Sastriar argued that the persistence and keen fighting spirit displayed by both his clients and their opponents in this litigation show that large substantial interests are really involved in the suit, substantial both as regards the pecuniary value of the interests and the legal questions of general importance involved. I am not, however, satisfied that the persistence and keenness may not be due more to sentimental considerations and to the not uncommon spirit of factious rivalry between land-holders of neighbouring villages. I would, therefore, refuse this application and dismiss it with costs.

SPENCER, J.—On the first point, it is clear that the subject-matter in dispute in this case is not of the value of Rs. 10,000 or upwards. It was found by both the lower Courts, whose decisions of fact are binding on this Court in second appeal, that no material diminution of water supply to which the plaintiffs were entitled had been caused by the defendant's acts, and that no damage had been caused thereby to the plaintiffs' lands. I think that the extent to which the property would be deteriorated in value by the decision of this Court remaining unreversed as the proper criterion by which the value of the subject-matter of this suit should be tested. [See *Ajuas Kooer* v. *Musammat Luteefa* (2).]

Mr. Venkatarama Sastriar, however, argues on the second point that the case falls within the words of the second part of the section 110 of the Code of Civil Procedure and that the "decree or final order involves directly or indirectly some claim or question to or respecting property of like amount or value." In *De Silva* v. *Silva* (1) an extreme case was suggested of a suit for a share of the value of Rs. 100 in an estate of the value of Rs. 10,000 being taken to the Privy Council. It was considered by the Court that if such an interpretation were placed upon the section, it would defeat the object of the section which is to prevent small claims from going to the Privy Council. I consider that it was not intended by the Legislature that claims of trifling value should be taken up to the Privy Council unless the property directly or indirectly involved in the result of the litigation is of Rs. 10,000 in value or upwards, and unless some substantial question relating to the right, title and interest in such property is directly or indirectly decided thereby. I do not think it can have been intended that when some subsidiary interest, such as an easement of inconsiderable value attached to property of great value, is in dispute, the value of the property affected rather than the value of the subject-matter of the suit should determine the right of appeal. The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value.

*Thirdly*, I am not satisfied that any question of law of general interest or importance is involved in this case. What the Judges had to consider was rather the application of the law to the particular facts of the case that was before them. I, therefore, agree in refusing the leave to appeal.

*Certificate refused.*

V. R. P.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3184 OF 1917.

June 15, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

BHUDHAR CHANDRA ROY CHOUDHURY—PLAINTIFF—APPELLANT

*versus*

NANDA LAL ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885) s. 30, sub-sec. (b)—Suit for enhancement of rent on ground of rise in prices of staple food crops—Evidence—Landlord, whether bound to prove price of crops at inception of tenancy.*

In a suit for enhancement of rent on the ground that there has been a rise in the average local prices of staple food crops during the currency of the present rent, it is not incumbent upon the landlord, in order to enable him to get a decree for increased rent under the provisions of section 30, sub-section (*b*) of the Bengal Tenancy Act, to prove by positive evidence what was the value of the staple food crops at the date of the inception of the tenancy in order to enable the Court to compare that value with the current list of prices kept by the Government under the provisions of the Bengal Tenancy Act. [p. 683, col. 2.]

BHUDHAR CHANDRA ROY CHOWDHURY *v.* NANDA LAL ROY.

Appeal against the decree of the District Judge, 24-Pergannas, dated the 5th August 1915, modifying that of the Settlement Officer, 24-Pergannas, dated the 6th April 1914.

FACTS of the case appear from the judgment.

Babu *Amarendra Nath Bose*, for the Appellant.—The plaintiff sued for enhancement of rent on the ground that there has been a rise in the average local prices of staple food crops during the currency of the present rent. (Refers to section 30 (*b*), Bengal Tenancy Act). The learned Judge has erred in law in asking the plaintiff to prove the price of staple food crops at the date of the beginning of the tenancy. Where an enhancement is claimed on the ground of a rise in prices, the Court shall compare the average prices during the decennial period immediately preceding the institution of the suit with the average prices during such other period as it may appear equitable and practicable to take for comparison. That is the rule laid down in section 32, Bengal Tenancy Act and that section has got to be read along with section 30 (*b*) in this case. (Refers also to section 37, Bengal Tenancy Act). It is not possible for the landlord to prove the prices of staple food stuffs in 1848. The learned Judge has wrongly omitted to read section 30 (*b*) with sections 32 and 37 Bengal Tenancy Act.

*Huro Prosad Roy* v. *Womatara Debee* (1) points out the difficulties of the case. The Judge has found that there has been a rise in price for the last 25 years, still he has not decree on enhancemant of rent.

No one appeared for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a judgment of the learned District Judge of the 24 Pergannas, dated the 5th August 1915, modifying the decision of the Assistant Settlement Officer of the same District. The suit was brought by the plaintiff for enhancement of rent on the ground that there had been a rise in the average local prices of staple food crops during the currency of the present rent. The tenancy, as found by the learned Judge, was created in the year 1848, and the view that the learned Judge has taken is this, that in order to enable a landlord to claim an increased rent under the provisions of section 30, sub-section (*b*) of the Bengal Tenancy Act, the landlord must prove by positive evidence what was the value of staple food crops at the date of the inception of the tenancy so that the Court could compare those prices when so proved with the current list that is kept by the Government under the provisions of the Bengal Tenancy Act and decide whether the landlord should or should not have an increase of rent. That seems to me to be an impossible view to take. *First* of all, it is not workable. *Secondly*, all these tenancies came into existence earlier than 1848 and it is quite impossible for a landlord to undertake to prove what were the local prices of staple food crops at the inception of the tenancy. The learned Judge ought not to have confined himself to this one section. If he had referred to the Act he would have seen what the Courts do in a case that came under section 30 (*b*) of the Bengal Tenancy Act. Section 32 coupled with section 37 show quite clearly what the Judge has to do and the limit of the time within which rent can be enhanced. There is no difficulty in a case like this. It was never intended that the landlord should be bound to prove what the local prices in the year 1848 were and the Court should compare those prices with the local prices in the year 1915. Evidence as to the local prices in the year 1848 may not be available now. It is highly possible that such records do not exist. That is a matter not provided for in section 32 of the Bengal Tenancy Act. The case must, therefore, go back to the lower Appellate Court for the learned Judge there to re-hear the appeal having regard to the observations that have already been made. The learned Judge will deal with the costs of the parties when he re-hears the appeal.

NEWBOULD, J.—I agree.

*Case remanded.*

(1) 7 C. 263; 8 C. L. R. 449; 3 Ind. Dec. (N. S.) 718.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 119 OF 1916.

February 20, 1917.

*Present*:—Mr. Justice Scott-Smith.

ABDUL KARIM—DEFENDANT—PETITIONER

*versus*

THE UPPER INDIA BANK, LTD., DELHI, PLAINTIFF—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 108 (b)—Lease—Duty of lessor to put lessee in possession—Notice to tenants, whether sufficient.*

A lessor is bound to give the lessee possession of the property leased. [p. 684, col. 2]

The obligation of the lessor is absolute and he must perform it, notwithstanding the fact that the lessee can take legal proceedings to recover possession himself from the party in occupation. [p. 684, col. 2.]

*Hurish Chunder Koondoo* v. *Mohinee Mohun Mitter*, 9 W. R. 582; *Munnee Dutt Sing* v. *William Campbell*, 12 W. R. 149; *Narainsawmy Naidu* v. *Yerramali Ram Krishnaya*, 5 Ind. Cas. 479; 7 M. L. T. 119; (1910) M. W. N. 221 & 280; 33 M. 499, followed.

*Natesan Chetty* v. *Vengu Nachiar*, 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20, distinguished.

A notice to the tenants telling them to pay rent to the transferee amounts to delivery of possession only where the transferor himself has possession to give, and not where he is himself out of possession. [p. 685 col. 1.]

*Natesan Chetty* v. *Vengu Nachiar*, 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20, relied upon.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Delhi, dated the 24th January 1916, decreeing the claim.

Rai Sahib Lala *Moti Sagar*, for the Petitioner.

Mr. *Ram Lal*, for the Respondent.

JUDGMENT.—This is an application for revision of the order of the Judge, Small Cause Court, Delhi, giving the upper India Bank, Limited, Delhi, a decree for Rs. 200 on account of rent against Abdul Karim defendant-petitioner. Certain properties situated in Delhi and belonging to an insolvent were sold by the Official Assignee of Bombay on the 4th October 1914 and were purchased by the Bank of Upper India. The latter leased it to the defendant on the 29th November 1914, for four months at a rent to Rs. 50 per mensem. The defendant denied the claim saying that he had never been put in possession of the property leased and had got possession of one stable only. The lower Court referred to section 108 of the Transfer of Property Act wherein it is laid down that the lessor is bound at the lessee's request to put him in possession of the property, and held that the plaintiff in the present case was not bound to put the defendant in possession because the latter never asked the former to put him in possession. The lower Court further held that the defendant is liable to pay rent because he had also been given the right to eject tenants, to enhance the rent and so on, and that he had only himself to blame if he did not recover the rent due from the Official Assignee or the tenants.

Mr. Moti Sagar on behalf of the petitioner has referred to the following authorities in support of the proposition that the lessor was bound to give the lessee possession of the property leased: Gour's Transfer of Property Act, (4th Edition), paragraph 2585, wherein it is said that the obligation of the lessor to deliver possession is absolute, and which he must perform notwithstanding the fact that the lessee can take legal proceedings to recover possession himself from the party in occupation.

*Hurish Chunder Koondoo* v. *Mohinee Mohun Mitter* (1), where it was held that a landlord cannot claim rent under a *kabuliyat* where the lessee has never obtained possession, delivery of possession being ordinarily a condition necessary for the maintenance of an action for rent.

*Munnee Dutt Sing* v. *William Campbell* (2), in which it was held that when a lessor gives a lease, he enters into an implied contract to give his lessee peaceable possession of the land which is the subject of the lease.

*Narainsawmy Naidu* v. *Yerramali Ram Krishnaya* (3), where it was held that if the land leased is already in possession of a third person to the knowledge both of the lessor and the lessee, it is the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee.

*Shama Prasad Ghose* v. *Taki Mullik* (4) in which it was held that the landlord was bound to do something more than merely sign the lease, and then say he

(1) 9 W. R. 582.

(2) 12 W. R. 149.

(3) 5 Ind. Cas. 479; 7 M. L. T. 119; (1910) M. W N. 221 & 280; 33 M. 499.

(4) 5 C. W. N. 816.

is entitled to the rent. He is bound to put the tenant into possession of the land let to him and, unless and until he does this he is not entitled to the rent.

Mr. Ram Lal on behalf of the respondent has referred to *Natesan Chetty* v. *Vengu Nachiar* (5), in the head-note of which the following occurs: "When the subject-matter of a lease is the rents and profits of land, the possession which a lessor, under section 108 (*b*) of the Transfer of Property Act, is bound to give the lessee, is sufficiently given by giving notice of the lease to the *ryots* or other persons in occupation and requiring them to attorn and pay rent to the lessee." In connection with this it is pointed out that the Bank wrote letters to some of the tenants telling them they should pay rent to the defendant. It is, however, laid down in the same head-note that such notices to tenants will amount to delivery of possession, only where the transferor himself has possession to give, and not where he is himself out of possession as in the present case. The authorities quoted by Mr. Moti Sagar are ample in support of the proposition that the lessor in the present case was bound to put the lessee in possession of the property leased. It is quite clear from the evidence that the Bank itself was unable to get possession of the whole of the property. The evidence of Lala Sheo Narain shows that on account of a dispute between the insolvent, whose property was sold, and his sons, the tenants, after July 1914, refused to pay rent to any one. The Bank, therefore, was never in possession of the rents and profits of the property leased and the notices which it sent to the tenants were, therefore, not a sufficient delivery of possession to the lessee. It is clear from the Bank's letter of the 19th December 1915 to the address of the Official Assignee, Bombay, that three rooms of the property were at that time occupied by the Official Assignee for the storage of certain chairs belonging to the estate of the insolvent. It is also clear from the evidence on the record both oral and documentary, that a dispute was going on as to the ownership of the property, and the sons of the insolvent were claiming a share in it and were obstructing the Bank in getting possession. In all these circumstances, and having regard to the authorities cited, I am of opinion that the lessee is not liable to pay rent for such part of the property as he was not given possession of. He admittedly got possession of one stable or part of a stable, and it is not denied that he is liable to pay rent therefor.

I allow the revision and setting aside the order of the lower Court remand the case for re-decision, and for passing a decree against the defendant for so much rent as he is equitably liable to pay for that portion of the property of which he actually got possession. The parties will bear their own costs in this Court whatever the result of the case may be.

*Revision allowed.*

(5) 33 M. 102; 3 Ind. Cas. 701; 6 M. L. T. 313; 20 M. L. J. 20.

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PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 4125 OF 1916.

May 21, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

FAKIRA SINGH UNDER THE GUARDIANSHIP OF RAM CHARAN SINGH—APPELLANT

*versus*

MAJHO SINGH—PLAINTIFF AND GAJADHAR SINGH—DEFENDANT—RESPONDENT.

*Transfer of Property Act* (*IV of* 1882), *s.* 53, *applicability of—Fraudulent sale—Sale to defeat one creditor—Sale* bona fide, *for valid consideration, whether voidable.*

Section 53 of the Transfer of Property Act applies even though only one creditor is defrauded and hindered in realizing his debt. [p. 687, col. 2.]

If there is a *bona fide* sale duly intended to be acted upon between the parties and the property passes from the vendor without any reservation to the vendee and the latter pays good and valuable consideration for the property, then even though it may have been intended to defeat the rights of the vendor's creditor in the realization of his debt, the creditor is not entitled to a declaration that the deed of sale is voidable as a fraud on him as a creditor of the vendor. [p. 688, cols. 1 & 2.]

FAKIRA SINGH *v.* MAJHO SINGH.

Appeal from a decision of the District Judge, Gaya

Mr. *Khurshed Hasnain*, for the Appellant.

Rai *Tribhuan Nath Sahay*, for the Respondent.

JUDGMENT.

ATKINSON, J.—This suit is brought by the plaintiff seeking a declaration that 5-*dams* share of the village of Muhammadpur Oro is his proprietary right and that the defendant No. 1 has no right to bring this share of the property in suit to sale in satisfaction of a debt due by the defendant No. 2 to the defendant No. 1. The defendant No. 2 was the original proprietor of this property. He contracted a debt with the defendant No. 1, and on the 5th December 1911, the defendant No. 2 sold the property in suit to the plaintiff who is his nephew for a consideration stated to amount to Rs. 995. This deed of transfer or sale was made by the defendant No. 2 to the plaintiff a fortnight after the defendant No. 1 had instituted a suit to recover the moneys due to him by the defendant No. 2. The consideration to support the deed dated the 5th December 1911 is set out in the deed; a part of it was to be applied in satisfaction of debts due by the defendant No. 2 to certain creditors, and part was to be paid to him in cash. It appears that at least two of the creditors specified in the deed were paid, and that the plaintiff retains still in his hands of the purchase-money the sum of Rs. 325 to discharge the claim of one Gendo Singh on foot of a mortgage-bond. The learned Munsif who tried the case came to the conclusion that the deed was a fraud on the creditors of defendant No. 2; that no consideration, in fact, passed to support the deed of sale, and that the transfer of the property was an attempt by the defendant No. 2 to defeat the rights of his creditors in the realization of their debts; the property in suit being the only immoveable property which the defendant No. 2 had. The learned District Judge, however, came to a somewhat different conclusion. The learned Judge was satisfied that the deed of sale was executed and that it was duly registered. The learned Judge thought, as I gather from his finding that proof of the foregoing facts cast the onus upon defendant No. 1 of showing and proving that the deed was a deed executed by the defendant No. 2 with the intent of defeating, delaying and hindering him as a creditor of the defendant No 2. As a matter of law the learned Judge was quite right in throwing the onus on defendant No. 1 of proving that the deed of sale was intended as a fraud. However, the learned Judge in point of law held that section 53 of the Transfer of Property Act could not possibly apply to this case, because the intention of the defendant No. 2 in effecting the sale to the plaintiff was at best on the evidence only an intention to defeat the rights of one particular creditor and that consequently section 53 of the Transfer of Property Act had no application. The Judge seems inclined to hold, though he does not do so expressly, that the intention on the part of the defendant No. 2 and his other creditors was to effect a transfer of the property in suit in order to defeat the defendant No. 1's rights in realizing his debt. With great respect to the learned Judge we think he has misconstrued and misapplied the law embodied in section 53, clause (1) of the Transfer of Property Act. The learned Judge considers that before section 53 can apply the intention must be shown to defeat the entire body of creditors but that merely to intend to defeat one creditor would not be within the provisions of section 53, With great respect to the learned Judge we think that he was entirely wrong in so holding. Section 53 of the Transfer of Property Act applies even though only one creditor may have been defrauded and hindered in realizing his debt. The law on the subject is well summarised in the case of *In re Le Moroney* (1). This case is of great authority representing the considered opinion of seven Judges of the Court of Appeal in Ireland, and in addition this decision has been approved of by the Privy Council in the recent case reported as *Musahar Sahu* v. *Hakim Lal* (2) as containing a most clear and able exposition of the Law of England and Ireland relative to the fraudulent transfers of property with intent to defeat creditors and which is made applicable

(1) (1887) 21 Irish 27.

(2) 32 Ind. Cas. 343; 20 C. W. N. 393; 30 M. L. J. 116; 3 L. W. 207; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 C. 521 (P. C.).

to the law of India by virtue of section 53 of the Transfer of Property Act. Section 53 in effect is only a re-enactment, in a more concise form, of the provisions of the Act of 10th Charles, Chapter I in Ireland, and the Statute of Elizabeth in England. The case cited is an authority not only on the construction of the English Statute of Elizabeth but also on the Irish Statute of Charles. The learned Master of the Rolls dealing with this very point says:

"Next Mr. Carton contended, in reference to the Statute of Charles, that the transaction before us was not intended to defeat *creditors* in the plural, but only one creditor, and *Wood* v. *Dixie* (3) was relied upon on this point. It is important in this connection to again consider what are the words of the Statute of Charles. Its intent is stated in the recital or preamble which I have already read, and which, no doubt, speaks of creditors. It was necessary there to use the plural and not the singular number. But when we come to the operative part of the section, the words used are not in the plural only; for we have "*that* person or persons, his or their heirs etc." and, therefore, no argument in favour of exempting the case of a single creditor can be deduced from the language of the Act. It would be the summit of absurdity to suppose that a mischief of this kind was to be struck at if two or more persons were affected, but that a single creditor was to be without protection."

That was the view taken in Ireland and to the same effect is the decision reported as *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (4) and there the Hon'ble Judges Sir Francis Maclean and Mr. Justice Banerjee say:

"Reading this section as a whole then, what it means, so far as it is applicable to a case like the present, is this, that where a transfer of immoveable property is made with intent to defeat or delay any creditor of the transferor it is voidable at his option."

Clearly, therefore, the learned District Judge was wrong in ruling that section 53 only applies when it can be established that there was an intent to defraud or defeat the general body of creditors from realizing their debts. The section applies with equal force and effect if a debtor disposes of his property with the intention of defeating one single creditor. But if the property of the debtor is transferred for consideration and *bona fide* to a purchaser and such transfer has the effect of putting the debtor's property out of the reach of the creditors as an asset capable of being realized to satisfy their debts nevertheless the transfer will be effective and the creditors will not be entitled to have the transfer set aside or declared void. I think it right to cite at some length the judgment of the Irish Court of Appeal because in the case cited the entire law on this subject is carefully considered and laid down. At page 57 of the report the Master of the Rolls says:

"Vice-Chancellor Kindersley, one of the greatest Equity Judges who has sat in England in recent time, there said that in the construction of the Statute of Elizabeth it was not a ground for invalidating a *bona fide* sale, that it is made in order to defeat an intended execution. That is decided by *Wood* v. *Dixie* (3). The sale of property for good consideration, made *bona fide*, is, therefore, sufficient to defeat the execution of a judgment-creditor. And I have only to consider whether the sale was *bona fide*, and on that point every case stands on its own merits."

At page 62, the Lord Chief Baron Palles sets out very fully what the law is and says:

"Again, the right of the creditors is, not that the debtor shall not *part with* any of his property, but that no such parting shall be without consideration, If 'says Alderson, B. in *Siebert* v. *Spooner* (5), an equivalent is given, there is only a change in the nature of the property which the party has, but not a conveying of it away.' When, therefore, there is a *bona fide* sale for value of part of the property of the debtor really

(3) (1845) 7 Q. B. 892; 9 Jur. 796; 115 E. R. 724 68 R. R. 590.

(4) 24 C. 825; 1 C. W. N. 665; 12 Ind. Dec. (N. s.) 1217.

(5) (1836) 1 M. & W. 714; 1 Tyr. & G. 1075; 2 Gale 135; 5 L. J. Ex. 249; 46 R. R. 471; 150 E. R. 621.

intended to have effect and operation between the parties to it, the right of the creditors is not invaded. No doubt the property sold has ceased to be available for their demands, but in lieu of it, there has been substituted the consideration for the sale, which may be assumed to be a substantial equivalent. Such a sale, therefore, would not be a fraud within the Statute, merely because it was made with the express intent to defeat or delay the execution of a creditor. Were there nothing more in the case, the consideration would remain capable of being made available, not under the intended execution but by some one or other of the modes known to the law, and, therefore, in such a case, there would not be a fraud within the Statute. This was the ground of the decisions in the only other cases cited by the appellant on this branch of the argument, *viz.*, *Wood* v. *Dixie* (3) and *Hale* v. *Salcon Omnibus Co.* (6). It is to be observed, however, that the decision in *Wood* v. *Dixie* (3) goes no further than determining that an intent to defeat a particular creditor in the case of a *bona fide* sale for value, does not *per se* and as a matter of law, render the conveyance fraudulent. If, however, in such a case, the intent were not only to sell the property, but forthwith to abscond with the proceeds, so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent. I should entertain no doubt that in such a case there would be an intention to defraud creditors, which, if the purchaser had notice of, would avoid the sale."

That appears to me to be a very clear and accurate exposition of the law on this subject. Thus in this particular case if the learned Judge on re-consideration is satisfied that there was a *bona fide* sale duly intended to be acted upon between the parties, and that the property was to pass from the defendant No. 2 without any reservation to the plaintiff and the plaintiff was to pay good and valuable consideration for the property, then even though it may have been intended to defeat the rights of the defendant No. 1 in the realization of his debt, the defendant No. 1 would not be entitled to a declaration that the deed of sale was voidable as a fraud on him as a creditor of defendant No. 2. We think that in order to arrive at a right conclusion on these points, which have not been considered, that it is necessary to remand the case to the learned Judge. It will be unnecessary for him to consider whether the deed was duly executed and duly registered; that has already been determined but we do think in the light of the evidence that the Judge should bring his mind to bear on the facts and to ascertain whether the deed was a deed for valuable consideration; and whether it was a deed *bona fide* between the parties. If he so holds then, in our opinion, in point of law he should grant the plaintiff the relief he seeks. If, on the other hand, the learned Judge holds that the deed is not *bona fide*; that it is lacking in reality; and that it was merely a colourable transaction designed and intended to defeat the rights of the defendant No. 1 as a creditor of the defendant No. 2, and that no consideration, in fact, passed that then he ought to dismiss the plaintiff's suit. We remand the case in entirety and having given our opinion as to what the law is we leave it to the learned Judge to decide the facts accordingly.

The appeal is, therefore, allowed and the costs will abide the result of the final determination of the suit.

CHAPMAN, J.—I agree.

*Appeal allowed,*
*Case remanded.*

(6) (1859) 4 Drew. 492; 28 L. J. Ch. 777; 7 W. R. 316; 62 E. R. 189; 113 R. R. 430.

## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 69 OF 1916.

June 22, 1916.

*Present*:—Syed Mohammad Ali, A. J. C.

BENI—ACCUSED—APPELLANT—APPLICANT

*versus*

EMPEROR—COMPLAINANT—RESPONDENT—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 424, 367—Appellate Court, Criminal—Judgment, contents of.*

The judgment of a Criminal Appellate Court must show that the Court has fully considered the evidence on both sides and the pleas raised in appeal and that its conclusions are well supported by reasons.

Criminal revision against the order of the District Magistrate, Hardoi, dated the 22nd March 1916, upholding that of the Magistrate, 1st Class, Hardoi, dated the 26th February 1916.

Babu *Hargobind Das*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application by Beni for revision of an order of the District Magistrate of Hardoi, rejecting his appeal from an order requiring him to give security for his good behaviour under section 110 of the Code of Criminal Procedure. The first ground urged in support of this application is that the judgment of the District Magistrate who heard the appeal of the applicant is not a judgment as required by law, and does not show that he had fully considered the evidence on both sides and the pleas raised before him. The judgment of the District Magistrate passed on the 22nd of March 1916 is as follows:—"There is no reason to reject the evidence of the many persons of position who prove appellant's general reputation as a thief. I dismiss the appeal." In support of this contention reliance is placed on the cases of *Sarwan* v. *Emperor* (1) and *Lal Behari* v. *Emperor* (2). In my opinion these cases show that the District Magistrate should have written something more than what he did actually write in his judgment and that the judgment written by him does not fulfil the requirements of law and does not show that he had fully considered the evidence on both sides and the pleas raised in appeal. In this view of the case it is not necessary to discuss and enter into other pleas. In my opinion it is necessary that this case should be re-heard according to law, and for this purpose it is necessary to set aside the order of the District Magistrate. I, therefore, set aside the order passed by the District Magistrate on appeal and direct that the case be transferred to the District Magistrate of Lucknow, who will pass a judgment according to law after re-hearing the appeal on the merits.

*Revision accepted.*

(1) 33 Ind. Cas. 647; 14 A. L. J. 279; 17 Cr. L. J. 167.

(2) 35 Ind. Cas. 485; 14 A. L. J. 445; 38 A. 393; 17 Cr. L. J. 305.





## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 122 OF 1916.

July 22, 1916.

*Present*:—Mr. Mittra, Officiating A. J. C.

LAVA AND OTHERS—APPLICANTS

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 353—Public servant carrying out order of Court made under repealed Act—Assault—Offence—Civil Procedure Code (Act V of 1908), O. XXI, r. 35—Delivery of possession to agent.*

Where a Court has jurisdiction to order delivery of possession of certain property, the mere fact that it purports to do so under the authority of a repealed Act will not take away its jurisdiction, nor deprive the process-server of the protection which the law gives to a public servant acting under the orders of a Court of competent jurisdiction. [p. 690, col. 1.]

A process-server who was not wearing his official badge was, while carrying out the orders of a Court of competent jurisdiction, assaulted by the accused. He had announced that he was carrying out Government order:

*Held*, that the accused were guilty of an offence under section 353 of the Penal Code. [p. 690, col. 2.]

Under the provisions of Order XXI rule 35, of the Civil Procedure Code delivery of possession can be made to any person orally authorised by the decree-holder to take possession, even though he does not hold a power-of-attorney from the latter. [p. 690, col. 2.]

SUJAN SINGH *v.* JIA LAL.

Criminal revision against the order of the District Magistrate, Nagpur, dated the 23rd June 1916, confirming the conviction and sentence passed by the Tahsildar and Magistrate, 2nd Class, Nagpur, on the 2nd June 1916.

Mr. *P. R. Naidu*, for the Appellants.

JUDGMENT.—The applicants have been convicted under section 353 and section 147 of the Indian Penal Code. The following facts may be taken as found by the Courts below, and I see no reason to doubt their correctness. One Krishna Rao obtained a foreclosure decree against the applicants in 1913. He made two attempts to obtain possession in execution of that decree, but these were infructuous. On the 5th February 1916, a special process-server came to the village. The decree-holder sent for four ploughmen with ploughs for taking possession of the field. A message had already been sent to one at least of the accused, informing him that delivery of possession was about to be given. After the field had been ploughed by the decree-holder's men, the accused turned up and resisted the delivery of possession. A fight followed, in which some of the decree-holder's men as well as some of the accused were injured. The process-server himself was assaulted.

It is contended that the warrant, having been issued on the printed forms of the Civil Procedure Code of 1882, was defective. I cannot agree that the process-server had no authority to execute the warrant for this defect. The Court had jurisdiction to order delivery of possession, and the mere fact that it purports to do so under the authority of a repealed Act, will not take away its jurisdiction, nor deprive the process-server of the protection which the law gives to a public servant, acting under the orders of a Court of competent jurisdiction.

The argument that the process-server had no badge is so far correct, but upon the findings there is every reason to believe that the accused knew that he was a process-server. It will be noted that a message had been sent to one of them and all the accused arrived after the complainant's party had taken possession, and the process-server says that he announced that he was carrying out Government orders. This is a probable story, and has been accepted by the Courts below. I, therefore, see no force in this argument.

It is contended that the warrant so far as it directed delivery of the standing crops was illegal. But the Court that passed the order had jurisdiction to decide whether the standing crops should, or should not be delivered, and this jurisdiction is not lost, if a wrong order has been passed. In such a case, the party aggrieved can only appeal to the Court to vacate the alleged illegal order. I do not express any opinion as to whether this was an illegal order, but I have assumed it for the sake of argument only. I note that there was no attempt made to remove the standing crops by the decree-holder's party.

It is said that possession could not be delivered in the absence of the judgment-debtors. I know of no authority in support of this view. They were, as a matter of fact, sent for, and they did come, but they had no right to resist the process-server.

It is argued that possession could only be delivered to the decree-holder or his agent. I do not agree with this contention, unless the word agent includes any person orally authorized to take possession. The four ploughmen were certainly sent for that purpose by the decree-holder, though they held no power-of-attorney. Eventually the decree-holder signed a receipt acknowleding the fact of possession having been delivered to him. The last argument advanced is that the common object of the accused is not proved. But the common object is to be inferred from their conduct, and no reasonable person can doubt that the accused were acting in concert to prevent delivery of possession.

The application is dismissed.

*Application dismissed.*

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## PUNJAB CHIEF COURT.

CRIMINAL MISCELLANEOUS CASE No. 120 OF 1916.

March 3, 1917.

*Present*:—Mr. Justice Broadway.

SUJAN SINGH—ACCUSED—PETITIONER

*versus*

JIA LAL—COMPLAINANT—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 526—Refusal to allow accused to cross-examine complainant—Transfer.*

SUJAN SINGH *v.* JIA LAL.

An application for transfer of a case was made on the ground that the accused had not been allowed to properly cross-examine the complainant and that certain orders and remarks recorded by the Magistrate clearly indicated that he had formed a strong opinion against the petitioner. It appeared that the Magistrate considered that the accused should be allowed to inspect certain bank books before cross-examining the complainant and the bank having objected to allowing the necessary inspection, the Magistrate passed an order on the 18th July 1916 directing the bank to give the accused's Counsel opportunity to inspect the necessary registers. On the 4th of August, however, in the absence of the accused's Counsel and without any reference to the previous order relating to the registers, the evidence of the complainant was closed. The complainant was then summoned as a witness by the defence but when Counsel wished to cross-examine him his request was refused:

*Held*, (1) that although the Magistrate's refusal may have been strictly legal, it was improper in the circumstances of the case and the Magistrate would have been well advised to have allowed at any rate a reasonable amount of cross-examination, especially when the prosecution raised no objection to such cross-examination: [p. 692, col. 1.]

(2) that inasmuch as the case had reached a very advanced stage, the charge having been framed and a certain amount of the defence evidence having been recorded, it could not be transferred but that the Magistrate should allow the accused to cross-examine the complainant after giving him an opportunity of examining the bank registers. [p. 692, cols. 1 & 2.]

Petition, under section 526 of the Criminal Procedure Code, for transfer of the case Jia Lal *v.* Sujan Singh, pending in the Court of the Additional District Magistrate, Lahore, to some other competent Court.

Messrs. *B. R. Puri* and *H. R. Bhandari*, for the Petitioner.

Mr. *R. Obbard*, for the Respondent.

ORDER.—This is an application under section 526, Criminal Procedure Code, for the transfer of a case under sections 420/467, Indian Penal Code, pending in the Court of Mr. Keough, Additional District Magistrate, Lahore. The reasons advanced for the transfer are detailed in the application and may be summed up as a general complaint against the conduct of the case by the Magistrate. It is said that the petitioner has not been allowed to properly cross-examine the complainant and that certain orders and remarks recorded by the Magistrate clearly indicate that he has formed a strong opinion against the petitioner. I have heard Mr. Puri in support of the application and Mr. Obbard has appeared on behalf of the complainant, the Crown being unrepresented.

The case is an old one; the trial before the Magistrate commenced on the 27th April 1916, the charge has been framed and a certain amount of the defence evidence has been recorded; and, therefore, it would only be under very exceptional circumstances that this Court would take the case out of the hands of the Magistrate. It has been urged that these exceptional circumstances exist and that this is a case in which this Court should exercise its power to transfer the case. After a careful consideration of the record of the proceedings and of what has been urged for and against the application I am forced to the conclusion that the petitioner has certainly got some grounds for complaint, though possibly more on account of the treatment by the Magistrate of the Counsel in the case than of the petitioner himself. It appears that at the initial stages of the trial Mr. Herbert was appearing for the complainant and joined with Mr. Puri, for the accused, in an application made to the District Magistrate, in which it was suggested that the case was more of a civil nature and it was prayed that permission to withdraw from the prosecution should be accorded. Mr. Keough in forwarding the file to the District Magistrate recorded a note to which my attention has been drawn. While I am not prepared to agree with the Counsel that Mr. Keough was wrong in expressing his opinion that the case was not of a civil nature, I certainly agree with him that his remarks regarding Mr. Herbert were wholly uncalled for and unnecessary. Had Mr. Herbert been given an opportunity I have no doubt he would have been able to justify his action; and Mr. Keough's surprise at Mr. Herbert's conduct was wholly irrelevant and should not have been expressed, even if felt. Again, on the 16th November 1916 when submitting the record to the District Magistrate on an application made under section 526, Criminal Procedure Code, Mr. Keough recorded a report as required by the learned District Magistrate; he was no doubt perfectly within his province in contradicting the allegations made in the application, but in doing so it was incumbent on him to be accurate. In stating that paragraph D of the application was a *glaring falsehood*, he appears to have completely lost sight of his order dated the 18th May 1916, which shows

that there was considerable foundation for the allegations made in the said paragraph D. The whole tone of the report indicates that Mr. Keough strongly resented the making of the application and went out of his way, in giving expression to this resentment, to make remarks which, in my opinion, Mr. Puri can justly take exception to—remarks which had no bearing on the question. Expressions such as are used by Mr. Keough can do no manner of good and must inevitably result in straining the relations between the Magistrate and the Counsel appearing before him.

In supporting this present application Mr. Puri stated that he found it extremely difficult, if not impossible, to appear before Mr. Keough after the way in which he had been treated. But I do not think that this in itself would be a valid reason for transferring the case. Mr. Keough has after all made comments on the Counsel on both sides and it cannot, therefore, be said that he has any particular bias against any particular one. It was then urged that the complainant had not been properly cross-examined, and it seemed to me that there is some force in this contention. Mr. Keough very rightly considered that the accused should be allowed to inspect certain bank registers before cross-examining Jia Lal; the bank seems to have objected to allowing the necessary inspection, and on the 18th July 19.6 a strong and perfectly correct order was passed in which the bank was directed to give the accused's Counsel an opportunity to inspect the necessary registers. On the 4th August 1916, however, in the absence of the accused's Counsel and without any reference to the previous order relating to the registers the evidence of the complainant was closed. The complainant was then summoned as a witness by the defence and yet when Counsel wished to cross-examine him his request was refused. This refusal may have been strictly legal; but it was improper in the circumstances, and the Magistrate would have been well advised to have allowed, at any rate, a reasonable amount of cross-examination, especially when, as Mr. Obbard informs me, the prosecution raised no objection to such cross-examination. While, therefore, owing to the stage at which the case has reached I am not prepared to transfer the case, I consider it necessary in returning the records to the Magistrate to direct that the accused petitioner be allowed to cross-examine the complainant Jia Lal after the petitioner has been given an opportunity of examining the registers of the bank above alluded to.

*Order accordingly.*

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## PATNA HIGH COURT.

CRIMINAL REVISION NO. 221 OF 1917.

June 25, 1917.

*Present*:—Mr. Justice Chapman.

MUKHAL SINGH AND OTHERS—PETITIONERS

*versus*

RAMSARUP SINGH AND ANOTHER—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s 145—Proceedings, object of—Portion of property made subject-matter of dispute—Mistake in law—Non-joinder of party—Order giving party more than his claim, validity of—Revision—High Court, interference by.*

The purpose of a proceeding under section 145 of the Criminal Procedure Code is merely to prevent a breach of the peace and if the Magistrate thinks that it is sufficient to prevent a breach of the peace to include in his proceeding only a portion of the land which is the subject of the Police report there is nothing to prevent him doing so. The rule that if a suit is brought only in respect of a portion of the land claimed a subsequent suit for the remainder might be barred is not applicable to proceedings under this section. [p. 693, col. 2.]

A mistake of law is not a ground upon which the High Court can interfere with proceedings under section 145 of the Criminal Procedure Code, unless the mistake goes to the jurisdiction. [p. 693, col. 2.]

Failure to add a party interested in the land in dispute as a party to the proceedings under section 145 is not a ground for interference by the High Court. [p. 694, col. 1.]

A Magistrate goes beyond his jurisdiction if by an order under section 145 of the Criminal Procedure Code he awards to a party more than that party has claimed, and in such a case the High Court will interfere with the order. [p. 694, col. 1.]

Criminal revision from a decision of the Deputy Magistrate, Saran, dated the 24th April 1917.

Messrs. *C. M. Agarwala* and *P. E. Lal*, for the Appellants.

Mr. *Parmeshwar Dyal*, for the Opposite Party

JUDGMENT.—This is a motion asking for interference by this Court with an order passed in a proceeding under section 145 of the Code of Criminal Procedure. The

first party is a purchaser of six-annas share of the proprietary right. His case was that the *zirait* land had been partitioned among the different proprietors and that certain plots out of the land in dispute had been allotted to his share, that there had been a submergence on account of innundation by the river, that the plots had re-appeared and that he had settled them with tenants upon the *batai* system. The second party were the *raiyats* of the village, who claimed that the entire lands in dispute were parts of their occupancy holding. The Magistrate awarded possession to the first party—giving the first party in fact more than they claimed, that is to say, he gave them the entire land described in the order by which these proceedings were initiated.

The first ground taken before this Court is that the proceeding is without jurisdiction so far as a portion of the land is concerned which lies outside the district of Saran. The Magistrate professedly exercised jurisdiction only within the district of Saran. The order originating the proceedings described the northern boundary of the land in dispute to be the boundary of the village Chaki Sahagpur in the district of Muzaffarpur. So far, therefore, as this order which originated these proceedings is concerned there was no want of jurisdiction, for it is conceded that so far as the present land is concerned anything south of the boundary of the village of Chaki Sahagpur would be within the district of Saran and within the jurisdiction of the Magistrate. I am asked, however, to infer from the evidence given by a Commissioner in the case who went to the spot that a portion of the land in dispute lay within the village of Chaki Sahagpur and, therefore, outside the jurisdiction of the Magistrate. My experience of the work of Commissioners especially in cases of village boundaries is not such as to justify me in saying that the evidence must necessarily be implicitly relied upon, and in any event the Magistrate himself has described the boundary of the disputed land as the boundary of the village of Chaki Sahagpur. His order, therefore, does not include any land situated within the village of Chaki Sahagpur: and if the petitioner has satisfied and is confident that he could satisfy any Court that any portion of the land is situated within the village of Chaki Sahagpur, this order will not imperil any possession he may have of that land.

Another ground contended is that only a portion of the land in respect of which disputes had arisen was made a subject of these proceedings. That is not a ground upon which, in my opinion, a High Court can interfere. The purpose of a proceeding under section 145 is merely to prevent a breach of the peace and if the Magistrate thinks that it is sufficient to prevent a breach of the peace to include in his proceeding only a portion of the land which is the subject of the Police report, there is nothing to prevent him doing so. The rule that if a suit is brought only in respect of a portion of the land claimed a subsequent suit for the remainder might be barred is not applicable. Another ground contended is that the Magistrate made a mistake in law in relying upon the ruling of *Hemnath Dutt* v. *Ashgur Sindar* (1), to the effect that if a portion of the holding of an occupancy *raiyat* is submerged and no rent is paid for it that portion must be taken to have been abandoned. There is no doubt a good ground for holding that that decision is no longer law so far as the Calcutta High Court is concerned, and that so far as the jurisdiction of this Court is concerned the decision is not correct in law. There is much to be said for this view and all that can be said for it was said by Mr. Justice Prinsep in the case of *Obhoya Charan Bhooia* v. *Koilash Chunder Dey* (2). But a mistake in law is not a ground upon which this Court can interfere with proceedings under section 145 unless the mistake goes to the jurisdiction. Another ground contended was that certain co-sharer proprietors were not made parties and in connection with this ground it was also contended that the first party has been awarded more than he claimed. It will be remembered that the first party claimed to be in exclusive possession of certain plots of the land in dispute. So far, therefore, as those plots

(1) 4 C. 894; 2 Shome L. R. 142; 2 Ind. Dec. (N. S.) 566.

(2) 14 C. 751; 7 Ind. Dec. (N. S.) 198.

PUNJAB CHIEF COURT.
CRIMINAL APPEALS NOS. 978 AND 1007 OF 1916.
January 10, 1917.
*Present*:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Shah Din.
NAND SINGH AND ANOTHER—CONVICTS—APPELLANTS
*versus*
EMPEROR—PROSECUTOR—RESPONDENT.

*Evidence Act (I of 1872), ss 133, 114, illus. (b)—Approver, statement of, value of—Corroboration, necessity of.*

An accomplice should not be convicted on the statement of an approver who is by nature a liar, unless such testimony is strongly corroborated and the corroboration distinctly implicates the accused in, and connects him with, the crime committed. [p. 698, col. 2.]

Appeals from the order of the Sessions Judge, Ferozepur, dated the 31st October 1916, convicting the appellants and sentencing them to death.

Mr. *Asquith*, for Nand Singh, and Dr. *Nand Lal*, for Jamal Din, Appellants.

Rai Sahib Lala *Mul Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—The murder, which is the subject of this case, was perpetrated close to a well near a house, which had been built on land in the outskirts of the village Tikhanwadh for the victim of the murder given by his sister *Musammat* Nandan and her husband. It seems that the family consisted of the victim Sham Singh, his brother Nand Singh (accused No. 2), resident of *Mouza* Malha, a village six *kos* from *Mouza* Tikhanwadh, and the sister aforesaid. The father of the family was one Dip Singh, who died four years ago leaving property. It is in evidence that Dip Singh favoured Sham Singh deceased and was on bad terms with Nand Singh and that he made a gift to Sham Singh of a large portion of his land, whereupon Nand Singh brought a suit and a sort of compromise was arrived at, under which Nand Singh was to get one-third of the produce during Dip Singh's lifetime, and thereafter, was to get half the property. That dispute was in this way composed; but about two years later an uncle Jit Singh died sonless. Nand Singh having taken possession of the whole of Jit Singh's estate Sham Singh brought a suit and got his share and also got a decree for Rs. 25 in connection with that case, which sum Sham Singh recovered by execution in December 1915. A third dispute arose thereafter between these two brothers. Nand Singh had asked Sham Singh to put a wall between the two parts of the house and Sham Singh refused. Finally, Sham Singh was killed on the night between the 6th and 7th June 1916. The case for the prosecution is that the murder was done by Bhan Singh and Jamal Din at the instigation of Nand Singh; that Nand Singh wished to get rid of his brother Sham Singh, partly on account of resentment against him and, no doubt, partly also because, by getting rid of the sonless Sham Singh, Nand Singh would get the whole of the family property. Bhan Singh, one of the alleged murderers, is Nand Singh's wife's brother, and is apparently a man of very bad character. The case for the prosecution depends almost entirely upon the statement of this Bhan Singh, to whom a pardon was tendered and who has given a detailed story, first to Raghbir Singh, Magistrate, 1st Class, on the 16th June 1916, then to the Committing Magistrate on 10th July 1916, and lastly in the Sessions Court on 26th October 1916. Briefly stated, his story as to the actual murder and the abetment is, that Nand Singh bribed him by the promise of Rs. 500 to murder Sham Singh, and that he at first refused, but at last agreed and received in advance Rs. 299 in cash and a promise to wipe off Rs. 100 which Bhan Singh owed to him; that his courage failed him and he enlisted the help of Jamal Din, accused No. 1, who owed him Rs. 185, promising Jamal Din to cancel that debt and to pay him Rs. 65 more in cash; that, after this was arranged, the pair went to Sham Singh's house, found him in his courtyard near the well and murdered him, Jamal Din covering the victim's mouth with one hand and seizing his throat with the other and strangling him, while Bhan Singh held his legs; that in the course of the struggle the deceased managed to get hold of Jamal Din's right hand between his teeth and to make a serious bite; that Jamal Din released himself by striking Sham Singh with his fist, breaking two of his teeth, and that Bhan Singh hid Rs. 284 out of the Rs. 299 in a field under an *ak* tree, but had not yet paid the remaining Rs. 65 to Jamal Din, when he was arrested by the Police.

NAND SINGH *v.* EMPEROR.

The assessors were unanimously of opinion that the accused were both guilty, and that Bhan Singh's story was substantially correct. The Sessions Judge convicted the pair, and sentenced both to death. They have appealed, and we have heard Mr. Asquith on behalf of Nand Singh and Mr. Nand Lal on behalf of Jamal Din.

The problem before us is whether considering the character of Bhan Singh and the nature of his statement and the circumstances of the case generally, the prosecution has produced sufficient corroboration of his story. The medical evidence is clear enough. Although in consequence of the decomposition of the body the doctor has not noticed any marks on the throat of the victim, yet there is otherwise sufficient foundation for his firm opinion that death was caused by asphyxia brought on by throttling and suffocation by closure of the mouth and nostrils. The doctor also noticed bruises on the lower lip and the fact that both central incisors of the lower jaw had been recently knocked out. We are satisfied, therefore, that the cause of the death was strangulation or suffocation. Further, we have the evidence of another doctor regarding the bite on the hand of Jamal Din and this is said to be probably a human bite. This also is corroboration of part of the prosecution story. Next we have P. W. No. 4, the deceased's sister, who says the two brothers were on good terms and who explains that Sham Singh became a *faqir* and that she and her husband gave him a site for a house and sank a well; also that Sham Singh used to practise medicine; and she stated in the first report that he was supposed to have some hundreds of rupees in his possession, and that perhaps the murder had been done for greed of money. Passing by evidence not connected with the actual murder or with the abetment, we have evidence (see P. Ws. Nos. 6, 22 and 24) which goes to show that the murderers did not go into the victim's house and that nothing had been disturbed in the house. Next P. W. No. 7 says that Sham Singh and Nand Singh were on very bad terms, and details quarrels between the brothers. P. W. No. 20, Baggu, also states emphatically that the brothers were on very bad terms and did not visit each other. P. W. No. 10, a *zaildar*, testifies to Bhana having pointed out where he had buried the Rs. 284 aforesaid, and P. W. No. 11 Bhola Singh, also a *zaildar*, corroborates this evidence. Then there is the evidence of P. W. No. 12 and P. W. No. 13 and Exhibit P. A, to show that Jamal Din owed Rs. 185 to Bhan Singh, and witnesses Nos. 14, 15, 16 and 17, who are what are usually called *wajtakkar* witnesses and whose evidence has been believed by the Sessions Judge to this extent that these men probably did meet two persons on the night of the murder, but probably did not recognise them as the two accused, not having known them before. In our opinion the view of the Sessions Judge that the identification is not satisfactory is sound; and though the learned Sessions Judge seems to think that, notwithstanding the absence of identification, their evidence is valuable as corroboration of the approver's story, it seems to us that it is not the sort of corroboration which the law requires, for it does not directly connect the two accused before us with the murder. It is just the kind of corroboration which the authorities say is not sufficient, for these persons' story, apart from their allegation of identification, if it be not believed, would be exactly the same, if the two persons they had met were other persons and not the two accused. Though two or three witnesses for the prosecution dilate upon the enmity existing between the two brothers, other witnesses go out of their way to say that there was no such enmity. There is also evidence (see P. W. No. 20 Baggu) that a few days before the murder Baggu saw Nand Singh at his own house counting out money to Bhan Singh, and some other evidence that the two men had been seen talking together. Lastly, we have some track evidence which we have carefully considered. The prosecution in argument did not lay any stress upon it, and we do not think that it is of any particular value.

It cannot be said that the corroboration contained in the evidence, of which a sketch has been given above, is very strong at the best, and in our opinion it is more than counterbalanced by an incident testified to by P. W. No. 29, Inspector of Police, who says that Bhan Singh,

when he made his first confession to the Police, implicated as his accomplice not Jamal Din, whom he never mentioned at all, but two men called Mangal and Kalu. We have looked at the *zimnis* and we find a very long and elaborate version of the story, in which Mangal and Kalu figure as the co-adjutors. It appears that when the Police put it to Bhan Singh that Mangal was in Jail at Faridkote and that Kalu, a well-known dacoit, was absconding, Bhan Singh turned round and said that they were not in it at all, but that Jamal Din was his accomplice, and then he proceeded to mention for the first time the bite in the thumb as having been done by his victim. Jamal Din was promptly sent for, and it was found that he had a bite in his thumb. Now if it was quite certain that, until Jamal Din appeared on the scene after Bhan Singh's statement about him, no one knew that he had a bite in his thumb, there might be something to be said for Bhan Singh's story; but Jamal Din lives in the same village, and whether he is, as the prosecution say, an intimate friend of Bhan Singh or not, at least he was well known to Bhan Singh and had dealings with him, and it is not safe in these circumstances to conclude that the introduction of the story of the thumb by Jamal Din on that occasion was *bona fide*.

The accused produced some evidence, but it is hardly necessary to discuss it as, in our opinion, there is no sufficient corroboration of Bhan Singh's story. Even according to the Sessions Judge the only corroboration is, *first*, the fact that Nand Singh and Sham Singh were on unfriendly terms, *secondly*, that there had been communication between Bhan Singh and Nand Singh shortly before the murder, and *thirdly*, the so-called corroboration by P. Ws. Nos. 14 to 17 aforesaid, which, however, we consider of no value at all. This, in our opinion, is not sufficient, even if we add the circumstance that the murder does not seem to have been done for gain, for, considering the character of Bhan Singh and considering that he is the sort of man who is capable of first naming two persons such as Mangal and Kalu and then carefully turning round and implicating another man, it is impossible for us to have any sort of confidence in Bhan Singh's veracity. If he was strongly corroborated, and if that corroboration *distinctly implicated the two accused in the murder* and in the abetment directly, it might be possible to ignore the fact that Bhan Singh is by nature a liar, but in the presence of such scanty corroboration as we have here, we find it impossible to convict the accused.

For these reasons we accept these appeals and acquit both the appellants.

*Appeals accepted.*

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CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 437 OF 1916.

May 18, 1916.

*Present*:— Mr. Justice Chitty and Mr. Justice Walmsley.

KOBBAT ALI—ACCUSED—PETITIONER

*versus*

EMPEROR – OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898)*, ss. 367, 424 – *Appellate Court, judgment of, contents of—Finding, definite, necessity of.*

A Court of Appeal dismissed a criminal appeal with the observation that the evidence for the prosecution was, on the whole, slightly stronger and that the story of the prosecution as regards probability was far more likely than the story set up by the defence:

*Held*, that the opinion expressed by the Court was not sufficient for a conviction in a criminal case and that unless the Court could come to some more definite opinion regarding the guilt of the accused, the latter ought to be acquitted. [p. 699, col. 2.]

**Rule against the decision of the Additional District Magistrate, Dacca, dismissing an appeal from the order of the Sub-Deputy Magistrate, Naraingunge, dated the 9th June 1916.**

FACTS appear from the following judgment of the lower Appellate Court:—

"The appellant has been convicted under section 456, Indian Penal Code, and sentenced to four months' rigorous imprisonment. It is alleged that complainant awoke on being touched by some one, got up and seized him. He was recognised as the accused. Complainant's wife struck him with a *dao*. Then he got away. Appellant's case is that complainant deliberately struck him on the hand with a *dao*, because he had deposed against complainant before the Police in connection with a section 110 case.

"Complainant admits he is a '*dagi*.' A great deal has been made of the question of the wound inflicted on appellant. The medical witness (D. W. No. 1) says he had an incised wound on the back of the left wrist, which was probably inflicted from in front. Why it should not have been inflicted from behind, I am quite unable to follow. It is perfectly easy to conceive a person's striking another on the back of the wrist from behind. It is a pity the doctor was not further cross-questioned on this point. However, the complainant's account of the wound is confused. In his first information he said the wound was inflicted on the back. In his deposition in Court, he says he does not know when his wife inflicted the cuts. His wife, a girl of 13, says she can't say when she hit him : and then, again, that she inflicted two cuts from behind the accused. All the prosecution witnesses, who came to the scene immediately after, say they saw blood marks in the hut and the investigating Sub-Inspector found marks also on the *dao*. It is quite conceivable that the complainant and his wife did not know, in the confusion, when they hit appellant, and the above inconsistencies are, I think, quite understandable, even the assertion that the blow was on the back and that there were two blows (as the lower Court observes, one may have missed). In support of the defence version of the wounding of appellant, we have one eye-witness and two witnesses, who came up just afterwards and were told by Kobbat that Mafijuddin had struck him.

"The evidence for the prosecution is thus, on the whole, slightly stronger, and the story, as regards probability, is far more likely.

"Under the circumstances, I see no reason to disbelieve the prosecution case. The appeal is dismissed and the finding and sentence affirmed. The appellant must be called upon to surrender and undergo the remainder of his sentence."

Babu *Atulya Charn Bose*, for the Petitioner.

JUDGMENT.—In this case the learned Additional District Magistrate in giving his judgment said that the evidence for the prosecution was, on the whole, slightly stronger and that the story, as regards probability, was far more likely. This is not sufficient for a conviction in a criminal case and we think that unless he could come to some more definite opinion he ought to have acquitted the accused. We accordingly set aside his order and direct that the appeal be re-heard. The petitioner will remain on the same bail pending the re-hearing of the appeal.

*Order set aside.*

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## BOMBAY HIGH COURT.

CRIMINAL CONFIRMATION CASE NO. 2 OF 1917 (APPEAL NO. 20 of 1917).

February 22, 1917.

*Present*:—Mr. Justice Batchelor and Mr Justice Shah.

LAXMYA SHIDDAPPA—ACCUSED—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of* 1898), *s.* 271—*Penal Code* (*Act XLV of* 1860), *s.* 302—*Murder—Plea of guilty—Conviction—Offence.*

It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. [p. 700, col. 1.]

*Emperor* v. *Chenia Bhika Koli*, 8 Bom. L. R. 240; 3 Cr. L. J. 337, followed.

Section 271 of the Criminal Procedure Code, though it directs that a plea of guilty shall be recorded, does not direct that the accused shall be convicted thereon, but only that he may be so convicted, that is to say, it is left to the discretion of the presiding Judge in each particular case to determine whether in spite of the plea it is or is not desirable to enter upon the evidence. [p. 700, col. 1.]

Appeal from conviction and sentence passed by the Additional Sessions Judge, Dharwar.

Mr. *H. B. Gumaste*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

BATCHELOR, J.—This is a case of some peculiarity inasmuch as the appellant has been convicted of murder on his own plea and has been sentenced to death, there being no evidence recorded in the Court of Session. The learned Judge below has explained very carefully and fully why he adopted the course of convicting the accused on his own plea, and it seems to me clear from the judgment that the learned Judge gave the matter much consideration and acted as he thought for the best in the circumstances of some no-

velty. Nor can it be said, at least in my opinion, that the learned Sessions Judge was definitely wrong in any point of law. Probably if his attention had been called to the practice of the Courts in such circumstances, he would have acted otherwise. That practice is defined by Sir Lawrence Jenkins, C. J. and Mr. Justice Russell in *Emperor* v. *Chinia Bhika Koli* (1), where it is laid down that "it is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death". The learned Judge below points to section 271 of the Criminal Procedure Code and observes quite correctly that he was bound to record the accused's plea of guilty. The section, however, though it directs that the plea shall be recorded, does not direct that the accused shall be convicted thereon, but only that he may be so convicted, that is to say, it is left to the discretion of the presiding Judge in each particular case to determine whether in spite of the plea it is or is not desirable to enter upon the evidence. In the case before us the practical difficulty as entailed by the accused's conviction on his mere plea is obvious. For the question which we have to determine is, assuming that the appellant is guilty of the murder, whether the sentence of death should or should not be enforced. Now that is a question which could only be answered when the circumstances of the crime are known to us, and the circumstances of this crime are not known to us. It may be that there are cases of murder where the circumstances would be so clear that a Bench of this Court would have no difficulty in confirming the capital sentence on the accused's mere plea of guilty. But this is not such a case. In the Magistrate's Court there was, we understand, some evidence led with a view to the inference that the accused was of unsound mind, and that is the plea which is the basis of his present appeal to us. There is nothing on our record which could enable us to say whether that plea is substantial or groundless. It is urged on behalf of the appellant that the crime itself was committed without any assignable motive, and, on the other hand, it is contended that there was some quarrel preceding the crime and that that quarrel led to the deceased's murder. It is precisely upon such points as these that we desire information in order to guide us to a decision whether the capital sentence is deserved. Was there a quarrel between the deceased and the accused prior to this offence, and, if so, what was its nature and by what interval of time did it precede the offence? These are questions upon which it is manifestly important to us to have an answer. They are, however, questions upon which on this record we have no answer. Therefore, in this particular case it seems to me that the learned Sessions Judge would have been better advised if he had taken the evidence available and I think that must now be taken in order that hereafter we may be in a position to decide rightly the important question which it is our business to decide.

I would, therefore, reverse this conviction and sentence and direct, as was done in *Chinia's* case (1), that the accused be tried in accordance with law notwithstanding his plea of guilty.

SHAH, J.—I agree.

*Conviction and sentence reversed.*

(1) 8 Bom. L. R. 240; 3 Cr. L. J. 337.

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## ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 974 OF 1916.

March 14, 1917.

*Present*:—Justice Sir Edward Knox, KT.

BACHA LAL—ACCUSED—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*U. P. Municipalities Act (I of 1900), s. 17—U. P. Municipalities Act (II of 1916), retrospective effect of—Offence under old Act—Sanction under new Act, validity of.*

A Municipal Board has power to grant sanction under the provisions of the U. P. Municipalities Act, 1916, for the prosecution of a person in respect of an offence committed under the Act of 1900 inasmuch as by section 17 of that Act a Municipal Board is a corporate body with a perpetual succession and a common seal and has power to do all things necessary for its constitution and can sue and be sued in its corporate name; and these powers have not been altered or limited by the Act of 1916. [p. 701, cols. 1 & 2.]

Criminal revision from an order of the District Magistrate, Banda.

Mr. *Peary Lal Banerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—Bacha Lal has been convicted of an offence under section 165 of

*In re* JIVRAJ DHANJI.

Local Act I of 1900 and sentenced to pay a fine of Rs. 50.

The allegation against him is that he encroached upon a Municipal drain. What Bacha Lal appears to have done is that he made an erection on the side of the old drain. The breadth of the side of the drain on top of which the erection has been made is fourteen inches and the length of frontage is 76 feet 3 inches. Bacha Lal's defence was that he did no new work, he only repaired what was there before. The judgment is somewhat confused. I understand from it that Bacha Lal is not responsible for the whole of the erection that has been made on the top side of the drain. The learned District Magistrate says that "the view most favourable to him which I am on the evidence able to take is that the platform extended over the wall of the drain when he bought the property and that he only raised the front part of it some seven or eight inches over a breadth of about half a foot and a length of some 76 feet." This he did without the permission of the Municipal Board. The action would undoubtedly amount to alteration of the drain. The offence, however, appears to have been a highly technical one and I cannot help feeling that the learned District Magistrate has taken an extreme view of the case. It is certainly not a case in which the maximum penalty prescribed by law should have been enforced. In addition to this, however, it is raised on behalf of Bacha Lal that the conviction in any case is illegal as Act I of 1900 has been repealed and that the Municipal Board that came into existence in 1916 was not empowered to grant sanction for the prosecution of an offence which had been committed before that Board came into existence. The sanction for prosecution was given under the powers conferred by the Local Act II of 1916. I have carefully considered this plea and I hold that it is not entitled to weight. Section 17 of Act I of 1900 under which the Municipal Board was incorporated had by virtue of section 17 of Act I of 1900 the existence of a corporate body with a perpetual succession and a common seal. It was empowered to do all things necessary for its constitution and could sue and be sued in its corporate name. All the members of the Board in existence when Local Act I of 1900 was on the eve of expiring and Local Act II of 1916 came into existence would be one and the same Board and have the same powers, unless those powers had been expressly limited or altered by law. No such alteration or limitation has been pointed out to me. I allow the application so far that I reduce the fine of Rs. 50 to Rs. 5. Any portion of the fine paid in excess of Rs. 5 should be refunded.

*Appeal allowed.*

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## BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 5 OF 1917.

March 14, 1917.

*Present*:—Mr. Justice Batchelor and Mr. Justice Shah.

*In re* JIVRAJ DHANJI—ACCUSED.

*City of Bombay Municipal Act (Bom. Act III of 1888), ss. 461 (o), 418—Bombay Municipal Bye-Laws, Ch. III, Bye-law 4, whether* ultra vires—*Measure, honest and current, but not verified, use of—Offence—Commissioner, duty of.*

The fourth bye-law in Chapter III of the Bye-Laws framed by the Bombay Municipal Corporation, which prohibits the use of any measure which has not been duly verified by comparison with the standard measure, is beyond the powers vested in the Municipal Corporation under section 461 of the City of Bombay Municipal Act, inasmuch as it purports to give the Municipal Corporation or the Commissioner far wider power than that conferred by section 418 of the Act. [p. 702, col. 2.]

Clause (*o*) of section 461 of the City of Bombay Municipal Act means no more than that the Corporation shall have power to pass bye-laws to prevent the practice of fraud by the use of measures which are false or defective with reference to the standard measures assumed to have been verified by the Commissioner as directed in section 418. But neither under section 418 nor under section 461 has the Corporation the power to say that in the private markets of the city no measure shall be brought into use unless it has already been verified by the Commissioner. Rather the provisions of the Act import that if the Commissioner has reason to suspect any particular measure which is current, his method of controlling it is to verify it as directed under section 418, and thereafter to secure that the measures of that denomination in use shall correspond with the verified measure. [p. 702, col. 2; p. 703, col. 1.]

There is nothing in section 418 or under section 461, clause (*o*), of the City of Bombay Municipal Act which would justify the Municipality in prohibiting the use of an honest measure in a private market, merely on the plea that if the use of that measure

were prohibited, it might be easier for the Municipality to ensure that the measures actually in use should not be false or defective with reference to the verified and standard measures. [p. 703, col. 1.]

The use of an honest measure of one description cannot be said to facilitate the commission of fraud by the use of false or defective measures of a wholly different name and description. [p. 703, col. 1.]

Criminal reference made by the Acting Third Presidency Magistrate, Bombay.

Mr. *Setalvad*, for the Municipality.

Messrs. *Inverarity* and *Baptista*, for the Accused.

JUDGMENT.

BATCHELOR, J.—This is a reference by the learned Third Presidency Magistrate, before whom the Municipal Commissioner of Bombay had lodged a complaint against the accused to the effect that the accused was guilty of infringing the 4th bye-law in Chapter III of the Bye-Laws framed by the Bombay Municipal Corporation.

The facts are not in dispute and are very clearly set out at the beginning of the learned Magistrate's reference. There is, therefore, no need to recapitulate them. On the facts stated and admitted, the learned Magistrate was of opinion that the prosecution must fail on several points of law. But as these points seemed to the learned Magistrate to be involved in some obscurity, a reference to this Court was made.

After argument on both sides I agree with the learned Magistrate that the prosecution must fail on one of the points of law to which the Magistrate has adverted. It is, therefore, unnecessary for me to consider the other points raised in the reference.

In my opinion the prosecution must fail, because the bye-law under which this prosecution was instituted is beyond the power vested in the Municipal Corporation under section 461 of the City of Bombay Municipal Act. We are concerned in the present case with a certain measure known as *maplo*. It is admitted that this measure is a perfectly honest measure which has been current in the City since August 1915. Now the bye-law of which the infringement has been alleged against the accused runs as follows. I quote only the words which are immediately applicable to the present case: "No tenant of a shop shall keep at such shop any measure which has not been duly verified by comparison with the standard measure." That bye-law, which affects the keepers of shops in private markets, purports to be enacted under section 461, clause (*o*), of the Municipal Act. This clause empowers the Corporation to make bye-laws not inconsistent with the Act with respect to the matter of preventing the use in any market of false or defective measures. Under section 418 of the Act it is provided that the Commissioner shall from time to time provide such local standards of measure as he deems requisite for the purpose of verification of measures in use in the City and shall make arrangement for the safe keeping of the said standards. It is also directed that the Commissioner shall provide from time to time proper means for verifying measures by comparison with the said standards. It is clear, as it seems to me, that under section 418, a duty is cast upon the Commissioner of recognising the measures actually current in the city, and his means of ensuring that such measures shall be faithfully followed are limited to the methods set out in that section. The bye-law, however, purports to give the Municipal Corporation or the Commissioner far wider power than that conferred by section 418. For it purports to empower these authorities to prohibit the use in a private market of any measure, honest or dishonest, provided only that it is a measure which has not been verified. Nor can the bye-law in my opinion be brought within the ambit of clause (*o*) of section 461. For that clause, as I construe it, means no more than that the Corporation shall have power to pass bye-laws to prevent the practice of fraud by the use of measures which are false or defective with reference to the standard measures assumed to have been verified by the Commissioner as directed in section 418. But neither under section 418 nor under section 461 has the Corporation any such power as they claim to exercise by this bye-law, the power, namely, to say that in the private markets of the city no measure shall be brought into use unless it has already been verified by the Commissioner. Rather the provisions of the Act import that if the Commissioner has reason to suspect any particular measure which is current, his method of controlling it is to

verify it as directed under section 418, and thereafter to secure that the measures of that denomination in use shall correspond with the verified measure. I can find nothing in section 418 or in section 461, clause (*o*), which would justify the Municipality in prohibiting the use of an honest measure in a private market merely on the plea that if the use of that measure were prohibited, it might be easier for the Municipality to ensure that the measures actually in use should not be false or defective with reference to the verified and standard measures. The use of an honest measure of one description cannot be said to facilitate the commission of fraud by the use of false or defective measures of a wholly different name and description.

On this ground I agree with the learned Magistrate that the bye-law of which the infringement is alleged against this accused is invalid under the Municipal Act, in so far as it prohibits the keeping, for use in a private market, of a measure which has been in use in the city out of which no standard has been kept by the Commissioner as required by section 418. Therefore, the prosecution must on this ground fail.

Under section 433 of the Criminal Procedure Code it is open to us to direct by whom the costs of this reference should be paid. But having regard to all the circumstances we make no order as to costs.

SHAH, J.—I am of the same opinion.

*Reference answered in the affirmative.*

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## PUNJAB CHIEF COURT.

### CRIMINAL APPEAL No. 977 OF 1916.

April 23, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

PIRTHI AND OTHERS—CONVICTS—APPELLANTS

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 288—Evidence transferred to Sessions record, value of—Conviction—Confession, retracted—Corroboration.*

Evidence brought on to the Sessions record, under section 288 of the Criminal Procedure Code, must be treated as substantive evidence and there is nothing illegal in basing a conviction on such evidence, but it would not be safe to do so without any other evidence to support it, and no responsible tribunal would permit the conviction of a person upon such evidence if it stood by itself. [p. 705, col. 1.]

Such evidence cannot be accepted as proper corroboration of a confession made to a Magistrate and subsequently retracted. [p. 705, col. 1.]

Appeal from the order of the Sessions Judge, Hissar, dated the 21st October 1916, convicting the appellants under section 302, Indian Penal Code.

Mr. *Sham Lal*, for the Appellants.

Mr. *Herbert* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—Shib Lal, Pirthi, Dalu, Narain Singh and Jhunni, *Jats* of *Mauza* Dhamaka, have been convicted of the murder of one Pem Singh on the night between the 2nd-3rd June 19 6 and under section 302, Indian Penal Code, have been sentenced to transportation for life. They have appealed and we have heard Mr. Sham Lal on their behalf, while Mr. Herbert has addressed us on behalf of the Crown.

Pem Singh was a young man of about 22 or 23 years of age and his home was in *Mauza* Vaina, Aligarh District, but he had been living for some time at *Mauza* Vaina Atoli or Atori in the Gurgaon District with his sister. This sister died some three years ago but Pem Singh continued to live in that village cultivating land there. According to the statement of his father, Jhanda, P. W. No. 1, he had returned to *Mauza* Vaina some three months before his death and is said to have left his home about the 10th *Jeth* last, corresponding to 22nd May 1916, taking Rs. 102 with him with the intention of purchasing bullocks. Jhanda, P. W. No. 1, after his son had been absent a week or so, began to make enquiries about him but without any result, and he reported the disappearance of his son on the 19th June 1916 at Police Station Toppal, Aligarh District. On the 22nd June 1916 he made a further report at Police Station Palwal, and in his latter report he mentioned the fact that his son had had an intrigue with a daughter of one Rai Singh of Atori who might be able to give some clue as to his whereabouts. He then came to hear that a man had been caught by the villagers of *Mauza* Dhamaka as a thief and had been beaten to death. As the girl with whom

PIRTHI v. EMPEROR.

Pem Singh was said to have had a liaison was married in *Mauza* Dhamaka, Jhanda not unnaturally thought that there might be some connection between his son and the man rumoured to have been done to death in that village. He related his suspicions to the Police, who commenced making inquiries and ascertained that the girl in question, *Musammat* Daryai, had left her home and had been caught at *Mauza* Pirthala with Pem Singh; that the girl had been brought back to *Mauza* Dhamaka and that two or three nights later a man had been seen prowling about in that village, caught as a thief, and beaten to death, his body being subsequently cremated in order to remove all traces of him.

Following up this clue the Police made inquiries in *Mauza* Dhamaka and ascertained that on the night in question P. W. No. 3, Bidhu, P. W. No 4, Nawashi, P. W. No. 5, Nathu, and P. W. No. 6, Devi Ram, had been on *thikari pahra* and on their being questioned they admitted having seen and caught a man prowling about at night and brought him back towards the *abadi*. They were met by a number of villagers, of whom the five appellants were the foremost and who, on seeing their capture, recognised him as the man who had carried off *Musammat* Daryai and proceeded to beat him to death, subsequently cremating his dead body. This information was elicited on the 26th June 1916, and according to the evidence Shib Lal and Jhunni, appellants, made certain statements and pointed out certain spots which resulted in the recovery of a *dhoti* from a well belonging to Ram Sahai (pointed out by Shib Lal) and a pair of shoes and a *safa* produced on the following day (27th June 1916) by Jhunni.

The accused were placed before Mr. Rust, Committing Magistrate, on the 29th June 1916, who on that date recorded the statement of Shib Lal (who expressed his desire to make one) and then that of Jhunni. In these statements Shib Lal and Jhunni admitted having killed Pem Singh and cremated his body. At the trial in the Court of Session the principal witnesses have practically in a body resiled from their statements made to the Committing Magistrate, and the learned Sessions Judge, has, under section 288, Criminal Procedure Code, brought on to the Sessions record the statements made by the four *thikari pahra* witnesses, by P. W. No. 2, *Musammat* Daryai, and P. W. No. 7, Mohar Ram. The conviction of the appellants is admittedly based on the statements made by these witnesses in the Court of the Committing Magistrate, and it has been held that these statements taken in conjunction with the confessions of Shib Lal and Jhunni, although retracted, are sufficient to convict the appellants.

After an examination of the evidence in its entirety we see no reason for doubting that Pem Singh had a liaison with *Musammat* Daryai and that she had eloped with him but had been brought back from *Mauza* Pirthala. *Musammat* Daryai, while denying the intimacy, admits that she had left her husband's home and, quite by chance, met Pem Singh outside her village, and that she had been followed by Narain Singh and Mohar Ram (P. W. No. 7) and caught at *Mauza* Pirthala, from where she was brought back. She admits these facts in the Sessions Court as well as that Pem Singh was with her at Pirthala. Mohar Ram, P. W. No. 7, supports her statement with regard to her capture at *Mauza* Pirthala by him and Narain Singh in the company of a man. In our opinion it has been established that *Musammat* Daryai did elope with Pem Singh and was caught with him at *Mauza* Pirthala.

The next point which has, we think, been clearly proved is that on the night when it is said Pem Singh was killed, Bidhu and his companions did surprise and pursue and capture a man who was, on his being brought back to the village, done to death. Bidhu and his companions adhered to this statement in the Court of Session and we see no reason for doubting them. In the Court of Session they, however, stated that the thief was not recognised by any one and they themselves professed to be wholly ignorant of the names of the villagers who beat their capture to death. Before the Committing Magistrate they clearly stated that the five appellants on seeing their capture recognised him as the lover of *Musammat* Daryai and set on to him.

Mr. Sham Lal on behalf of the appellants has urged that it was illegal to base the conviction of his clients on the

evidence brought on to the record under section 288, Criminal Procedure Code, and we were referred to *Umar* v. *Empress* (1), *Ghanwara* v. *Emperor* (2) and *Queen-Empress* v. *Jadub Das* (3). We are unable to hold that Mr. Sham Lal's contention is correct, for in our opinion the evidence brought on to the Sessions record under section 288, Criminal Procedure Code, must be treated as substantive evidence and there is nothing *illegal* in basing the conviction on such evidence. At the same time we do not think that it would be safe to base a conviction on such evidence without any other evidence to support it. To do so would, in our opinion, be exceedingly dangerous and we agree with the ruling in *Queen-Empress* v. *Nirmal Das* (4), thinking "that it is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence, if it stood by itself." [See also *Queen-Empress* v. *Jeochi* (5), *Emperor* v. *Dwarka Kurmi* (6) and *Umar* v. *Empress* (1).] Similarly we think that the evidence brought in under section 288, Criminal Procedure Code, cannot be accepted as proper corroboration of a confession made to a Magistrate and subsequently retracted. See *Queen-Empress* v. *Jadub Das* (3) and *Queen-Empress* v. *Bharmappa* (7).

Turning to the evidence in this case we find that against Pirthi, Dalu and Narain Singh, appellants, the only evidence is the statements brought on to the record under section 288, Criminal Procedure Code. In our opinion it would be unsafe to convict them on this evidence and we, therefore, accept their appeals.

The case against Shib Lal is on a different footing, for against him there is not only this evidence but also his own confession recorded by Mr. Rust on the 29th June 1916. It is true that this confession was retracted by him before Mr. Rust on the 13th July 1916 as well as before the Sessions Judge, but it is to some extent corroborated by the fact that a *dhoti* said to belong to the deceased Pem Singh was discovered from a well which was pointed out by him. In these circumstances we see no doubt as to his guilt and especially as there has been no reason shown to us for thinking that Bidhu and his companions had any motive for falsely naming him.

With regard to the case of Jhunni, there is in addition to the evidence brought on to the record under section 288, Criminal Procedure Code, his own confession and that of Shib Lal. With regard to his own confession it is in evidence that before he made his statement, some sort of promise of pardon was made to him. It is not quite clear whether such an offer was actually made but we do not feel justified, in the circumstances, in taking his confession into consideration against him. Eliminating that, however, there still remains the confession made by Shib Lal. Although we would not consider the statements of Bidhu and his companions made before the Committing Magistrate as worthy of acceptance as complete corroboration of Shib Lal's confession as against Jhunni, there is in addition the fact that Jhunni himself produced a pair of shoes and a *pugri* which have been identified as belonging to the deceased. With this additional corroboration we feel no doubt as to Jhunni's guilt and we accordingly must uphold his conviction. The evidence recorded by the Sessions Judge clearly shows that the attack by the villagers on the person caught by Bidhu and his companions was made after the pursuit had ended and when the capture (who, we have no doubt, was Pem Singh) was being brought back to the village. In these circumstances there was not the slightest justification or excuse for killing him and the offence, therefore, clearly falls under section 302, Indian Penal Code.

We accordingly accept the appeal of Pirthi, Dalu and Narain Singh and direct their release. The convictions of Shib Lal and Jhunni are, however, maintained and their appeal is dismissed.

*Appeal partly accepted.*

(1) 51 P. R. 1887 Cr.
(2) 30 Ind. Cas. 436; 15 P. W. R. 1915 Cr.; 16 Cr. L. J. 612.
(3) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.
(4) 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N S.) 1334.
(5) 21 A. 111; A. W. N. (1898) 196; 9 Ind. Dec. (N. S.) 780.
(6) 28 A. 683; A. W. N. (1903) 187; 3 A. L. J. 852; 4 Cr. L. J. 61.
(7) 12 M. 123; 2 Weir 376; 4 Ind. Dec. (N. S.) 435.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 158 OF 1917.
February 28, 1917.
*Present*:—Mr. Justice Teunon and
Mr. Justice Chaudhuri.
MRS. E. H. JOLLY—COMPLAINANT—PETITIONER
*versus*
ST. JOHN WILLIAM JOLLY—DEFENDANT—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 488 (9)—Complaint—Husband complained against living temporarily in Calcutta—Jurisdiction of Calcutta Courts.*

Respondent who lived in Darjeeling came to Calcutta where he resided from the 16th to 23rd January. While he was residing in Calcutta an application under section 488, Criminal Procedure Code, was made by his wife to the Presidency Magistrate's Court in Calcutta:

*Held*, that the residence of the husband in Calcutta from the 16th to the 23rd January, when the application under section 488, Criminal Procedure Code, was made, was sufficient to give the Presidency Magistrate's Court in Calcutta jurisdiction, having regard to sub-section 9 of section 488, Criminal Procedure Code.

Mr. *S. Sandell*, for the Petitioner.

Babu *Santosh Kumar Bose*, for the Opposite Party.

JUDGMENT.—In this case the petitioner before us applied to the Chief Presidency Magistrate under the provisions of the section 488 of the Code of Criminal Procedure. The application was against one St. John William Jolly who, it appears, is her husband. They have not been living together and the lady applies for maintenance. At the hearing of the case a preliminary objection was taken on the ground of jurisdiction. It is stated that the husband has lived in Darjeeling from the year 1913, and that he is still a resident of Darjeeling. But in his own affidavit the opposite party, the husband, admits that he was in fact in Calcutta on business from the 29th November till the 9th of January. The petitioner's first application bears date the 9th January. The husband says that he left Calcutta for Darjeeling on that day, and though it is clear that the petition was written on the 9th it is not clear that it was actually presented to the Magistrate before the 10th January But the husband further admits that he had returned to Calcutta on the 16th January and has been in Calcutta since or at least throughout the continuance



of the proceedings. Now, on the 23rd January when the husband was admittedly in Calcutta, the petitioner put in a fresh application to the Presidency Magistrate requesting that that petition and her original petition of the 9th should be treated as parts of one and the same petition and that action should be taken on her application as on and from the 23rd January. Obviously the evidence of the husband in Calcutta from the 16th to the 23rd January, when that application was made, is sufficient to give the Court jurisdiction having regard to sub-section (9) of section 488, Criminal Procedure Code.

We, therefore, make the Rule absolute, set aside the order complained of and direct that the case be remitted to the Presidency Magistrate before whom it was to be heard and decided by him on the merits.

We desire to add that we trust that after the delay that has already been allowed to occur, the learned Presidency Magistrate on the return of the case to him will proceed to dispose of it with all expedition.

*Rule made absolute.*

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ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 781 OF 1916.
December 6, 1916.
*Present*:—Justice Sir George Knox, KT.
PARBHU LAL—APPLICANT
*versus*
*Musammat* JANKI—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 253—Discharge, effect of—District Magistrate, power of, to hold or direct further inquiry.*

Where an accused is discharged by a Magistrate under section 253 of the Criminal Procedure Code, the District Magistrate has jurisdiction to hold a further inquiry himself or to direct a further inquiry by a Subordinate Magistrate. [p. 707, col. 2.]

*Queen-Empress* v. *Chotu*, 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465, relied upon.

Criminal revision against the order of the District Magistrate, Aligarh, dated the 12th September 1916.

Messrs. *A. H. C. Hamilton* and *C. R. Alston*, for the Applicant.

Mr. *Bhagwati Shanker*, for the Opposite Party.

JUDGMENT.—One *Musammat* Janki had made over custody of certain valuables to a man named Parbhu Lal. This much is admitted by Parbhu Lal, although he says that he had not that amount of the valuables which *Musammat* Janki says she made over to him. *Musammat* Janki in the first instance went to Babu Sohan Lal and apparently instituted a criminal complaint in his Court against Parbhu Lal. The record of that case is not before me; but an order has been produced in the case which simply says that with reference to certain Police papers Janki's complaint is ordered to be filed. She then went to the Court of Babu Sham Lal, a Magistrate of the second class, a few days after. There is a certified copy of an order passed in the case, which is to the effect that the complainant has failed to produce any evidence, that on her own admission she deposited ornaments with the accused and the accused lost them in a theft at his house. Her case seems to be one for Civil Courts as no breach of trust seems to be intended. The complaint is dismissed under section 203, Criminal Procedure Code. For the third time *Musammat* Janki went to the Court of Babu Sohan Lal, Magistrate of the first class. Whether it was the same Sohan Lal who dealt with the case in the first instance does not appear. He too dismissed the complaint under section 203, Criminal Procedure Code. He says that "two witnesses have been produced only to show that the complainant placed her valuables in the custody of her master Parbhu Lal. Whether or not they were returned to the custody of himself is not known, even if these doubtful witnesses were fully believed Besides the Police who had already fully inquired into the matter certainly did not find that Parbhu Lal's house was not robbed. It seems true that the complainant's property was taken away by the thieves and she now wants it back from her master. I do not think a case of criminal misappropriation is made out. The complaint seems groundless and is dismissed under section 203, Criminal Procedure Code. The complainant might go to Civil Court." As to the complaint which she preferred to the District Magistrate of Aligarh after Sohan Lal had dismissed her complaint, it would appear that she out of Court tried to interview the District Magistrate and followed up her attempt by a complaint instituted before him. The Magistrate in an order dated 12th September 1916 sets aside the Sub-Divisional Magistrate's order dismissing the complaint and directs that a warrant under section 420, Indian Penal Code, with reasonable bail be issued against Parbhu Lal. It is from this order of 12th September that the present application has been made, and it is contended that the learned District Magistrate has not shown in his order any legal ground which would justify further inquiry and that in face of the circumstances under which the complaints on the same facts had been dismissed, he did not exercise a proper discretion in the matter. I have always felt considerable difficulty in dealing with applications of this kind. I know that different High Courts take different views on the question but there is the Full Bench decision of this Court in *Queen-Empress* v. *Chotu* (1), in which it was held that when a Magistrate had discharged an accused person under section 253, Criminal Procedure Code, the District Magistrate had jurisdiction to hold further inquiry himself or direct further inquiry by a Subordinate Magistrate. So far as I know this decision has not been departed from in this Court. The Full Bench which arrived at that decision was a Full Bench of the whole Court, and the Judges who pronounced the decision were Judges of great experience, especially in criminal matters. I understand that this position is not contested by the learned Counsel who appears for Parbhu Lal. If a Magistrate has jurisdiction to hold further inquiry in such a case, I do not think that his discretion should be interfered with except on very strong grounds. I cannot say that I find in this case that the Magistrate who dealt with the case went at all fully into the matter, and the impression left upon my mind is that whether *Musammat* Janki's complaint is true or false, on that point I pronounce no decision whatever, she has not had a full opportunity ot proving her case in the Courts below. The first Court which dealt with it evidently looked

(1) 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N S.) 465.

into the matter through Police spectacles. The order passed by the second Court, namely, Babu Sham Lal, is also a very summary order. It undoubtedly was the case that the complainant had failed to adduce any evidence before him. At the same time I do not think it was a case which he should have dealt with under section 203, Criminal Procedure Code. There was no doubt that ornaments belonging to *Musammat* Janki had been deposited with Parbhu Lal; but the facts stated in her complaint were facts on which a summons should, in my opinion, have been ordered. The third order, namely, that passed by Babu Sohan Lal on the 5th of September 1916, bears internal evidence of carelessness and want of proper apprehension of the case. He too seems to have been led away by the Police report; and all that he says is that he does not think that a case of criminal misappropriation has been made out, and that the complaint seems groundless. He evidently wished to throw off the responsibility on to a Civil Court. Under these circumstances I am prepared to uphold the District Magistrate's order which was within his jurisdiction. But the Court to which the case goes for trial should warn *Musammat* Janki in most clear terms of the danger of instituting a false case. Provided that is done and she incurs the risk, I think she is entitled to a full trial of the case which she puts against Parbhu Lal. Parbhu Lal was never summoned and as far as the record shows has not been in any way inconvenienced by the previous attempts of *Musammat* Janki to get her case heard. He can recompense himself if the case after proper trial is found to be a false one. The application is dismissed.

*Application dismissed.*

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 164 OF 1916.

December 15, 1916.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

EMPEROR—APPLICANT

*versus*

PARIO *wd.* BACHAL—OPPONENT.

*Criminal Procedure Code (Act V of 1898), s. 439—Revision—Enhancement of sentence—High Court, interference by.*

The enhancement of a sentence by the High Court, under section 439 of the Criminal Procedure Code, is a serious proceeding. The High Court should not ordinarily interfere where a substantial sentence has been passed by the Trying Court and will be always slow to interfere, unless the sentence passed is manifestly inadequate.

Criminal report by the District Magistrate, Karachi, against the order of the second class Magistrate, Manjhand.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The accused has been sentenced to three months' rigorous imprisonment for theft.

The District Magistrate reports the case to us with a recommendation that the sentence be enhanced to six months.

Enhancement of a sentence is a serious proceeding. This Court does not ordinarily interfere when substantial sentence has been passed by the Trying Court and is always slow to interfere, unless the sentence passed is manifestly inadequate.

The alteration recommended by the District Magistrate is altogether too trivial to justify an appeal to our revisional jurisdiction. It is not desirable that District Magistrates should rely upon this Court to obtain appropriate punishments on the conviction of offenders. They should rather see that the case is properly represented before the Trying Magistrate.

We decline to interfere in this case and direct the record and proceedings to be returned.

*Interference declined.*

*In re* RATNA MUDALI.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 807 OF 1916
(CRIMINAL REVISION PETITION No. 657 OF 1916).
AND
CRIMINAL REVISION CASE No. 821 OF 1916
(TAKEN UP No. 42 OF 1916.)
February 14, 1917.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

IN CR. R. C. No. 807.
*In re* RATNA MUDALI AND ANOTHER—PETITIONERS.
IN CR. R. C. No. 821.
*In re* RATNA MUDALI—PETITIONER.

*Criminal Procedure Code (Act V of 1898), s. 54, scope of—Cognisable cases—Police, power of, to arrest when warrant already issued by Magistrate.*

Section 54 of the Criminal Procedure Code does not prevent any Police Officer from arresting a person where a warrant for his arrest has already been issued by a Magistrate, and the exercise of the power is not restricted only to the officer to whom the warrant is directed. [p. 709, col. 2.]

*Charu Chandra Majumdar, In the matter of*, 37 Ind. Cas. 57; 20 C. W. N. 1233; 44 C. 76; 18 Cr. L. J. 73 and *Queen-Empress* v. *Dalip*, 18 A. 246; A. W. N. (1896) 48; 8 Ind. Dec. (N. S.) 871; *Queen-Empress* v. *Kalian*, 19 M. 310; 6 M. L. T. 173; 1 Weir 206; 6 Ind. Dec. (N. S.) 922, distinguished.

Per *Napier, J.*—The object of the Code is to give the widest powers to the Police in cognisable cases and the only limitation is the necessary requirement of reasonability and credibility of the information to prevent the misuse of the powers. [p. 709, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court, Chingleput, in Criminal Appeal No. 30 of 1916, preferred against the judgment of the Court of the Joint Magistrate of Chingleput, in Calendar Case No. 115 of 1916.

The Hon'ble Mr. *T. Rangachariar*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.

AYLING, J.—The only point argued is that the arrest was illegal. It is in evidence that a warrant had been issued for the arrest of Velan and Kuppan on a charge of a cognisable offence, that the constables knew of this, and had been directed by their Sub-Inspector to be on the look-out for them, and arrest them if found. In such circumstances, I have no hesitation whatever in deciding that they were justified, under section 54 of the Code of Criminal Procedure, in making the arrest. Of the cases quoted by Mr. Rangachariar, *In the matter of Charu Chandra Majumdar* (1) is clearly distinguishable on the ground that no warrant had been issued. The other cases, *Abdul Gafur* v. *Queen-Empress* (2), *Queen-Empress* v. *Dalip* (3) and *Queen-Empress* v. *Kalian* (4), appear to me to have no bearing on the applicability of section 54 of the Code of Criminal Procedure.

There is no reason for interfering with the convictions; but I regard the imposition of a fine on the 1st accused as unnecessary and would remit that portion of the sentence.

The fine, if paid, should be refunded.

NAPIER, J.—This point is to my mind not arguable. A clear distinction is made in the Criminal Procedure Code between cognisable and non-cognisable cases. Section 54 empowers any Police Officer to arrest without an order from a Magistrate and without a warrant any person who has been concerned in a cognisable offence or against whom a resonable complaint has been made or credible information received or a reasonable suspicion exists of his having been so concerned. The object of the Code is to give the widest powers to the Police in cognisable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. The Legislature could have confined the power to officers in charge of a Police station, as is done in section 55, where matters are dealt with which are not offences, but has not thought fit to do so. The suggestion that a Police Officer who suspects a man of having committed a cognisable offence may arrest but that he may not arrest when a warrant has been issued, has nothing in the language of the section to support it and would enable a man wanted by the Police on a charge of murder, for instance,

(1) 37 Ind. Cas. 57; 20 C. W. N. 1233; 44 C. 76; 18 Cr. L. J. 73.
(2) 23 C. 896; 12 Ind. Dec. (N. S.) 595.
(3) 18 A. 246; A. W. N. (1896) 48; 8 Ind. Dec (N. S.) 871.
(4) 19 M. 310; [6 M. L. J. 173; 1 Weir 206; 6 Ind. Dec. (N. S.) 922.

acquittal in the murder trial is reversed he is instructed not to press the Government appeal against the acquittal in the section 330 trial.

The evidence produced by the prosecution in the case under section 302 falls into the following classes:—

1. The evidence that Jawand Singh was beaten by Abdullah approver under the orders of Miran Bakhsh, head constable, as soon as he reached the *deori* at Sandhwan and expressed his inability to disgorge his share of the stolen property.

2. The evidence of Abdullah the informer to the effect that on the evening of the 31st of October, Miran Bakhsh, head constable, between 9 P. M. and midnight in a state of intoxication pounded Jawand Singh with his knees, that Jawand Singh died at about 3 o'clock the next morning and that the approver and the two accused removed the body to the canal and there caused it to sink by weighing down the *chadar* which was wrapped round it with clods of earth.

3. The evidence of Abdullah *chaukidar* and Ranga and Waryama sweepers who during the night of the 31st of October sat and watched in the inner *deori* of the *haveli* where the Police had put up, and saw the head constable enter the room and heard the groans of Jawand Singh.

4. The evidence of Sant Singh and Bhagwan Singh, etc., who depose that on the early morning of the 1st of November on enquiry from the head constable they were told by him that Jawand Singh was still in the *kothri* which was then locked and that on the following day, *i.e.*, 2nd of November they found, on opening the *kothri* with the key which was in possession of Ahmad Din, that Jawand Singh was not inside the *kothri*.

5. The statements of persons who prove that on the 10th of November the body of a man was found in a terminal lake of the canal at Harike, which is some 12 miles away from Sandhwan, that the body was photographed and buried and again after exhumation was identified as the body of Jawand Singh.

Finally there is the medical evidence which shows that the death of Jawand Singh was not due to drowning, that the *post mortem* revealed fractures of the 7th and 8th ribs on the right side in the mammary line and of the 2nd, 3rd, 4th and 6th ribs on the left side in the parasternal line.

The body was identified on the 14th November by *Musammat* Bhagan, the mother of Jawand Singh, by Siwan Singh, *lambardar* of his village, and also by Abdullah, the *chaukidar* of Sandhwan. The photograph which was taken of the body and also a pair of drawers which had been removed from the body by the sweeper at Kasur were identified by these witnesses. Although the learned Sessions Judge in so many words does not say that he found that this body was the body of Jawand Singh, he does not anywhere suggest that he disbelieves this evidence, and we understand him to have proceeded on the theory that the body recovered was indeed Jawand Singh's body. Before us it has not been contended on behalf of the respondents that the recovered body was not Jawand Singh's, and we have no hesitation in holding that it was Jawand Singh's corpse. So much then is clear, *viz.*, that Jawand Singh was in the hands of the Police on the evening of the 31st of October 1915, that he was not seen alive subsequently in village Sandhwan or anywhere else; and the question for decision is whether he came by his death in a manner unknown to the respondents, for such was their plea before the learned Sessions Judge, or as is alleged by the prosecution, at the hands of the Police. The story told by Miran Bakhsh is that he was aroused between 3 and 4 o'clock in the morning of the 1st of November by Abdullah whom with Ahmad Din he had, the evening before, left in charge of Jawand Singh in the *kothri* and was then informed by Abdullah that Jawand Singh had disappeared. If this, however, were a truthful story, we should expect to find that he raised an alarm and that he caused a search to be made for the fugitive in the interior of the *haveli*, for it is admitted that the only means of exit from the *haveli* lay through the *deori* in which Miran Bakhsh, Sakhawat Ali, Mula, Bassa and Abdullah *chaukidar* were sleeping. Nothing, however, of this kind seems to have been done. The village was not aroused and the Jat witnesses depose that when they inquired about Jawand Singh next morning, they were told by the head constable that he was still in the *kothri*. On the morning of the 1st of November the head

constable sent off Mula and Bassa to Kishen Kot in order that a remand might be obtained, and it is a remarkable fact that he sent no information to Kishenkot by the hand of the constable, who took Bassa and Mula, of the fact that Jawand Singh had escaped. It is true that Miran Bakhsh wrote up a diary dated the 1st of November in which a mention of the flight of Jawand Singh is made, but we have no assurance whatever that the entry referred to was really made at the time—3 or 4 A. M. on the 1st of November—at which it purports to have been written, for though the *thana* is only some 6 *kos* away, that report reached the *thana* only on the 4th November. On the showing of Miran Bakhsh himself he appears to have taken little or no action on the 1st of November beyond sending Abdullah away ostensibly in search of the fugitive. It is true that he says he despatched Sakhawat Ali also on the same errand, but Sakhawat Ali contradicts him on this point and states that he did nothing at all on that day. It was only on the evening of the 2nd of November that Miran Bakhsh proceeded to Kishenkot and there informed Lahori Mal Sub-Inspector of the flight of Jawand Singh, and it is a somewhat suspicious circumstance that in his report to Lahori Mal he suggested that Jawand Singh might have committed suicide. In view of the fact that Jawand Singh was merely suspected of complicity in an act of house-breaking, the suggestion that he might have committed suicide appears to indicate that the head constable knew that Jawand Singh was no longer alive.

On receipt of the head constable's report the Sub Inspector Lahori Mal proceeded to Sandhwan and reached there to find that the Jat proprietors had gone off to make a report of their suspicions to the *thana*. The Sub-Inspector, however, found the village full of rumour that Jawand Singh had been made away with by the Police, and he at once proceeded to record statements among which the most important was that of Waryama, one of the sweepers who had been watching inside the *deori* on the night of the 31st of October.

Waryama's statement was corroborated by those of Ranga, Kharaiti, Mehr Din, Budhi and Sant Singh on this point. They all agreed that they had heard the groans proceeding from the hut in which Jawand Singh was confined on the night of the 31st.

The learned Sessions Judge has come to the conclusion that the story told by Abdullah approver is unreliable, also that the other witnesses who have been produced to corroborate the approver's statement are equally untrustworthy. We have been carefully conducted through the evidence by both the learned Government Advocate and the learned Counsel who appeared for Miran Bakhsh, and we find ourselves forced to the conclusion that the attitude of the learned Sessions Judge towards this mass of evidence cannot be supported. We find that his criticisms are in part quite erroneous, because he has compared portions of the approver's statement instead of comparing the statements made by him on different occasions as a whole. Other criticisms we must hold to be puerile because they deal with such minor incidents as would not affect the credibility of the main story. Generally speaking we hold that the attitude of the learned Sessions Judge was excessively hypercritical. We see no reason to doubt that whatever ill-usage was suffered by Jawand Singh was inflicted upon him with the full knowledge of Miran Bakhsh, head constable. Indeed, as Miran Bakhsh was conducting the enquiry in the burglary case and was the chief person interested in its successful solution, we have no doubt that the order to extort information from Jawand Singh came originally from him. In fact it is perfectly clear that as soon as Jawand Singh arrived the head constable had him well beaten by Abdullah in the *deori*. We are, however, unhesitatingly prepared to go farther than this; and we hold that the evidence of Waryama and Ranga sweepers to the effect that at about 9 o'clock at night they saw Miran Bakhsh proceed to the *kothri* in which Jawand Singh was confined, that immediately after they heard sounds of pain proceeding from the *kothri* and that Miran Bakhsh head constable left the *kothri* after a considerable stay there, is quite true in all its main details. Much argument has been used before us to show that the Police had no need of calling these two sweepers to keep watch during the night. Above all it was suggested that, had

they intended to inflict torture on Jawand Singh, they would have carefully avoided calling witnesses who might subsequently give evidence against them. This argument is fallacious, for we are quite satisfied that it was never the intention of the accused to kill Jawand Singh and that they had no apprehension that the comparatively petty torture they originally intended to inflict would ever come to the ears of the authorities. Just as in the early morning Jawand Singh had been publicly beaten without any attempt to conceal the fact, similarly the torture inflicted upon him in the *kothri*, if it had had no fatal result, would have passed without attracting any particular attention.

The learned Sessions Judge appears to accept the fact that Jawand Singh was killed by the Police, but he comes to the conclusion that the whole offence could have been perpetrated by the approver without the consent and apparently without the knowledge of the head constable. We have, however, given above reasons for holding that Miran Bakhsh was the prime mover in the affair and though he might have screened his subordinate had the result been less serious, we do not believe that had he been innocent he would have displayed the inaction which he did exhibit, when, according to him, the flight of Jawand Singh was reported to him. It has been suggested that this charge against Miran Bakhsh is due solely to the enmity of the Jats of Sandhwan, but after all Jawand Singh was not a man of their village and they were not interested in him personally. Further if they were determined to get the Police into trouble, it has not been explained why they were not satisfied with implicating Ahmad Din and Abdullah approver, the two men who admittedly were in charge of Jawand Singh and spent the night with him inside the *kothri*, and why they determined to implicate also the head constable Miran Bakhsh. Moreover, had Miran Bakhsh been innocent, is it credible that the Superintendent of Police would have sacrificed him and tendered a pardon to Abdullah approver who according to the finding of the learned Sessions Judge was the protagonist among the offenders?

In addition to the evidence already mentioned, there is also the evidence of Mula and Bassa who were detained on the night of the 31st of October in the *deori* which led to the *kothri* in which Jawand Singh was confined. It is possible that their averment is correct and that they were too much under the influence of the accused to make an earlier disclosure than they did; no more than a passing reference is necessary to them, for the learned Counsel for the Crown has stated that he does not wish to attach any value to their evidence. With the exception of Sakhawat Ali constable, who also was under orders of Miran Bakhsh at Sandhwan all the witnesses produced by the prosecution support the prosecution story. Sakhawat Ali supports Miran Bakhsh's story, but on his own showing his knowledge of the events of that night is practically *nil*, for he admits that after a bibulous evening he fell into a drunken sleep and was awakened only early the next morning. The accused called no evidence in their defence before the Sessions Court and we are satisfied that the story told by the approver is true in its main lines and that the accused respondents must be held guilty of causing the death of Jawanda.

It remains for consideration of what offence they should be convicted. The prime offender was Miran Bakhsh, head constable, whilst Ahmad Din acted under his order, and though he abetted the offence of his superior officer, nevertheless played a minor part and with his own hands inflicted a minor degree of hurt upon Jawanda. It must also be borne in mind that the Police on the night of the offence had been indulging in liquor. This is clear not only from the statement of Sakhawat Ali but also from that of the approver, and it is extremely probable that had Miran Bakhsh not been under liquor, his assault upon Jawanda would not have been of so savage a nature and the results would not have been fatal. We are quite convinced that it was never originally the intention of the head constable and his co-adjutors to cause the death of Jawanda and bearing in mind the provisions of section 86 of the Code we do not think it right to find him guilty of a more serious offence than that of voluntarily causing grievous hurt in order to extort an admission. The abetment of that offence is brought home to Ahmad Din,

We, therefore, reverse the acquittal of the respondents and convict them respectively of the offence and of the abetment of the offence described in section 331 of the Indian Penal Code. Miran Bakhsh is sentenced to ten years' rigorous imprisonment including three months' solitary confinement under section 331, Indian Penal Code, and Ahmad Din to five years' rigorous imprisonment including three months' solitary confinement under sections 331, 109, Indian Penal Code.

*Appeal allowed.*

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## MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 217 OF 1916.

December 19, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

MUTHUSWAMI NADAN AND ANOTHER—APPELLANTS

*versus*

KALINGA MOOPAN—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 147, 148, 537—'Local enquiry,' meaning of—Evidence, recording of, by Magistrate deputed to make enquiry, legality of—Order on report and evidence—Jurisdiction—Waiver of objections, effect of—High Court—Revision, grounds for—Government of India Act (5 & 6 Geo. V, Ch. 61), s. 107—Letters Patent, s. 15.*

Per *Curiam*.—The High Court does not interfere, under section 15 of the Charter Act, with orders passed by a Magistrate under section 147 of the Criminal Procedure Code, unless such orders were passed without jurisdiction. [p. 715, col 2.]

The words 'local enquiry' in section 148, Criminal Procedure Code, are not synonymous with mere local inspection, and a person deputed to make an enquiry under the section is competent to examine witnesses. [p. 717, col. 1; p. 716, col. 1.]

Per *Ayling, J.*—Whatever may be the scope of the enquiry contemplated by section 148, the Magistrate delegating the enquiry to a Subordinate Magistrate is not absolved, on receipt of the latter's report from the duty imposed on him by section 145 (4) of receiving any evidence produced before him by the parties and taking any further evidence he may find necessary. [p. 716, col. 1.]

Where a first class Magistrate acts on the evidence recorded by the Magistrate who was deputed to make the enquiry without objection by the parties and bases his order thereon, the order is not one passed without jurisdiction and the High Court cannot interfere with it in revision. [p. 716, col. 2.]

*Arumuga Govindan* v. *Venkatasubbier*, 31 M. 82; 3 M. L. T. 108; 17 M. L. J. 535; 6 Cr. L. J. 384, dissented from.

*Quære.*—Whether such an order would amount to a defect of jurisdiction where the first class Magistrate refuses to take evidence tendered before him?

Per *Seshagiri Aiyar, J.*—Where a first class Magistrate acts upon evidence taken by a Subordinate Magistrate the former must be deemed to have acted without jurisdiction, but the defect is cured by section 537 where the parties do not object to the procedure and are not prejudiced thereby. [p. 717, col. 2.]

Appeal under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Spencer in Criminal Reference Case No. 109 of 1916, reported as 36 Ind. Cas. 158, preferred against the order of the Court of the Sub Divisional Magistrate of Trichinopoly in Miscellaneous Case No. 42 of 1914.

Mr. *S. V. Srinivasa Gopalachariar*, for the Appellants.

The Public Prosecutor, for the Government.

Mr. *K. S. Ganesa Aiyar*, for Counter-Petitioner.

### JUDGMENT.

AYLING, J.—This is a Letters Patent appeal against the decision of the Hon'ble Mr. Justice Spencer, passed on a petition presented under section 15 of the Letters Patent, Charter Act (section 107 of the Government of India Act), for the setting aside of an order of the Sub-Divisional Magistrate of Trichinopoly under section 147 of the Criminal Procedure Code. The learned Judge held that the Sub Divisional Magistrate's order was not without jurisdiction and declined to interfere.

As observed in *Kamal Kutty* v. *Udayavarma Raja* (1), it has never been customary to interfere in cases of this sort under section 15 of the Charter Act, unless the Magistrate's order was passed without jurisdiction: and we have merely to consider whether that was the case in the order before us.

The chief ground of attack is that the Magistrate recorded no evidence himself: but forwarded the records to a Subordinate Magistrate under section 148 of the Criminal Procedure Code for trial, enquiry and report after taking evidence, and based his order on the said report and the oral evidence recorded by the Sub-Magistrate.

Appellants' first contention is that the term "local enquiry" in section 148 of the

(1) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; 23 M. L. J. 499; 13 Cr. L. J. 753; (1912) M. W. N. 1154.

Criminal Procedure Code means merely "local inspection" and that the order directing the Sub-Magistrate to record oral evidence on the spot is *ultra vires*. The word "inquiry" frequently occurs in the Criminal Procedure Code; but nowhere, so far as I know, with this very limited meaning. The main authority for appellants' contention is that evidence might legally be recorded by a Sub-Magistrate with the assent of parties, and that they might even agree to be bound by the result of the inquiry thus held To what extent Prinsep, J.'s, view was shared by the learned Judge in *Arumuga Govindan* v. *Venkatasubbier* (2) is not clear: but as at present advised, I am not prepared to assent to the proposition that the local enquiry authorised by section 148 is only a local inspection, or that the Sub-Magistrate's report in this case was not admissible in evidence.

What seems to be clear is, that whatever the scope of the said inquiry, the receipt of the Sub-Magistrate's report does not absolve the Sub Divisional Magistrate from the duty, imposed on him by section 145 (4), of receiving any evidence produced before him by the parties, and taking any further evidence he may find necessary. This, if I understand it right, is the true meaning of the pronouncement in *Baikunt Kumar, In the matter of* (3), as well as in Criminal Revision Case No. 243 of 1892 of this Court reported as *Hanumanthappa* v. *Hussain Saib* (4) and in *Kolha Koer* v. *Muneswar Tewari* (5). In the present case there is nothing to indicate that the parties were desirous of adducing any further evidence before the Sub-Divisional Magistrate, though he gave a hearing to both sides after receipt of the Sub-Magistrate's report. In fact so far as appears, both parties were quite content to abide by the result of the Sub-Magistrate's inquiry: and the Sub-Divisional Magistrate even notes at the end of paragraph 4 of his order that before him they advanced no arguments against the Sub-Magistrate's finding. The present objection seems to me a pure afterthought put into the head of the unsuccessful party.

Whether in case the Sub-Divisional Magistrate had declined to take evidence tendered before him, this would have amounted to a defect of jurisdiction is a matter we need not decide. The learned Judges in *Kolha Koer* v. *Muneswar Tewari* (5) held that it would, or that it was at any rate a matter justifying interference.

That, in the absence of such refusal, the order in the present case should be treated as one without jurisdiction, I see no reason to hold: and in so far as the decision of the learned Judge in *Arumuga Govindan* v. *Venkatasubbier* (2) seems to lay down such a proposition, I must most respectfully dissent from it.

The second point is that the Magistrate's order contains no finding that the right of way in question was exercised within three months before the inquiry. This, as pointed out by Spencer, J., was never raised in the Magistrate's Court: and I think we should decline to make it a ground of interference now.

I would dismiss the appeal with costs of the Public Prosecutor.

SESHAGIRI AIYAR, J.—I agree. In this case there was a complaint to the Police by the respondents that their right of way was obstructed by the appellants. The Sub-Divisional Magistrate came to the conclusion that there was a dispute likely to cause a breach of the peace, and directed the parties to put in their statements. Then he went to the locality and after inspecting the disputed pathway directed the Sub-Magistrate to make a local enquiry, to record evidence and to report to him under section 148 of the Code of Criminal Procedure. Witnesses were summoned by the parties for examination before the Sub-Divisional Magistrate. It was apparently agreed by both parties that these witnesses might be examined by the Sub-Magistrate. It is clear that no objection was taken to the examination of witnesses by the Sub-Magistrate. The latter examined seven witnesses for the petitioners, four for the counter-petitioner and a Court witness, and sent in his report. The report was read in evidence before the Sub Divisional Magistrate and arguments were addressed by the

(2) 31 M. 82; 3 M. L. T. 108; 17 M. L. J. 535; 6 Cr. L. J. 384.
(3) 3 C. L. R. 134.
(4) 2 Weir 118.
(5) 34 C. 840; 6 Cr. L. J. 452.

Pleaders on both sides. Finally, the Sub-Divisional Magistrate came to the conclusion that there was a pathway which had been obstructed by the appellants, and directed that the appellants should not disturb the respondent in the enjoyment of that path until a decision was come to thereon by the Civil Court. Against this order, a petition was presented to this Court and was heard by Mr. Justice Spencer. The learned Judge came to the conclusion that there was no irregularity in the conduct of the proceedings by the Sub-Divisional Magistrate and dismissed the petition. This Letters Patent appeal is against the order of the learned Judge.

Mr. Srinivasa Gopalachariar contended that it was not competent to the Sub-Divisional Magistrate to delegate the examination of his witnesses to his subordinates. It is true that section 148 of the Code of Criminal Procedure only authorises the Sub-Divisional Magistrate to depute his subordinate to make a local enquiry. What exactly is connoted by the term "local enquiry" has not been laid down in any decided case. "Local inspection" may perhaps imply that no witnesses are to be examined at the spot. But the expression "local enquiry" is not necessarily inconsistent with the idea that witnesses are to be examined in connection with the enquiry. The term "enquiry" itself is defined by section 4, clause (*k*), which says: "it includes every enquiry other than a trial conducted by a Magistrate or Court." As at present advised, I am not satisfied that a person making a local enquiry is not competent to examine witnesses.

The further question is, supposing it was competent to the Sub-Magistrate to examine the witnesses, whether the evidence taken by him can be used by the Sub-Divisional Magistrate for passing his order. Clause 2 of section 148 says that the report of the officer so deputed may be read as evidence in the case. It does not say that the evidence taken at the enquiry shall be part of the record in the case, and can be relied upon for his order by the Sub-Divisional Magistrate. It is, therefore, doubtful whether the procedure adopted by the Sub-Divisional Magistrate in basing his conclusion upon the evidence taken by the Sub-Magistrate is regular. The learned Advocate relied upon the decision of Mr. Justice Wallis (as he then was) in *Arumuga Govindan* v. *Venkatasubbier* (2), for the position that where a first class Magistrate acts upon evidence taken by a Sub-Magistrate, the former must be deemed to have acted without jurisdiction. I am inclined to take the same view. I have already held in *Annie Besant* v. *Emperor* (6) that where there is no legal evidence upon which a conclusion can be based, the Magistrate must be deemed to have acted without jurisdiction. But there is nothing in the record before us to suggest that the Sub-Divisional Magistrate refused to hear any evidence which was tendered before him. Apparently in the case disposed of by Mr. Justice Wallis, the Magistrate refused to hear the evidence which he was asked to receive, The reference at the end of the judgment to cross-examination on the depositions given before the Sub-Magistrate does not show that objection was not taken to the procedure by the party affected by it. I think that this defect or irregularity in the procedure is cured by section 537 of the Code of Criminal Procedure. As pointed out by Mr. Justice Subramania Aiyar in *Kader Batcha* v. *Kader Batcha Rowthan* (7), a mere technical irregularity should not be allowed to affect the proceedings unless the party has been prejudiced thereby. In this case, the parties were apparently willing that the Sub-Magistrate should examine the witnesses. They took no objection to the procedure before the Sub-Divisional Magistrate, examined the witnesses before him and were content to have his decision upon the materials placed before the Sub-Magistrate. It is clear to my mind that there has been no prejudice to the appellants by the procedure adopted by the Sub-Divisional Magistrate. The learned Judge Mr. Justice Spencer was asked to exercise his powers of revision under the Government of India Act, section 107, and he came to the conclusion that there was no irregularity. In the Letters Patent appeal, we should not interfere with that order unless we are satisfied that the party has been prejudiced by the order of the Sub-Magistrate.

(6) 37 Ind. Cas. 607; (1916) 2 M. W. N. 497; 4 L. W. 625; 32 M. L. J. 151; 39 M. 1164; 18 Cr. L. J. 239.
(7) 29 M. 237; 4 Cr. L. J. 58.

HAZANI KHAN *v.* NAFER CHANDRA PAL.

On the second point as to whether the enquiry started at the instance of the respondent was within three months of the last exercise of the right of way, I am clear that we should not allow this objection to be argued in this Court, because if it had been raised before the Sub-Divisional Magistrate, the respondent would have been in a position to say that when he filed the petition, more than three months had not elapsed from the date of his exercising the right of way.

For these reasons, I am of opinion that the order of the learned Judge is right and that this appeal should be dismissed.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 555 OF 1917.
June 8, 1917.
*Present*—Mr. Justice Teunon and
Justice Sir Shamsul Huda, KT.
HAZARI KHAN AND OTHERS—1ST PARTY—PETITIONERS
*versus*
NAFER CHANDRA PAL CHOWDHURY AND OTHERS—2ND PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Symbolical possession of subject-matter delivered to party some time before proceedings—Evidence of actual possession on date of proceedings, whether can be discarded.*

Where symbolical possession of a holding was delivered to a party on the 2nd June 1915 and proceedings under section 145, Criminal Procedure Code, in respect of the same holding were instituted in November 1916:

*Held*, that it was incumbent on the Magistrate to go into the question of actual possession between those two dates and consider the evidence tendered by the parties on that question before he could properly pass a final order under section 145, Criminal Procedure Code and that it was not competent to him to wholly discard and leave out of consideration the evidence of actual possession on the date on which the proceedings were instituted. [p. 719, col. 1.]

Rule against the order of the District Magistrate, Nadia.

FACTS of the case appear from the judgment.

Babu *Gurudas Sinha*, for the Petitioners.—The final order made by the Magistrate is clearly unsustainable. The delivery of possession was taken through the Civil Court by the opposite party on 22nd June 1915. The Magistrate has taken into consideration only the symbolical possession given to Nafar Chandra Pal of the 2nd party on 22nd June 1915. But we set up an independent title, and the present proceedings were started in November of 1916. The Magistrate has obviously erred in not trying the question of actual possession between June 1915 and November 1916. Before passing his final order, the Magistrate ought to have considered the evidence of actual possession tendered by both parties. The petitioners have been seriously prejudiced by the Magistrate not going into the question of actual possession. A Magistrate has to base his order upon actual possession and not upon symbolical possession.

Babu *Manmatha Nath Mukerjee* for Babu *Amarendra Nath Bose* (with him Babu *Monmotho Nath Pal*), for the Opposite Party.—The Criminal Court is bound to maintain the recent delivery of possession by the Civil Court, unless it is proved that the decree under which delivery of possession took place was obtained by fraud. The remedy of the other party lies in the Civil Court, see *Krista Alhadini Dasi* v. *Radha Syam Panday* (1). Some of the members of the first party were aware of the attachment after judgment and the delivery of possession and also some of them objected to the sale of the holding before the Munsif. So the 1st party petitioners cannot be heard to raise objection to the Magistrate's order now.

Babu *Gurudas Sinha* replied.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Nadia and the second party to proceedings under section 145 of the Code of Criminal Procedure to show cause why the final order that was made under that section should not be set aside on certain grounds. It appears that the members of the second party obtained a money decree against one Nabai Khan and three others, his sons, and that in execution of that decree certain holdings alleged to be the property of Nabai Khan were put up for sale and purchased by the second party. One of the holdings so put up for sale is described as the *kunjimari khal* and four connected *jalkars* with a rental of Rs. 3 and it appears that in pursuance of the

(1) 7 C. W. N. 118.

sale, delivery of possession was taken through the Civil Court on the 22nd June 1915. The case for the first party was that this *khal* and its connected *jalkars* did not in fact belong to Nabai Khan personally but were the property of practically the whole body of villagers, Nabai Khan and Sabdul Khan being entered in the *zemindar's sherista* as representative tenants. Their case then was that the possession given in July 15th to the *zemindar* of the second party in no way affected their rights and did not in fact affect their possession, which continued as before from June 1915 upto November 1916 when these proceedings were instituted.

From the judgment delivered by the Trying Magistrate it is quite clear that he did not appreciate the case set up by the 1st party, and in making his order he has proceeded solely upon the symbolical possession given to Nafar Chandra Pal, the leading member of the 2nd party, on the 22nd June 1915. But the possession thus given is obviously of little value as against parties who set up an independent title, and even as against Nabai Khan and his descendants the value of the decree and of the delivery of possession as a piece of evidence must vary inversely with the time that has elapsed since the date of the decree and the delivery of possession thereunder. As we have said, that delivery of possession was in June 1915 and the present proceedings were instituted in November 1916. It was obviously incumbent on the Magistrate to go into the question of actual possession between those miscellaneous dates and consider the evidence tendered by the parties on that question before he could properly pass a final order under section 145, Criminal Procedure Code. There can be no question that the petitioners have been seriously prejudiced by the way in which the trial has been held and by the way in which the Trying Magistrate has wholly discarded and left out of consideration the evidence of actual possession on the date on which the proceedings were instituted.

That being so, we set aside the order complained of and we direct that the proceedings be re-heard from the point at which the taking of evidence was completed in the Court of the Trying Magistrate. But having regard to the period of time that has elapsed, it will be open to either party to adduce further evidence as to possession and also, if they are so advised, evidence going to show under sub-section (5) of section 145, Criminal Procedure Code, that no dispute likely to lead to a breach of the peace now exists.

*Order set aside.*

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## PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 11 OF 1917.

March 19, 1917.

*Present*:—Mr. Justice Broadway.

ALIQULLAH—ACCUSED—PETITIONER

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case, grounds for—Reasonable apprehension.*

Where an accused person has a reasonable apprehension that he will not be fairly treated by the Magistrate his case should be transferred, but the apprehension must be a real and reasonable one. [p. 721, col. 1.]

The sole question to be considered is whether the facts disclosed in the application for transfer give rise to a reasonable inference that the Magistrate who is seised of the case may be wittingly or unwittingly prejudiced against the accused. [p. 721, col. 1.]

*Juggan* v. *Emperor*, 22 Ind. Cas. 996; 36 A. 239; 15 Cr. L. J. 212; 12 A. L. J. 399, relied upon.

Petition, under section 526 of the Criminal Procedure Code, for transfer of the case, Uttam Chand *v.* Aliqullah, from the Court of the Honorary Magistrate, 1st Class, Partabpur, to some competent Court at Lyallpur.

Kunwar *Dalip Singh*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—This is an application under section 526, Criminal Procedure Code, for transfer of a case under section 498, Indian Penal Code, pending in the Court of Sardar Bahadur Partab Singh, Honorary Magistrate at Jaranwala in the District of Lyallpur. The petitioner is in the Veterinary Department and the complainant in the case is a Sub-Assistant Surgeon. The complaint is that the petitioner with the assistance of some other persons abducted the wife of the complainant on the 16th of November 1916. The complaint was filed on the evening of the 17th November 1916

in the Court of Sardar Bahadur Partab Singh, Honorary Magistrate, who at once issued warrants resulting ultimately in the recovery of the woman. On the 6th December 1916 an application was filed on behalf of the petitioner in the Court of the District Magistrate asking for transfer of the case on grounds which are identical with those now advanced before me in this Court. The learned District Magistrate called for a report, which was furnished by the learned Magistrate on the 10th December 1916, in which he denied the allegations made. On the 19th December 1916 the learned District Magistrate rejected the application.

The case came up before the Magistrate on the 16th January when 13 witnesses were examined and the case *postponed* for the summoning of some five or six remaining witnesses. On the 18th January 1917 the petitioner filed this application and I have heard Mr. Dalip Singh on his behalf and Mr. Tek Chand on behalf of complainant. Mr. Dalip Singh referred me to *Dupeyron* v. *Driver* (1), *Kali Charan Ghose* v. *Emperor* (2), *Machal* v. *Matru* (3), *Jit Singh* v. *Emperor* (4) and *Kadir Bakhsh* v. *Sundar Lal* (5) and urged that the point for consideration in the applications for transfer was not whether the Magistrate was or was not a fit and competent Magistrate, but whether there was a reasonable apprehension in the mind of the accused person that justice would not be impartially meted out to him. The standard of reasonableness, he urged, was not to be an abstract one, but was to be guaged according to the incidents and surroundings of each particular case. He argued that in this particular case the facts set forth in the affidavit were sufficient to cause, in the mind of the petitioner, a reasonable apprehension that Sardar Bahadur Partab Singh would not deal with him fairly and impartially. These facts briefly are that—

1. The Magistrate received the complaint at a late hour in the evening of the 17th November 1916 and issued warrants forthwith.

2. He acted wrongly in recording the statement of one of the other persons accused in this case.

3. The case was one between Hindus and Muhammadans.

4. The Tahsildar of Jaranwala is a friend of the complainant and would be likely to use his influence with the Honorary Magistrate against the petitioner.

The learned Magistrate has explained that the complainant came to him when he was still at work in the evening and lodged the complaint; that he thereupon recorded his statement and proceeded to take action which was obviously justified, inasmuch as it resulted in the recovery of the complainant's wife; that Mangal Sain, the co-accused above mentioned, was desirous of making his statement and he accordingly recorded it, after which he was remanded to custody inasmuch as nobody was prepared to stand surety for him. It was also urged before me that the complainant in his capacity as a medical man has treated the family of the Magistrate. This fact is admitted by the Honorary Magistrate who pointed out that precisely the same way the petitioner, in his capacity as a Veterinary Assistant, has been attending on the Magistrate's cattle. Mr. Tek Chand on behalf of complainant greatly emphasised this latter fact and has denied that the case is one between Hindus and Muhammadans. He pointed out that although the complainant was a Hindu and the petitioner a Muhammadan, arranged with the petitioner were six Hindus and one Sikh, and he urged that no ground had been made out for transfer. After giving my careful consideration to all the facts of this case, it seems to me that the petitioner has thought fit to assume the want of impartiality on the part of the Magistrate without any reasonable ground. The complainant apparently on the evening of the 16th November discovered that his wife was missing. It must have taken him a little time to ascertain that she had eloped or been abducted, and the names of those persons who had assisted her in running away. I can see nothing extraordinary or suspicious in his having gone to the Honorary Magistrate at Partapu ron the evening of the 17th, after he had succeeded in giving

(1) 23 C. 495; 12 Ind. Dec. (N. S.) 320.
(2) 33 C. 1183; 3 C. L. J. 637; 10 C. W. N. 793; 3 Cr. L. J. 477.
(3) 22 Ind. Cas. 930; 15 Cr. L. J. 193; 10 N. L. R. 15.
(4) 19 Ind. Cas. 718; 4 P. W. R. 1913 Cr; 14 Cr. L. J. 233; 154 P. L. R. 1913.
(5) 27 Ind. Cas. 837; 1 P. W. R. 1915 Cr.; 13 Cr. L. J. 213, 127 P. L. R. 1915.

such information as he deemed necessary, and in instituting the case in the Court of this Magistrate. The complainant has filed an affidavit which goes to show that there was no other Magistrate available in the neighbourhood, and the necessity for prompt action is apparent. Assuming that the Tahsildar of Jaranwala was available, the fact that he was on friendly terms with the complainant would be a valid reason for the complainant not instituting proceedings in his Court. The fact that the statement of Mangal Sain was recorded by the Magistrate is altogether insufficient, to my mind, to create any serious apprehension in the mind of the petitioner. Nor do I think that any such apprehension is justified by the fact that the complainant happens to be a friend of the Tahsildar. A man in the position of this Honorary Magistrate should, I think, be assumed to be above being influenced by a Tahsildar Magistrate. With regard to the allegation that the question involved is one between Hindus and Muhammadans, it seems to me that this is unduly straining the situation. The fact that he has more confidence in a European Magistrate cannot, I think, be taken judicial notice of and in this particular case it should be borne in mind that *one* of the accused persons only is a Muhammadan. Mr. Dalip Singh stated that the other co-accused were quite willing that the case should be transferred. It may be they are willing, but it seems to me significant that none of them have supported the action of the petitioner by filing any application for transfer. I am in complete accord with the rulings cited by Mr. Dalip Singh and consider that when an accused person has a reasonable apprehension that he will not be fairly treated, his case should be transferred, but at the same time I am strongly of opinion that that apprehension must be a real and reasonable one. As pointed out in *Juggan* v. *Emperor* (6), the sole question to be considered is whether the facts disclosed in an application for transfer give rise to a reasonable inference that the Magistrate who is seised of the case may be wittingly or unwittingly prejudiced against the accused. Nothing that was put forward in the application or the affidavit before me or that has been urged at the Bar leads me to think that such an inference arises in this case.

It is also significant that after the application for transfer had been rejected by the District Magistrate, no steps were taken by the present petitioner to prosecute his wishes for the transfer till after the bulk of the evidence for prosecution had been recorded. Mr. Dalip Singh urged that, as a matter of fact, his client had asked the Court before the commencement of the case for an adjournment in order to enable him to move this Court. Reference to the record shows that no such application was made. Taking all the circumstances into consideration, I am of opinion that no case for transfer has been made out and I accordingly reject this application and return the records to the Magistrate for disposal of the case.

*Application rejected.*

(6) 22 Ind. Cas. 996; 36 A. 239; 15 Cr. L. J. 212; 12 A. L. J. 399.



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PATNA HIGH COURT.

CRIMINAL APPEAL No. 56 OF 1917.

April 23, 1917.

*Present*:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Roe.

RAGHO LAYA AND OTHERS—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 164 (3)—Confession, how to be made—Magistrate, duty of, when recording confession.*

Under section 164 (3) of the Criminal Procedure Code, no Magistrate should record any confession unless upon questioning the person making it he has reason to believe that it is made voluntarily. What is meant by the Code is that the Magistrate should ask the accused some such question as "why are you confessing? Are you sorry for your crime or is it that some one has told you that you will gain something by a confession?" and should refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question. [p. 724, cols. 1 & 2.]

Criminal revision from an order of the Assistant Sessions Judge, Manbhum.

JUDGMENT.

ROE, J.—The appellants in this case

have been convicted on a charge of dacoity and sentenced to five years' rigorous imprisonment in cases in which there were no previous convictions and to six years in the case of previously convicted accused.

The dacoity took place on the night of the 9th of April 1916 in the house of one Hari Pado Ghose of Bhalahit. That there was a dacoity cannot be disputed. The sole point for consideration is whether it has been proved by evidence that the appellants before us were among the dacoits. The investigation was taken up by Sub-Inspector Shujan Kumar Bhattacharji on the 11th of April and no clue appears to have been obtained till the 30th of April. On that day the Sub-Inspector walking with the *chaukidar* saw an old convict named Dinu Mallik returning to his house at 7 A.M. with a bundle of raw *lac* on his shoulder. As soon as he saw the officer Dinu threw down the bundle and ran way. The officer searched his house and found nothing in it which could be connected with the dacoity under investigation but nevertheless arrested Dinu Mallik and on a statement made by him, caused searches to be made in the houses of Jitu Manjhi, and Lagwa Manjhi of Jamtara, Pahalan Goala of Aladi, Lakhiram Goala, Gobinda Rai and Bano Bagdi of Dangri; and himself made searches in the houses of Paran Goala and Ragho Laya of Jaspur. The only result of these searches was that a *gathi* was found in the house of Ragho Laya and that Hari Pado and his brother and another relative have identified that *gathi* as part of the proceeds of the dacoity.

On the 2nd or 3rd of May Gobinda made a statement in consequence of which the house of Manu Mallik of Palatpur was searched. Nothing was discovered, but Manu was arrested on the 6th or 7th of May and made a statement to the Police in consequence of which were found in a jungle, a mile and and a half from the scene of the dacoity, traces of a cooking fire. The Sub-Inspector was also allowed to say in his evidence that Dinu Mallik and Manu Mallik had, at different stages of the investigation, pointed out to him spots at which they stood during the commission of the dacoity 20 or 30 yards from the house and also a mango grove in which it was alleged that the dacoits collected before attacking the house. Evidence was also collected to show that Gobinda Rai had been seen sitting with Manu Mallik on the outskirts of Palatpur on a date towards the end of *Chaitra* and that Gobinda was in the habit of visiting Manu Mallik.

From the evidence of P. W. No. 11 it appears that Dinu Mallik is a cousin of Ragho Laya and often goes to Ragho Laya's house and that in *Chaitra* last Paran Goala and Dinu Mallik together purchased at about *besham* time two *handis* and two other earthen pots.

In consequence of other information the house of Shyam Singh was searched and in a recently made hole in the floor a silk *dhoti* and a silk *sari* were discovered which have been identified as part of the proceeds of the dacoity. Dinu Mallik and Manu Mallik also made on the 8th of May 1916 statements to a Deputy Magistrate of the 1st Class which have been used as confessions. In both of their confessions occur the names of Pahalan Goala and Lakhiram Goala. It had been stated by Hari Pado that in the progress of the dacoity two of the dacoits held him down and threatened to kill him if he did not disclose the whereabouts of his valuables.

On the 14th of May, 12 suspected persons were mixed up with 58 other undertrial prisoners and out of these 70 persons Hari Pado identified Pahalan and Lakhiram. This exhausts the evidence in the case and upon it Dinu Mallik, Manu Mallik, Pahalan Goala, Lakhiram Goala, Ragho Laya, Gobinda Rai, and Paran Goala have been convicted of dacoity and Shyam Singh of an offence under section 411. Even upon this bald statement of the facts it is apparent that the case against the majoirty of the accused is a somewhat flimsy case. The accused were not represented in the Sessions Court and I feel bound to say that the learned Assistant Sessions Judge would have been well advised to regard himself as not merely a machine for recording a conviction but as a Judicial Officer required to scrutinise carefully the evidence upon the record. Not one single point has been mentioned in his judgment which might tell in favour of the accused. In the first information it is stated that from the voices of the dacoits they

appeared to be low caste people of the locality, *Bhuiyans*, *Dosads* or *Bouris*. None of the accused belong to these classes. Ragho Laya has been convicted upon the identification of a water pot found among the utensils of his house. No allusion is made in the judgment to the fact that one of the assessors recorded his opinion that it was uncertain whether this water pot belonged to the accused himself or to Hari Pado or that in the evidence of the search witness P. W. No. 9 it is admitted that when this witness went to Ragho Laya's house for a sing-song in *Magh* last, he saw there a *gathi* similar to that produced as the *gathi* of Hari Pado.

In dealing with the case against Paran, no allusion is made to the fact that the date on which the two *handis* were purchased by him and Dinu Mallik might be any date in *Chaitra*, and not necessarily the date of the dacoity.

In dealing with the case against Gobinda it is said in the judgment that Manu Mallik and Gobinda were frequently seen together in *Chaitra* last. It is not mentioned that in the evidence of P. W. No. 16 an excellent reason for that association has been given, namely, that Gobinda when he goes to Manu's village holds *puja* in the house of Manu.

In dealing with the confessions the learned Assistant Sessions Judge does not mention the fact that the statement made by Manu Mallik to the Deputy Magistrate was not a complete confession at all, but a denial that he was aware of the object of the dacoits in going to Bhalahit and a denial that he took any larger part in the dacoity than sitting at the *mora* of the village and receiving afterwards Rs. 5 from Pahalan; nor is it noted that the confession of Dinu gave no details whatsoever of the occurrence. His confession consists of seven lines of which four lines are names of accused, and the remainder runs baldly "committed dacoity in the house of a person at Bhalahit one night about three weeks ago. They did not give me any share out of their booty; we did not beat any one." No definite finding has been recorded that the Court is satisfied that these confessions were voluntarily made.

I propose to deal, firstly, with the case of Ragho Laya and to enquire whether it has been established that in consequence of Dinu Mallik's statement to the Police part of the proceeds of the dacoity were found in Ragho Laya's house. The assessor Babu Damodar Lal says it is doubtful whether the *gathi* Exhibit 10 belongs to Hari Pado or Ragho Laya. I think this is a fair opinion, bearing in mind the evidence given by the witness who sang songs in Ragho Laya's house. It has not been established to my satisfaction that anything was discovered in consequence of any of Dinu Mallik's statements to the Police. The pointing out of a patch of ground upon which the accused sat or the pointing to a mango grove as the place at which the dacoits collected cannot be said to have led to the discovery of anything. Therefore, the whole of the statements made to the Police by Dinu Mallik are inadmissible in evidence for the reason that nothing was discovered in consequence thereof. It is to be particularly noted with regard to Ragho Laya that he was a man well known to Hari Pado and if he was taking an active part in the dacoity, I fail to see why Hari Pado should have failed to recognise him at the time of the dacoity.

It is next to be considered whether the identification of Pahalan and Lakhiram by Hari Pado can be said to have arisen from any statement made by Dinu Mallik when under arrest. From the evidence of the Sub-Inspector it appears that the houses of Pahalan and Lakhiram were searched in consequence of those statements, and it is certain that it was on the combined confessions of Manu and Dinu that Pahalan and Lakhiram were among those who were put before Hari Pado for an honest identification. It is alleged in the grounds of appeal that Pahalan and Lakhiram were carefully shown to Hari Pado at the Mirza *thana* where they were kept for 24 hours before being identified in the jail. No investigation was made into this assertion in either of the Courts below, for the reason that no mention of the fact was made by the accused before the filing of the grounds of appeal. But it is to my mind curious that the two persons identified at

this honest identification were persons against whom there was no other evidence whatsoever, and if indeed, the complainant Hari Pado did see these people so clearly on the night of the dacoity as to be able to identify them more than a month later, it is curious that he should not have noticed at the time that they were not low caste *Bouris*, *Bhuiyans* or *Dosads*. It may be said, however, that neither Lakhiram nor Pahalan have any previous convictions and there is no reason why particular efforts should be made to implicate them in the case. My impression of the evidence against the five non-confessing convicts is that there is nothing at all to corroborate the retracted confessions as against Ragho Laya, Gobinda and Paran and that the identification by Hari Pado of Pahalan and Lakhiram is not sufficiently convincing to justify their conviction.

The case against Dinu Mallik I regard as extraordinarily weak. He was arrested in the first instance not on account of this dacoity but because he was obviously in a guilty frame of mind when returning to his house at 7 A. M. on the 30th of April. In his house were found a number of old coats, which I take it the Sub Inspector suspected were proceeds of other thefts, but nothing in his house was found connected with the dacoity in question. His confession is on the face of it too bald a statement to carry with it any conviction that to have made such a statement he must have been fully aware of all the facts of the occurrence. And it was, moreover, recorded in a most slovenly fashion.

I have had occasion very frequently to point out that under section 164 (3) of the Code of Criminal Procedure no Magistrate shall record any such confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily. It is the invariable practice of the Deputy Magistrates in this Province to ignore entirely this provision of the Code. It is considered sufficient to make use of a stock phrase which in this instance runs "I am a Magistrate, if you want to make any statement of your own accord you may do so; do not make any statement which you have been tutored by others to make," and then follows the story of the crime without any answer whatsoever to the Magistrate's formula. To my mind a Magistrate might just as well say to the accused "*hocus pocus*" or "*abra ca dabra*." Such phrases would be as much a compliance with the terms of section 164 (3) as the formula now in vogue. What is meant by the Code is that the Magistrate should ask the accused some such question as "why are you confessing? are you sorry for your crime or is it that some one has told you that you will gain something by a confession", and to refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question. The attention of Magistrates has been drawn several times to this defect in their procedure but the comments of this Court have invariably been completely ignored. In my view the Local Government should take steps to see that Magistrates understand the requirements of section 164 (3) and that if Magistrates fail to observe them they are severely reprimanded. I am of opinion that none of the statements made by Dinu Mallik to the Police are admissible against him and that the confession which he made to the Magistrate has not been shown to be a voluntary confession. It is inconclusive of his guilt and he should be acquitted.

The statement of Manu Mallik is very much more full than that of Dinu Mallik, but in it Manu denies taking any part in the occurrence. He does not admit assisting in the dacoity in any way. He acknowledges only the receipt of Rs. 5 after the dacoity as the price of his keeping silence during the dacoity. The statement made to the Police that the dacoits cooked their food at a place a mile and a half from the scene of occurrence resulted in the discovery of the *chulha* on which the food was cooked. Even granting that the statement made to the Magistrate was voluntarily made and that it is corroborated by the discovery made by the Police with Manu's assistance, there is nothing in the statement upon which Manu can be convicted. There is no evidence on the record to show that the statement is untrue. If true, Manu was merely an unwilling witness. We may suspect that he was something more than this, but in the absence of corroboration of this suspicion, we cannot convict him.

RAJESWAR BAGCHI *v.* EMPEROR.

The case of Shyam Lal Singh has been clearly proved by the silk articles found in his house and identified with certainty by the complainant. The circumstances in which they were concealed in his house indicate clearly knowledge that they were stolen property. I would, therefore, reject the appeal of Shyam Lal Singh.

I would allow the appeals of Manu Mallik, Dinu Mallik, Gobinda Rai, Ragho Laya, Lakhiram Goala, Pahalan Goala and Paran Goala and direct that they be released from jail.

CHAMIER, C. J.—I agree. The case against the men whom we are acquitting proves on careful examination of the record to be even weaker than I supposed when I first read the judgment of the Assistant Sessions Judge. I agree that a stricter compliance with section 164 (3) of the Code of Criminal Procedure should be insisted upon.

*Appeal accep'ed in part.*

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CALCUTTA HIGH COURT.
CRIMINAL REVISIONS NOS. 1105 AND 1107 OF 1916.
January 16, 1917.
*Present*:—Mr. Justice Teunon and Mr. Justice Chaudhuri.
IN NO. 1105
RAJESWAR BAGCHI—ACCUSED—PETITIONER
*versus*
EMPEROR—OPPOSITE PARTY.
IN NO 1107
NRIPATI CHANDRA DAS—ACCUSED—PETITIONER
*versus*
EMPEROR—OPPOSITE PARTY.

' *Stamp Act* (*II of* 1899), *ss.* 62 (*b*), 68 (c)—*Offence, ingredients necessary for—Application for loan in prescribed form recommended by surety and approved by Manager of creditor Bank, whether agreement which should bear stamp.*

An application was made to a Bank for a loan on a prescribed form, which contained columns intended to show the signature of the person recommending the loan or undertaking any responsibility on behalf of the applicant. A person recommended the loan by saying "I guarantee the payment". The accused, who was the Manager of the Bank, approved the proposal by saying in the last column of the form that the application for the loan should be granted. No stamp was affixed to the form:

*Held*, (1) that the words "I guarantee the payment" signed by the person who recommended the loan did not represent a completely executed security bond, so that the Manager by his signature in the last column of the form could not be held to have appended his signature to that security bond by way of acceptance thereof. Therefore the conviction of the Manager under section 62 (*b*) of the Stamp Act could not be supported; [p. 726, col. 1.]

(2) that the Secretary of the Bank, who advanced the loan to the applicant on his executing that bond, could not be convicted under section 68 (*c*) of the Stamp Act, as his duties in connection with the transaction were purely ministerial and he did not, in fact, accept the proposal for the loan. [p. 726, col. 1.]

The essential question in a case under section 68 (*c*) of the Stamp Act is whether the act complained of is a device intended to defraud the Government of duty payable in respect of a document. [p. 727, col. 1 ]

Rule against the order of the Deputy Magistrate, Rungpur, dated the 24th July 1916.

Babus *Dasarathi Sanyal* and *Mritunjoy Chatterjee*, for the Petitioner.

Mr. *Camel* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.

CRIMINAL REVISION NO. 1105 OF 1916.

This Rule is directed against the order of the Deputy Magistrate of Rangpur convicting the petitioner of an offence under section 62 (*b*) of the Stamp Act II of 1899 and sentencing him to pay a fine of Rs. 20.

It appears that on the 11th *Agrahyan* 1319, one Arajulla Sheikh applied to an institution, known as the Gaibandha Bank, Limited, for a loan of Rs. 50. The application was made on a prescribed form, which contains columns intended to show the signature of the person recommending the loan or undertaking any responsibility on behalf of the applicant. In that form one Sadat Ali stated that the applicant was a middle class man and gave certain other particulars with regard to him and recommended that he should be granted the loan on a bond. He then added the words in Bengali, "*ami adai karia diba*", that is to say, I will make the payment or see that the payment is made, in other words, he said "I guarantee the payment." The present petitioner was at that time, and we are informed that he is still, the Manager of the Bank, and in the last column of this form he approves the proposal made by Arajulla and

says that this application for a loan of Rs. 50 to carry interest at the rate of Rs. 2-11-0 monthly should be granted, and to this approval he appends his signature. The Magistrate in convicting the petitioner has taken the view that the words "I guarantee the payment" signed by Sadat Ali represents a completely executed security bond, and that the signature of the Manager found in the last column of the proposal is to be taken as the signature to that security bond appended by way of acceptance thereof.

We are unable to take this view, and we are also unable to take the view which has been put forward before us by the learned Counsel for the Crown. That view is to the effect that the proposal and the approval of the proposal to be found in column 9 represent a completely executed agreement between the principal borrower and the Manager and that it should, therefore, have borne 8-annas stamp. We are unable to take that view for this reason, that the statements in the proposal made by applicant himself and by the Manager do not represent a completed agreement, more particularly with regard to the rate of interest. Neither the proposed surety nor the applicant said anything regarding interest and there is nothing in the form itself to show that the borrower or the surety agreed to the proposed rate. Thus at most the proposal with the statements made in its various columns represent merely negotiations which were intended to lead up to the execution of a bond and the payment thereon of the sum of Rs. 50.

In that view the conviction cannot be supported and we accordingly set aside the order complained of and direct that the fine, if paid, be refunded.

CRIMINAL REVISION NO. 1107 OF 1916.

This Rule is directed against the order of the Deputy Magistrate of Rungpur convicting the petitioner under section 68 (*c*) of the Stamp Act II of 1899 and sentencing him to pay a fine of Rs. 15.

It appears that on the 11th *Agrahayan* 1319, one Arajulla applied to an institution called the Gaibanda Bank Limited for a loan of Rs. 50. Applications or proposals for loan made to that Bank have apparently to be made on a certain form prescribed by the institution, and one of the columns of this form requires the signature of the person recommending the loan or taking upon himself responsibility in connection therewith. In this particular case after a recommendation to the effect that the loan applied for should be granted on a bond, a person of the name of Sadat Ali writes certain words translated as follows: "I guarantee payment." It next appears that on this application the Manager or the Managing Committee of the Bank, a person of the name of Rajeswar Bagchi, approved the application and decided that a loan of Rs. 50, carrying interest at the rate of Rs. 2-11-0 monthly, should be granted to the applicant. The bond was thereupon, it appears, executed by the applicant Arajulla and on the execution of this bond the present petitioner who was the Secretary of the Bank made to him a loan of Rs. 50. The surety did not, in fact, sign the bond. Arajulla having failed to make the payment a suit was brought by the Bank against the borrower Arajulla on his bond and apparently on the strength of the entry already referred to in the proposal form against Sadat also as his surety. The matter thus came to the notice of the authorities and a prosecution having been instituted, the petitioner who was at the time the Secretary of the Bank has been prosecuted and convicted, as already stated, on the ground that Sadat Ali's offer to make the payment, accepted by the Manager of the Bank with a qualification as to interest, is to be looked upon either as a security bond or as an agreement or at least as a device intended to avoid the necessity of a property executed security bond or agreement, and thus implying on the part of all concerned in it an intention to defraud the Government of duty. Whether, as it stands, having regard more particularly to the added qualification as to interest, there is on this proposal a complete agreement or security bond we need not in fact decide. The essential question is whether it is a device intended to defraud the Government of duty, and if so, whether the present petitioner who was at the time the Secretary of the Bank shared in that intention. On this point it is to be observed that the Secretary was in fact not the person who accepted the proposal. His duties in con-

nection with the transaction were, it may be said, purely ministerial. Apart from that it is to be pointed out that the proposal and the recommendation of Sadat Ali contemplated throughout that the loan should be made not on this proposal but on a duly executed bond. That bond was, in fact, executed by the borrower Arajulla, and it is certainly a point very material to this question of intention to note that had the surety also signed it, no additional stamp duty would have been required.

Having regard to these considerations we are of opinion that it cannot be said that the present petitioner shared or took any part in this transaction with intent to defraud the Government. We, therefore, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

*Convictions set aside.*

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## PATNA HIGH COURT.

CRIMINAL REVISION No. 222 OF 1917.

June 23, 1917.

*Present*:—Mr. Justice Chapman.

RAKTOO RAI—PETITIONER—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 476—Penal Code (Act XLV of 1860), s. 193—Sanction to prosecute—False statement—Materials arising out of cross-examination, whether sufficient.*

An order directing a prosecution for perjury merely upon materials arising out of cross-examination is a very unsafe proceeding, especially where the cross-examination has been protracted.

Criminal revision from an order of the Magistrate, Sitamarhi, Mozufferpore.

Mr. *Harnarain Prasad*, for the Applicant.

JUDGMENT.—This is a petition asking for interference by this Court with an order passed under section 476 of the Code of Criminal Procedure initiating the prosecution of one Raktoo Rai on a charge of perjury. Raktoo Rai was a witness in a case in which certain persons were charged with unlawful assembly and theft of a crop from a field. The case ended in a conviction in the Magistrate's Court. In appeal there has been an acquittal upon the ground that the case has every appearance of being false and that the motive for the false case was the dismissal by the Sheohar Raj of Tribeni Lal who gave the information to the Police, the persons whom he accused being mostly the *amlas* of the Sheohar Raj. Raktoo Rai was called as a witness for the prosecution. The moment his examination commenced he asserted that he knew nothing whatever about the matter. He was thereupon declared hostile and cross-examined at great length. The order passed under section 476 was after the receipt of the Sessions Judge's judgment. No reasons are cited in it why the prosecution should be ordered: but in his explanation the Magistrate says that the cross-examination of Raktoo Rai disclosed that the evidence was false, the false statements being to the effect that he had been intimidated into giving evidence before the Police by threats. He was ordered by the Sub-Inspector to give the name of a man named Lalji: the Sub-Inspector said that if he did not do so he would be prosecuted for theft and cheating: that he had been called by Tribeni Lal the first informant and taken to the Sub-Inspector: that Tribeni told the Sub-Inspector that Raktoo was his witness: and that he had then said that he would not give evidence as he knew nothing. The Sub-Inspector said that "he cited you as a witness—you will be compelled to give evidence." Thereupon Raktoo said: "I was afraid of his threats and so I spoke." I am of opinion that the order directing a prosecution for perjury merely upon materials arising out of cross-examination is a very unsafe proceeding, especially in the case of a protracted cross-examination of this kind. I have read this cross-examination and I have been unable to find any such manifest contradictions as would afford any basis for a prosecution. That is the only material upon which the proceeding has been based. I also consider it unsafe to charge a witness for perjury upon statements of this kind when the Sessions Judge has found substantial grounds for suspecting the whole conduct of the prosecution. It is clear that the only evidence that the statements were false would be the statements of the Sub-Inspector himself, Tirbeni and other persons under their influence; this being so, the order directing the prosecution of the petitioner is set aside. I direct that further proceedings be stayed.

*Order set aside.*

COHEN, ALEC ARAN *v.* SASI BHUSAN DAS GUPTA.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 61 OF 1917.
February 9, 1917.
*Present*:—Mr. Justice Teunon and
Mr. Justice Chaudhuri.
ALEC ARAN COHEN—COMPLAINANT—PETITIONER
*versus*
SASI BHUSAN DAS GUPTA AND ANOTHER —ACCUSED—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 406, 206—Disposing of car in contravention of hire-purchase agreement—Offence—Merger of agreement in decree.*

The accused obtained a motor car from the complainant on a hire-purchase agreement, stipulating that so long as the whole amount of the price was not paid, the car would remain the absolute property of the complainant and that the accused would not in any way dispose of it. The complainant brought a suit for the recovery of the price still remaining due under the agreement and got a decree for a certain sum with costs, but no lien on the car was declared by the Court. Soon after this decree the accused sold away the car:

*Held*, that the accused in disposing of the car in contravention of the original hire-purchase agreement did not commit an offence under section 406, Indian Penal Code, as the original contract was merged in the decree of the Civil Court. [p. 729, col. 2.]

*Semble.*—That the act of the accused might amount to an offence under section 206, Indian Penal Code, for which proceedings might be taken by the complainant against the accused on getting sanction from the Court which made the decree. [p. 729, col. 2.]

Rule against the order of the Fourth Presidency Magistrate, Calcutta.

FACTS material to the report will appear from the following portion of the verified petition of the complainant:—

1. That in December 1915 the accused above named took a motor car from your petitioner on the hire-purchase system, the price settled being Rs. 3,250, of which he paid Rs. 400 on the 14th November 1915, and Rs. 300 on the 1st of December 1915 and he took possession of the car agreeing to pay the balance by weekly instalments of Rs. 60 and executing a bond therefor.

2. That in the said bond the said accused made the following stipulation:—

"Failing payment of any four consecutive instalments, the bill to become due at once and for such consideration I do further agree that the motor car shall remain their absolute property till such time and period as the balance is liquidated in full. That I further undertake not to part with the possession of the said motor car, do or suffer anything to be done whereby the same may be distrained or taken in execution, or deal with the motor car otherwise than in the usual course of my business."

3. That the said accused having stopped payment of the instalments stipulated by him, your petitioner instituted a suit in the Original Side of the Hon'ble High Court for the money due and obtained a decree in May 1916.

4. That thereafter when your petitioner went to attach the said motor car, he came to know that the accused had sold the car to Sheik Samir above named on or about the 24th June 1916 accepting Rs. 1,300 only as the price therefor.

5. That your petitioner thereafter instituted a complaint in the Court of the Chief Presidency Magistrate, Calcutta, charging the accused Sasi Bhusan Das Gupta aforesaid with an offence under section 406, Indian Penal Code, and your petitioner obtained a search warrant from the said Court in execution of which the car was brought before the Court where it is now lying.

6. That the case was tried by Mr. K. B. Das Gupta, Presidency Magistrate, who on the 4th January 1916 examined your petitioner and the aforesaid Sheik Samir as a witness called by the Court, and discharged the accused under section 253, Criminal Procedure Code, and made an order directing the car to be made over to the aforesaid Sheik Samir."

* * * * * * *

The order of the Presidency Magistrate was in these terms: "I find from the judgment of the Hon'ble Judge of the High Court of the 19th May 1916 that it was held by the Hon'ble Judge that it was an executed contract of sale under which the accused took the car from the complainant. After the case was disposed of in the High Court, the accused sold the car to Sheik Samir. He sold it knowing that it was his property. So I cannot find that he dishonestly disposed of it. The case for the prosecution thus fails. The accused is discharged."

The decree of the Hon'ble High Court referred to in paragraph 3 of the petition was in these terms:—

"* * *. It is ordered and decreed that the defendant do pay to the plaintiff

the sum of Rs. 2,310 with interest thereon at the rate of 6 per cent. per annum from the date hereof until realisation. * * * *"

Babu *Manmotha Nath Mookerjee*, for the Petitioner, contended that the transaction was on hire-purchase system.

The title in the goods (car) could not pass till the whole amount was paid or realised.

The opposite party was clearly guilty under section 406, Indian Penal Code, because knowing full well that the price had not been paid and as such according to the agreement he could not be the owner of the car, the opposite party disposed of the same in violation of the express terms of the contract.

At any rate the accused should be retried for an offence under section 206, Indian Penal Code, for fraudulently transferring the car to prevent its seizure in execution.

Mr. *S. K. Sen* (with him Babus *Probodh Chandra Chatterjee* and *Surendra Kumar Bose*), for the Opposite Party.—The transaction was an out and out sale and the car was not taken on hire-purchase system and as such the opposite party was the owner and could deal with the same in any manner he liked.

The petitioner having got a decree for the price of the car, the contractual obligation ceased to exist and the contract merged in the decree and as such the opposite party could not be guilty of a criminal offence for violating the terms of the contract.

The petitioner had applied in the Civil Court for the appointment of a Receiver to take charge of the car; the prayer was apparently not granted and the opposite party *bona fide* sold the car after the decree was passed.

There was no allegation before the learned Presidency Magistrate that the car was *fraudulently* sold. This is a new case made in the High Court. This Court has no power to order a further enquiry for an offence under section 206, Indian Penal Code, because no sanction has been obtained from the Civil Court for the prosecution of the opposite party under the said section.

JUDGMENT.—This Rule is directed against an order of the Fourth Presidency Magistrate by which he discharged the accused person under the provisions of section 253, Criminal Procedure Code. The complainant in the case was one A. A. Cohen, and it appears that on what may be described as a hire-purchase agreement the accused opposite party has obtained from him a motor car. A sum of Rs. 2,310 remained due upon the car, and in that state of things the complainant brought a suit on the Original Side of this Court, praying *inter alia* for the appointment of a Receiver and the issue of an injunction. He obtained a decree directing payment by the defendant in that suit of the sum of Rs. 2,310 and also costs. No lien on the car was declared; and it would seem that the prayer for the issue of an injunction and the appointment of Receiver was refused. Before the Presidency Magistrate the complainant brought his suit on the footing that the car was still his property, and that in disposing of the car in contravention of the terms of the original contract the accused person had acted dishonestly. But it appears to us that the original contract has been merged in the decree, and it is, therefore, rather difficult to say at the present stage that the car still remains the property of the complainant.

We are, therefore, unable to make this Rule absolute. But we leave it open to the complainant to apply for sanction to the Court which made the decree to the taking of proceedings in view of the provisions of section 206, Indian Penal Code, or to take such other steps as he may be advised. In these terms this Rule is discharged.

*Rule discharged.*

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ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 937 OF 1916.

March 22, 1917.

*Present*:—Justice Sir George Knox, KT.

LALA AND OTHERS—APPLICANTS

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 345 (1)- *Penal Code* (*Act XLV of* 1860), *s.* 323—*Compounding of offence—Compromise, who can.*

The person by whom an offence under section 323 of the Criminal Procedure Code, 1898, may be compounded is the person to whom the hurt is caused, and not the person who causes the hurt. [p. 730, col. 2.]

Criminal reference by the first Additional Sessions Judge, Aligarh, dated the 24th November 1916.

JUDGMENT.—This case has got into a bad tangle. It appears from the evidence for the prosecution that Lala, Udai Ram, Moja, Har Chandi and Puran were convicted of offences under sections 325 and 323 of the Indian Penal Code, Udai Ram and Moja under section 323 and the others were convicted under section 325. The accused applied in revision to the Court of the Additional Sessions Judge of Aligarh. The view apparently taken, though this is not clear, by the learned Sessions Judge was that Lala was attempting to take cattle to the pound; that Kallua, Parshadi, Genda and Heta tried to rescue the cattle by force. Upon their doing so Lala, Udai Ram, Moja, Puran and Harchandi assaulted those who were trying to rescue the cattle. As a result both parties received injuries and one of them Lala accused received grievous hurt. The learned Sessions Judge, being of opinion that the Magistrate had gone wrong in convicting the applicants, was about to report the case to this Court but the parties, according to the learned Sessions Judge, have compromised and have duly attested a form before him to that effect. He sends the case on with a recommendation that the conviction and sentence be quashed. The so-called application for compromise is No. 14A of the record. In it Parshadi on the one side and Puran, Udai Ram, Moja and Lala on the other, say that the parties have come to an understanding with each other and the prayer is that the case be struck off and not decided. The paper No. 14 A is worthless. In the first place one of the accused Harchandi is no party to it. In the second place, and this is the more serious difficulty, Kallua who was one of the persons to whom hurt was caused is also no party to it. Section 345, clause (1), of the Code of Criminal Procedure lays down that the offences punishable under the sections of the Indian Penal Code described in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table. When we look down the table and come to the offence of causing hurt under section 323, the person by whom the offence may be compromised is the person to whom the hurt is caused. The learned Sessions Judge appears to have misunderstood the meaning of the word "compounded." The table shows that the person by whom the offence may be compounded is the person to whom the hurt is caused, it is not the person who causes the hurt. In the case with which I am dealing the persons hurt were Parshadi and Kallua.

Again on turning to section 439 of the Code of Criminal Procedure, I find that while the High Court may exercise several powers enumerated therein which are conferred on a Court of Appeal, the powers granted to the Court of Appeal by section 345, are not mentioned. Looking to the case as reported by the learned Additional Sessions Judge, I can find no adequate reason why the conviction and sentence should be quashed.

There is another paper on the record No. 35A which purports to be a compromise between Lala, on the one side and Kallua, Parshadi, Genda and Heta on the other and it says that the matter between them has been settled and the case be struck off from undertrial cases. It is described by the learned Sessions Judge as a cross-complaint. The Magistrate before whom the paper was filed had endorsed upon it the words: "I allow the compromise, these are cross-cases and the parties are related. I acquit the accused under section 345 of the Criminal Procedure Code". The case which the Magistrate had before him was a complaint under section 325 of the Indian Penal Code. How the learned Magistrate could accept a compromise under this section it is difficult to understand, especially as some of the persons to whom hurt had been caused were no parties to the compromise. As mentioned above the learned Sessions Judge describes the compromise as a cross-complaint. It is nothing of the kind. Lala, Udai Ram, Moja, Harchandi and Puran were sent up by the Police for the offence of causing grievous hurt under section 325. Lala appears to have filed a complaint against Kallua, Pershadi and Heta for the same offence, *i.e.*, the offence under section 325 of the same date. There was only one case. The remarks made by the learned Sessions Judge and the Magistrate show the extreme

danger there is of taking up what are supposed to be two cases together. There was only one case of which the Police took cognizance and which Lala tried to bolster up by a complaint of his own. The paper No. 35A is, for the reasons given above, equally defective.

I refer the learned Sessions Judge to the cases of *Ram Chandra* v. *Emperor* (1) and *Murray* v. *Queen-Empress* (2).

Let the record be returned.

*Record returned.*

(1) 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L J. 247.

(2) 21 C. 103; 10 Ind. Dec. (N. S.) 701.



## CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 441 OF 1917.

May 28, 1917.

*Present*:—Mr. Justice Teunon and Mr. Justice Richardson.

MUCHI MIAN—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 216 B—"Assisting in any way to evade apprehension", meaning of—Harbouring offender.*

The words "assisting a person in any way to evade apprehension" in section 216B, Indian Penal Code, are not to be read as *ejusdem generis* with the two methods specified in the preceding part of the section, *viz.*, supplying with food, shelter, etc. [p. 732, col. 1.]

Where the accused in answer to an enquiry of an Inspector of Police replied that his brother, who was charged under section 411, Indian Penal Code, was in the house and promised to produce him, but on going inside the house he returned after a delay of 15 minutes with his brother's son and said that he had made a mistake, as the son was in the house and not his brother, and subsequently on search being made by the Police, the brother was found hiding in the house:

*Held*, that as by the methods he employed the accused did give time and opportunity to the offender to conceal himself or effect his escape, he was guilty under section 216B for giving material assistance to the offender in evading apprehension. [p. 732, col. 1.]

Mr. *Zorab* and Babus *Manmotha Nath Mukerjee* and *Santosh Kumar Pal*, for the Petitioner.

Mr. *Remfry*, for the Crown.

JUDGMENT.—In this case the petitioner has been convicted under section 216 of the Indian Penal Code and sentenced to six months' rigorous imprisonment.

It appears that the petitioner's brother one Azizar Rahman was charged with the commission of an offence punishable under section 411, Indian Penal Code, that to the knowledge of the petitioner first warrants for Azizar's arrest and then a proclamation under the provisions of section 87 of the Code of Criminal Procedure had been issued by a Magistrate. It also appears that the proclamation had been duly published at the house in which the two brothers as joint owners used to reside.

On the 23rd September 1916, on information received, an Inspector of Police with a sergeant and a posse of constables proceeded to his house and interviewed the petitioner.

The facts then found against the petitioner are that in answer to the Inspector's enquiry the petitioner replied that Azizar was in the house and promised to produce him. He then went inside the house and after a delay of 15 minutes returned with Azizar's son and said that he had made a mistake and that it was the son who had come to the house the preceding evening. The learned Sessions Judge has further found that the statement made to the Police Officer in the first instance, the delay of 15 minutes spent, as the Police Officer would presumably infer, on a search for the offender, the subsequent production of Azizar's son, and the false statement made with regard to Azizar himself, who on search was in fact found in hiding in the thatch of the roof, were all parts of a plan by which the petitioner sought to give and did give Azizar Rahman an opportunity of making his escape or of concealing himself.

On behalf of the petitioner it is contended that the facts found are insufficient for the finding that the petitioner "assisted (the offender) in any way to evade apprehension" and so "harboured" him within the meaning of sections 216A and 216B, Indian Penal Code. In support of this contention it is urged that the words "assisting in any way" should be read as *ejusdem generis* with the two methods specified in the preceding part of the section, and in further support of this view we are referred to the case of *Emperor* v. *Husain Bakhsh* (1). But this case though entitled to our great respect is not one which we are bound to follow and

(1) 25 A. 261; A. W. N. (1903) 29.

moreover the facts in that case were wholly different. If the intention had been that the words "assisting in any way" should be read as *ejusdem generis* with the former part of the section, we should have expected the Legislature to frame this provision of law somewhat in the following manner: "the word 'harbouring' includes the giving of assistance by supplying a person with shelter, food, etc., means of conveyance or otherwise."

As the section has been framed, we are not prepared to hold that the ways in which assistance may be rendered must, for the purposes of the section, be restricted to methods which may properly be regarded as *ejusdem generis* or of a like nature with supplies of food or of other necessary articles.

On the contrary we are of opinion that by the methods he employed the petitioner did give time and opportunity for the offender to conceal himself or effect his escape and thereby gave him material assistance in evading apprehension.

In this view the petitioner has been properly convicted but having regard to all the facts we are of opinion that the sentence is unnecessarily severe. We, therefore, reduce the sentence from six months to three months' rigorous imprisonment.

The petitioner will now surrender to his bail and serve out the unexpired portion of his sentence.

*Sentence reduced.*

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CALCUTTA HIGH COURT.
CRIMINAL REVISION NO. 442 OF 1917.
May 24, 1917.
*Present*:—Mr. Justice Teunon and
Mr. Justice Richardson.

UDAI NARAIN GAIN—PETITIONER
*versus*
RAMANATH MIDDA—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 439—Acquittal, setting aside of—Revision—Mistake of law as to accused's right to property—Penal Code (Act XLV of 1860), s. 379—Theft—Bona fide claim of right—Execution—Land delivered to decree-holder in execution of decree—Crops growing, whether pass.*

Where, in execution of a decree in a title suit, possession of land is given to the decree-holder the growing crops pass with the land. [p. 733, col. 2.]

The accused, having cut and removed paddy from a land of which possession had been delivered to the complainant in execution of a decree in a title suit, was prosecuted for theft, but was acquitted by the Magistrate on the ground that he had grown the paddy prior to the delivery of possession:

*Held*, (1) that the case had not been properly tried and, therefore, the order of acquittal could not stand; [p. 733, col. 2.]

(2) that the case should be re-tried but that the accused should not be convicted of theft if it was proved that though he may have made a mistake as to his rights under the law, he was acting in the exercise of a *bona fide* claim of right. [p. 733, col. 2.]

FACTS of the case material to this report are as follows :—

The petitioner, after having obtained a settlement from his landlord on payment of the proper *selami*, had been in possession of the disputed plot of land as tenant till 1912. After the death of the landlord, his son illegally settled the land with the accused who dispossessed the petitioner. Thereupon the petitioner brought a title suit against the accused in the Civil Court, and the Civil Court found that the petitioner was a tenant in possession of the land after having obtained settlement from the landlord on payment of a *selami* of Rs. 600 and that the defendant wrongfully dispossessed the petitioner. The petitioner obtained peaceful possession of the land through the Civil Court peon. Thereafter the accused entered upon the land armed with *lathis* and other weapons, and forcibly cut away paddy growing on the land. The petitioner prosecuted the accused for criminal trespass, rioting and forcibly removing the paddy and causing hurt. The accused admitted having taken away the paddy but stated further that the paddy was grown by him before the delivery of possession to the petitioner. The Magistrate apparently believed the prosecution story that the accused carried away the paddy by force, but came to the conclusion that he did not commit any offence thereby inasmuch as the paddy was grown by the accused and acquitted the accused under section 258, Criminal Procedure Code. Against that order of acquittal the petitioner moved the High Court.

Babu *Bejoy Kumar Chatterjee*, for the Petitioner,—The report of the Magistrate is in favour of the petitioner's case. As

*In re* GUMPARTHI VENKATARAMIAH.

a matter of fact he has found that there has been a miscarriage of justice in this case, but as in his opinion the case is of a trivial nature he has refused to ask the Local Government to prefer an appeal against the order of acquittal.

The opposite party after he was defeated in the civil suit went to the disputed land with his men, and forcibly cut and removed the paddy, after the Civil Court peon had given possession of the disputed land to the petitioner. I submit that the learned Magistrate erred in law in holding that the accused had a right to forcibly cut and remove the paddy, after the petitioner had taken possession of the land through Court, even though the paddy was grown by the accused. At any rate, the learned Judge ought to have held that the accused was guilty of criminal trespass and rioting by going to assert his right or supposed right by the use of force. It was improper on the part of the Magistrate to dismiss the case summarily in this way. The order of acquittal is evidently bad in law. The evidence as regards rioting was not at all taken into consideration by the Magistrate.

Babu *Satis Chandra Ghose* (with him Babus *Manmotha Nath Mukherjee* and *Aruna Chandra Ghose*,) for the Opposite Party.—Sufficient cause has not been shown for your Lordships' interference under section 439, Criminal Procedure Code. In *Faujdar Thakur* v. *Kasi Choudhuri* (1) it has been held that in the case of an acquittal the High Court should not interfere unless *prima facie* there has been a gross miscarriage of justice. No such gross mistake of law or miscarriage of justice has been shown as would justify your Lordships' interference. The paddy was grown before delivery of possession and the land was in possession of my client for three or four years under settlement from the landlord. The paddy was taken by him under a *bona fide* claim of right, and hence no offence was committed by him.

JUDGMENT.—This case arises out of a dispute regarding apparently 9 *bighas* of land. The Magistrate appears to have found that as a matter of fact in a suit brought by the complainant against the accused for declaration of his title to and recovery of possession of the said land the complainant was successful. In execution of that decree the complainant obtained possession from the Court. Thereafter the accused, opposite party removed from the land, the possession of which had been given to the complainant, the crop that the accused had grown thereon. The charges brought against the accused were charges of rioting and charges of theft. The charge of rioting has not been considered by the Magistrate, and in so far as the charge of theft is concerned the learned Magistrate has acquitted the accused on the ground that he had grown the crop prior to the delivery of possession. In this clearly he has fallen into a mistake of law. When in execution of a decree in a title suit possession of land is given, the growing crop passes with the land.

In that view of the matter it is quite clear that this case has not been properly tried, and we, therefore, set aside the order complained of and direct that the complainant's complaint be further enquired into and the case against the accused-opposite party re-tried. On the re-trial, of course, care will have to be taken not to convict the accused of theft, should it be found that though he may have made a mistake as to his rights under the law he was yet acting in the exercise of a *bona fide* claim of right.

*Order set aside.*

(1) 27 Ind. Cas. 186; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122; 42 C. 612.

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## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 532 OF 1916.
CRIMINAL REVISION PETITION No. 439 OF 1916.
December 19, 1916.

*Present*:—Mr. Justice Spencer.

*In re* GUMPARTHI VENKATARAMIAH —ACCUSED—PETITIONER.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 72, *scope of—Summons to give evidence at Police investigation, disobedience to—Service not effected through departmental superior, effect of—Offence—Penal Code* (*Act XLV of* 1860), *s.* 174.

Section 72 of the Code of Criminal Procedure requiring service of summonses to Government and Railway servants to be effected through the heads of their departments applies only to summonses issued by a Court of Justice, and not to orders of

*In re* GUMPARTHI VENKATA RAMIAH.

Police Officers investigating a crime under Chapter XIV of the Code.

Non-attendance, therefore, in obedience to a summons issued by a Sub-Inspector of Police and served personally on an *amin* requiring him to give evidence at a Police investigation constitutes an offence under section 174, Indian Penal Code.

The matter, however, is one to be departmentally dealt with. The practice of launching a prosecution without consultation with the delinquent's official superior deprecated.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Deputy Magistrate, Kavali, in Criminal Appeal No. 10 of 1916, preferred against that of the Court of the Stationary 2nd Class Magistrate, Kavali, in Calendar Case No. 34 of 1916.

Dr. *S. Swaminadhan*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner is an *amin* of a Civil Court. He has been convicted for intentional disobedience to an order of a Sub-Inspector of Police issued under section 160 of the Code of Criminal Procedure to attend at an enquiry to be held by the Police into a case of mischief by fire.

The case seems to have arisen out of some inter-departmental jealousy, which is much to be deprecated. This hardly appears to have been a suitable case for criminal prosecution of one Government servant for disobedience to the order of another Government servant. If the Police Authorities had addressed the District Munsif or the District Judge, the *amin* might have been punished departmentally, if after enquiry it appeared that his conduct had been contumacious. Criminal proceedings were, however, instituted with the sanction of the District Superintendent of Police and ended in the conviction of the *amin* for an offence under section 174, Indian Penal Code. In the result a nominal punishment would have met the ends of justice. The Stationary Sub-Magistrate of Kavali imposed a fine of Rs. 100 on this public servant, whose monthly pay is only Rs. 8. On appeal this was reduced by the Deputy Magistrate of Kavali to Rs. 5.

In revision Dr. Swaminadhan relied on section 72 of the Code of Criminal Procedure, which provides that where the person summoned is in the active service of the Government or of a Railway Company, the summons shall ordinarily be sent in duplicate to the head of the office in which such person is employed. The *amin* in the present case was in the active service of Government, being engaged at the time in getting a crop harvested under the orders of a Civil Court. He refused to receive the Police notice unless it was sent through his departmental superior, his excuse being that if he absented himself from the village, the parties to the civil litigation might have tampered with the straw and grain for which he was responsible.

I am of opinion that section 72 of the Code of Criminal Procedure cannot help the petitioner. From the context it evidently is intended to apply only to summonses issued by a Court of Justice and not to orders of Police Officers investigating a crime under Chapter XIV.

The petitioner was, therefore, legally bound to attend at the instance of the Sub-Inspector and his omission to do so was intentional.

The conviction was thus legal and I cannot interfere with it. I do not consider that the Police Authorities behaved reasonably in the matter. The Sub-Inspector might well have taken the *amin's* statement at Annavaram when he saw that the *amin* had a responsible public duty to perform there and could not conveniently leave the place. Instead, he ordered him to attend at Chinakraka Police Station next day without allowing him time to write to his departmental superior and arrange for a substitute to take his place during his absence. I reduce the fine to one anna and direct the remainder, if paid, to be refunded.

As I am unable to make any order as to costs, I will merely place my opinion on the record that the circumstances of this case are such that the *amin* deserves to have the costs, incurred by him in defending himself in the prosecution and in appealing here and in the Deputy Magistrate's Court, defrayed by the Government.

*Sentence reduced.*

V. K. P.

CALCUTTA HIGH COURT.
CIVIL REVISION CASE No. 25 OF 1916.
January 5, 1917.
*Present*:—Mr. Justice Teunon and
Mr. Justice Chaudhuri.
RAJ KUMAR DEOTY—PETITIONER
*versus*
SATISH CHANDRA GHOSH—
OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195 (7)—Sanction for prosecution of witness during pendency of suit, propriety of—District Judge, whether can revoke sanction granted by Subordinate Judge.*

Sanction for the prosecution of a witness for deposing falsely in a suit which is still pending is improper, particularly when the witness is a near relative and *am mukhtiar* of the plaintiff, a lady who depends upon him for the proper prosecution of her suit.

Generally speaking, it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose is still pending.

On a petition to the High Court for the revocation of a sanction for prosecution granted by a Subordinate Judge, the High Court having formed a firm opinion as to the impropriety of the sanction, set it aside, though it felt that the proper course for the petitioner should have been to apply to the District Judge under section 195 (7) of the Criminal Procedure Code.

Rule against the order of the Subordinate Judge, Howrah, dated the 14th November 1916.

Sir *Satyendra Prosanna Sinha*, Dr. *Dawarka Nath Mitter* and Babu *Manindra Nath Banerjee*, for the Petitioner.

Mr. *Norton* and Babus *Haradhan Chatterjee* and *Manmotha Nath Ganguli*, for the Opposite Party.

JUDGMENT.—This is an application for the revocation of a sanction granted by the Subordinate Judge of Howrah. The sanction was granted in a suit brought by a lady of the name of Kali Dasi Dasi and her case was that a certain business was the exclusive property of her husband, while the case of the defendant, who is the brother of her deceased husband, was that it was the joint property of the two brothers. In the course of certain proceedings for the appointment of a Receiver it appears that the person whose prosecution has been directed, being the brother of the plaintiff, swore an affidavit to the effect that there are entries in the books of the business showing that the defendant was in fact a servant. Some, if not all, the books of business were apparently brought into Court but it is stated that no clear proof with regard to them was given, and it does not seem to be certain that all the books of the business were produced. It is in respect of this statement in the affidavit that the prosecution has been sanctioned. Now it appears that the petitioner, who is the brother of the plaintiff, is also her *am mukhtiar* and is the person on whom she depends for the proper prosecution of her suit. Generally speaking it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose is still pending, and in this particular case, having regard to the position of the petitioner towards the plaintiff, we think the impropriety of such a step is all the greater. We, therefore, set aside the sanction which has been granted by the Subordinate Judge.

We may then observe that it has been objected in law that this application should have been made to the District Judge of Hooghly. This argument is based upon the language of section 195 (7) and of sub-clause (*a*) of that sub-section and also on the fact that the number of suits exceeding Rs. 5,000 in value, in which appeals lie from the decision of the Subordinate Judge to this Court, are much fewer in number than the suits of Rs. 5,000 and under in which appeals lie to the District Judge. That in such a case the application for revocation of sanction should be made to the District Judge is the view taken in the cases reported as *Imperatrix* v. *Lakshman Sakharam* (1) and *Anant Ramchandra Lottikar In re* (2), and those cases appear to have been followed in this Court in *Maduray Pillay* v. *Elderton* (3). Having, however, formed a firm opinion as to the impropriety of the sanction that has been granted we do not think it necessary, whatever may be the correct reading of section 195 (7), to send the petitioner before us back to the District Court in order to his obtaining relief which we are prepared and are competent to give him.

*Sanction set aside.*

(1) 2 B. 481; 1 Ind. Dec. (N. S.) 743.
(2) 11 B. 438; 6 Ind. Dec. (N. S.) 288.
(3) 22 C. 487; 11 Ind. Dec. (N. S.) 325.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 515 OF 1917.
June 6, 1917.
*Present:*—Mr. Justice Teunon and
Mr. Justice Richardson.
LALIT MOHAN CHAKRAVARTY AND OTHERS—PETITIONERS
*versus*
HARENDRA KUMAR DE AND OTHERS—OPPOSITE PARTY.

*Eastern Bengal and Assam Disorderly Houses Act (II of 1907), s. 3, order passed under—Jurisdiction of District Magistrate to interfere with.*

A District Magistrate has no jurisdiction to interfere with an order passed by a Criminal Court in the exercise of its jurisdiction under section 3 of the Eastern Bengal and Assam Disorderly Houses Act, 1907. [p. 737, col. 1.]

Rule against the order of the Additional District Magistrate, Dacca.

FACTS of the case appear from the judgment.

Babu *Hemendra Kumar Das*, for the Petitioners, submitted that an order passed by a first class Magistrate under section 3 of the Eastern Bengal and Assam Disorderly Houses Act was a judicial order and as such the District Magistrate or the Additional District Magistrate had no jurisdiction to revise it or pass any final order in the matter by way of setting aside or modifying the order passed by the Trying Magistrate. He could only refer the case to this Hon'ble Court under section 438, Criminal Procedure Code, if he thought fit. In *Rajani Khemtawali* v. *Emperor* (1) it was held that the High Court can interfere under section 439, Criminal Procedure Code. See also *Kokil Ram* v. *Emperor* (2), which is a case under the Bengal Disorderly Houses Act, and this Hon'ble Court interfered under section 439, Criminal Procedure Code.

Mr. *J. N. Ray* (with him Babu *Khitish Chandra Neogy*), for the Opposite Party, contended that the order passed was a purely administrative order and the Additional District Magistrate in his administrative or executive capacity had jurisdiction to modify or set aside the order of the Trying Magistrate. Section 3 does not create any offence; the proceedings are purely administrative. See *Rajani Khemtawali* v. *Emperor* (1).

(1) 5 Ind. Cas. 323; 14 C. W. N. 404; 11 C. L. J. 297; 37 C. 287; 11 Cr. L. J. 112.
(2) 6 C. L. J. 710; 6 Cr. L. J. 423.

[RICHARDSON, J.—The Magistrate issues a Rule and the party is called upon to show cause—is not this a judicial act?]

The proceedings seem to be in the nature of proceedings under sections 133, 144, Criminal Procedure Code, disobedience to which is punished under section 188, Indian Penal Code, as in the present proceedings under section 6 of the Act.

[TEUNON, J.—See section 5. It speaks of "prosecution," and proceedings have to be instituted on "sanction" or "complaint."]

In *Rajani Khemtawali* v. *Emperor* (1) it was held that the word "prosecutions" was a mistake.

Babu *Hemendra Kumar Das* was not called upon to reply.

JUDGMENT.

TEUNON, J.—In this case it appears that on a complaint made in accordance with the provisions of section 5 (*c*) of the Eastern Bengal and Assam Disorderly Houses Act, 1907, proceedings or prosecutions under section 3 were taken against the owners and occupiers of houses Nos. 7, 25 and 26 of a certain lane in the city of Dacca. On the enquiry held in accordance with the provisions of section 3 of the aforesaid Act, the enquiring Magistrate found that as a matter of fact the houses in question were used as brothels, as disorderly houses and for the purpose of habitual prostitution to the annoyance of the inhabitants of the vicinity, that is to say, in contravention of the provisions of section 2 (*b*) of the same Act. He thereupon directed that such use of the houses in question should be discontinued within fifteen days from the date of the order. The persons affected by the order moved the Additional District Magistrate of Dacca and obtained from him an order by which he practically stayed the order of the enquiring Magistrate for a period of six months and also modified it in certain other particulars.

The question involved in this Rule is whether the District Magistrate had jurisdiction or was competent to modify the order of the enquiring Magistrate in the manner in which he has done, on in any manner whatsoever. Neither in the Act itself, nor in the Criminal Procedure Code, nor in any law that has been brought to our

notice do we find any provision which justifies the District Magistrate in interfering with an order passed by a Criminal Court in the exercise of its jurisdiction under section 3 of the Act, to which we have made reference. It is also clear that if orders made under section 3 are modified by other Magistrates, difficulties would arise in applying the provisions of section 6 of the Act. We are, therefore, clearly of opinion that the Magistrate's action was wholly without jurisdiction, and in so far as it is an order modifying the Trying Magistrate's order and not an order directed to Police Officers, we direct that it be set aside.

RICHARDSON, J.—I have only one word to add with reference to the case of *Rajani Khemtawali* v. *Emperor* (1), which was cited in the course of argument. Whatever opinion may have been expressed in the judgment delivered in that case, I do not understand that any point was actually decided by the learned Judges inconsistent with our decision in the present case.

*Order set aside.*

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PATNA HIGH COURT.
CRIMINAL REFERENCE No. 29 OF 1917.
May 24, 1917.
*Present*:—Mr. Justice Mullick.
SHEO JHAWAN PANDE—
PETITIONER
*versus*
*Musammat* RAM SAKHI KUARI—
RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 439—Penal Code (Act XLV of 1860), s. 323—Conviction—Loss of record, whether ground for acquittal - Sentence, petty—Re-trial, whether can be ordered.*

Petitioner was convicted under section 323 of the Penal Code and sentenced to pay a fine of Rs. 50. He moved the Sessions Judge to exercise his revisional powers and to refer the case to the High Court. It was discovered that the record of the case was lost, so that the Sessions Judge could obtain no materials upon which to make his reference. He, therefore, asked the High Court to set aside the conviction and sentence and to order a re-trial:

*Held*, that the loss of the record after conviction was no ground for the acquittal of the accused and that the sentence being a petty one no re-trial could be ordered.

47

Criminal reference made by the District Judge, Chapra

Mr. *Sarju Persad*, for the Petitioner.

JUDGMENT.—It appears that the petitioner was convicted by a Deputy Magistrate exercising first class powers of an offence under section 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 50. The petitioner then moved the Sessions Judge to exercise his revisional powers and to refer the case to the High Court. It was then discovered that the record of the case was lost, so that the learned Sessions Judge could obtain no materials upon which to make his reference. He has, therefore, asked this Court to set aside the conviction and sentence and to order a re-trial.

In my opinion this is just one of those cases in which a re-trial should not be ordered.

The loss of a record after conviction is no ground for the acquittal of the accused, for the logical conclusion from such an argument would be that in the event of a wholesale destruction of records by fire or earthquake, all accused persons whose records had been lost and who sought relief in appeal or revision would be entitled to acquittal. There is no authority in law for such a proposition.

If this had been a serious case in which the accused had been sentenced to a substantial term of imprisonment, there might have been some ground for directing a re-trial; but the case is a petty one, the fine inflicted small, and the Trial Magistrate an officer exercising first class powers. I do not think that in a case of this kind I should exercise my revisional powers either to set aside the conviction or direct a re-trial.

The reference is accordingly discharged.

*Reference discharged.*

CHANDRA MANDAL *v.* RAM MANDAL.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 111 OF 1916.
August 4, 1916.
*Present*:—Sir Lancelot Sanderson, KT. Chief Justice, and Mr. Justice Walmsley.
CHANDRA MANDAL AND OTHERS—COMPLAINANTS—PETITIONERS
*versus*
RAM MANDAL AND OTHERS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 137, proceedings under—Magistrate, whether can act as arbitrator—Claim of right, bona fides of.*

Section 137 of the Criminal Procedure Code is imperative and mandatory. [p. 738, col. 2.]

In proceeding under that section a Magistrate is not justified in assuming the role of an arbitrator, simply because both the parties agree to his acting as such. Consent or waiver of the parties cannot invest a Magistrate with jurisdiction which he does not possess [p 738, col. 2.]

*Upendra Nath* v. *Rampal*, 4 Ind. Cas. 436; 10 C. L. L 482; 11 Cr L. J. 1; *Paresh Nath Biswas* v. *Emperor*, 13 C. W. N. cclxxxiii (283), relied upon.

Where in a proceeding under section 137 of the Criminal Procedure Code, a party appears and shows cause, alleging that what is claimed as a public pathway is not so, the Magistrate should record evidence on the matter of the complaint as in a summons case, and should at the outset enquire into the *bona fides* or speciosity of the claim. [p. 738, col 2.]

*Manipur Dey* v. *Bidhu Bhusan Sarkar*, 26 Ind. Cas. 146; 18 C. W. N. 1086; 15 Cr. L. J. 698; 42 C. 158; *Rakhal Chandra Shaha* v. *Kailash Chandra Sarkar*, 7 C. W. N. 117, relied upon.

Criminal revision upon a reference under section 438 of the Code of Criminal Procedure by the Sessions Judge, Jessore, for setting aside an order passed by the Sub-Divisional Magistrate, Narail, dated 24th May 1916.

FACTS of the case appear from the following Letter of Reference by the Sessions Judge to the Registrar of the High Court:—

"SIR,

Under section 438, Criminal Procedure Code, I herewith transmit the record of the case noted in the margin to be laid before the High Court with the following report:—

(1) *A brief analysis of the case.*

The Sub-Divisional Magistrate of Narail passed a conditional order on the petitioners to show cause why they should not remove the huts erected by them from a pathway lawfully used by the public. They appeared and showed cause. Neither party, however, adduced any evidence. The Sub-Divisional Magistrate was asked to arbitrate. He made the order absolute after a local enquiry on the 24th of May last.

(2) *The order recommended for revision.*

The order by which the conditional order for removal of obstruction was made absolute.

(3) *In what particular portion of that order the Court making the reference considers an error on a point of law to exist.*

The whole order. Section 137, Criminal Procedure Code, though imperative in its character, was not followed.

(4) *The grounds on which in the opinion of this Court the order should be reversed.*

(*a*) The learned Sub-Divisional Magistrate did not follow the procedure laid down in section 137, Criminal Procedure Code. When the petitioners appeared and showed cause, when they alleged that what was claimed as a public pathway was not so, when they urged it was a part of their homestead, the learned Magistrate should have recorded evidence on the matter of the complaint as in a summons case. Section 137, Criminal Procedure Code, is imperative and mandatory. He was not justified in assuming the role of an arbitrator, because both the parties agreed to his being so. When the parties wished him to blink at law, he should not have readily agreed to it. Consent of parties or waiver did not vest him with jurisdiction. There is ample authority in support of this view: see *Upendra Nath* v. *Rampal* (1) and *Paresh Nath Biswas* v. *Emperor* (2). The order was illegally made absolute therefore.

(*b*) It does not appear that the learned Sub-Divisional Magistrate inquired at the outset into the *bona fides* or speciosity of the claim of the petitioners. He should have clearly inquired and found whether the petitioners urged a *bona fide* claim or elaborated a mere pretence to oust him of jurisdiction. This was absolutely necessary: see *Manipur Dey* v. *Bidhu Bhusan Sarkar* (3) and *Rakhal Chandra Shaha* v. *Kailash Chandra Sarkar* (4). The Magistrate now urges in his explanation that when he found the pathway a public thoroughfare, it necessarily followed that he held the claim of the petitioners to be a mere pretence. I do not

(1) 4 Ind. Cas. 436; 10 C. L. J. 482; 11 Cr. L. J. 1.
(2) 13 C. W. N. cclxxxiii (283).
(3) 26 Ind. Cas. 146; 18 C. W. N. 1086; 15 Cr. L. J. 698; 42 C. 158.
(4) 7 C. W. N. 117.

think such an inference is always justifiable. The petitioners may have honestly, though mistakenly, believed in the truth of the claim they put forward (see section 3, clause 20 of Act X of 1897). It is moreover not open to the Magistrate to add by his explanation to the order complained of: see *Madhu Sudan Das Gupta* v *Sasti Prosad Nandy* (5).

On both these grounds, I am of opinion that the Magistrate illegally made the conditional order absolute. I recommend its reversal.

The explanation of the Sub-Divisional Magistrate has been placed on the record."

Babu *Hemendra Chandra Sen*, for the Petitioners.

JUDGMENT.—We accept the reference; and, in the result, the order is quashed.

*Reference accepted.*

(5) 7 C. W. N. 859.

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PATNA HIGH COURT.

CRIMINAL REVISION No. 139 OF 1917.

May 11, 1917.

*Present*:—Mr. Justice Jwala Prasad.

GHASI RAM—ACCUSED—PETITIONER

*versus*

SUKRA URAON AND OTHERS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 235 (1)—Joint trial for distinct offences against different persons committed at different times, whether legal—"Same transaction," meaning of.*

The trial of several accused in respect of several distinct offences committed at different times and at different places against different persons is illegal. The fact that the complaints were lodged on the same day or that the motive for the commission of the offences was the same in all the occurrences does not at all go to show that the offences were committed in the course of the same transaction. [p. 740, col. 1.]

Criminal revision from an order of the Judicial Commissioner, Ranchi.

Mr. *Sharoshi Chandra Mitra*, for the Appellant.

JUDGMENT.—The petitioner in this case has been convicted by the Sub-Divisional Magistrate of Simdega in the District of Ranchi under section 447 of the Indian Penal Code in respect of four complaints lodged before the Magistrate by four different persons:—

(1) Sukra Uraon lodged a complaint in respect of extortion, wrongful confinement, and possibly of criminal trespass said to have been committed on the 15th July 1916;

(2) Lende Uraon lodged a complaint in respect of criminal intimidation and trespass said to have been committed on the 16th of July 1916;

(3) Saijniwa Uraon lodged a complaint in respect of a criminal trespass of the 22nd of July 1916; and

(4) Chuku Uraon lodged a complaint in respect of a criminal trespass said to have been committed on the 22nd of July 1916.

The place of occurrence in each of these cases is different.

On appeal the learned Judicial Commissioner of Ranchi, in his judgment dated the 18th of January 1917, observes as follows:—"It seems that the accused was on his trial for four acts of criminal trespass committed on three separate dates. I am not prepared to hold that these acts under the special circumstances which existed were not so connected together as to form the same transaction. The joint trial is justified under section 235 (1). The details which appeared in the explanation should have been mentioned in the judgment."

The Sub-Divisional Magistrate in his judgment does not at all hold that the above offences on separate dates were committed in the course of the same transaction. He has, however, in the explanation that he submitted to the Judicial Commissioner, tried to show that the aforesaid offences were committed in the same transaction. He says in his explanation: "The place of occurrence being village Bhaimunda, Tola Jumka Chhapar, Sukra Oraon's case included a complaint of extortion said to have taken place in Khinda, the trespass occurring in Bhaimunda. All these complaints were brought the same day and the complainants are witnesses for themselves and for each other. It appears that on the same day and place these persons were made to sign an agreement regarding the terms of their tenancies. These terms are all of such a nature that it is quite

impossible to believe that the accused obtained the so-called signatures honestly and it was to enforce these terms that he committed trespass in interfering with the cultivation of each of the complainants."

The above explanation of the Magistrate is, I think, not sufficient to show that the offences were so connected as to form the same transaction. The agreement, to enforce which the offences are said to have been committed, was executed on a date long prior to the dates of the occurrences complained of. The fact that the complaints were lodged on the same day or that the motive for the commission of the offences was the same in all these occurrences does not at all go to show that the offences were committed in the course of the same transaction. The act complained of in each case is a complete transaction in itself, namely to compel the complainant to pay enhanced rent or to quit the land. The object in each case is distinct from and independent of the other cases. There is no distinct finding of the Courts below that the offences were in the course of the same transaction.

This case is similar to the case of *Nanda Kumar Sirkar* v. *Emperor* (1), where three persons laid three separate complaints against the accused, alleging that they committed rioting and individually caused hurt to each of the complainants, and it was held that though the origin and the preparations for the commission of the offences might be the same, the offences were distinct from each other and the joint trial of the accused for the offences was illegal.

The trial of the accused in respect of the four distinct offences committed in this case at different times and at different places must be held to be illegal and the conviction must be set aside.

The question is whether the case should be remanded for re-trial separately in respect of each of the complaints lodged against the accused. I do not think any useful purpose will be served by having a re-trial.

The main charge in the complaint of Sukra Uraon is that of extortion and of wrongful confinement of the complainant by the accused. This has been disbelived by the first Court.

There is no mention in the complaint petitions of Sukra and Lende of their ploughs having been turned out of the fields.

In the other cases the ploughs of the complainants are said to have been turned out of their respective fields.

I have looked into the evidence on the record and I find that the evidence consists mainly of the four complainants themselves. It is doubtful if the evidence proves conclusively that the accused was present at the time when the ploughs were turned out of their fields.

The case against the accused is of a vague and general character, of having given orders to his servants in execution of which the ploughs of the complainants were turned out of their respective fields

The conviction is, therefore, set aside and the application is allowed. The fine, if realized, must be refunded.

*Application allowed.*

(1) 11 C. W. N. 1128; 6 Cr. L. J. 321.

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CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 246 OF 1917.
April 16, 1917.
*Present*:—Mr. Justice Teunon and Mr. Justice Newbould.
GANESH CHANDRA SIKDAR AND ANOTHER—PETITIONERS
*versus*
EMPEROR—OPPOSITE PARTY.

*Bengal Excise Act* (V *of* 1909), *ss.* 46, 90—*Act VII B. C. of* 1914, *s.* 2, *cl.* 14—*Medicinal preparation containing alcohol, manufacture and sale of—Offence.*

A preparation containing alcohol is not outside the provisions of the Bengal Excise Act as amended by Bengal Act VII of 1914, simply because it is a medicinal preparation or may be used for medicinal purposes. [p. 741, col. 2.]

The manufacture and sale of Mrita Sanjivani Sudha prepared in accordance with the "Ayurvedic" Pharmacopœia and used for medicinal purposes only otherwise than in conformity with the provisions of the Excise Act is an offence, unless it is exempted by notification under the provisions of section 90 of the Act. [p. 741, col. 2.]

GANESH CHANDRA SIKDAR *v.* EMPEROR.

Babus *Manmatha Nath Mukerjee* and *Phanindra Lal Maitra*, for the Petitioners.

The Hon'ble Mr. *B. C. Mitter*, Advocate-General (with him Mr. *Camell*, Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.—In this case the petitioners before us have been convicted in respect of the manufacture and sale of a liquid substance spoken of as Mrita Sanjivani Sudha and have been sentenced under section 46 (*a*) of the Bengal Excise Act V of 1909 each to pay a fine of Rs. 200 or in default to undergo six weeks' rigorous imprisonment.

The manufacture and sale is admitted and the contention of the petitioners, who are Kavirajes by profession, is that Mrita Sanjivani Sudha is a beneficent drug, prepared in accordance with a formula to be found in an Ayurvedic Pharmacopœia, and used for medicinal purposes only. The ingredients, it is said, are *gur*, ginger, betel nut and various barks, and after a certain period of fermentation from this base with certain additions in the shape of spices, crushed fruits, and *balela* skins the finished product is obtained by a process of distillation. The preparation, there is evidence, is prescribed for women suffering from fever or bowel complaints after childbirth and other virtues claimed for it are that it stimulates the appetite, aids digestion, and when taken at bed time soothes the wakeful.

It may be conceded that the preparation possesses all these virtues, but the question still remains whether it is an excisable article within the meaning of the Bengal Excise Act. In that Act excisable article has been defined as meaning "any liquor or intoxicating drug as defined by or under this Act" and in section 2, clause (14), as amended by Bengal Act VII of 1914, liquor has again been defined as meaning "liquid consisting of or containing alcohol" and as including various specified substances.

It is not disputed that Mrita Sanjivani Sudha contains alcohol and analysis shows that the four sample phials or bottles submitted to the Chemical Examiner consisted of the usual volatile byeproducts of distillation and fermentation, volatile essential oils, water and alcohol, the proportion of alcohol ranging from 68·3 per cent. to 87 per cent. In other words, the preparation as sold or as prepared and put up for sale is an alcoholic liquid varying in strength from 31·7 to 13 underproof. There can, therefore, be no question that the manufacture and sale of this preparation otherwise than in conformity with the provisions of the Excise Act is an offence, unless the petitioners can show that this article has been exempted by notification under the provisions of section 90 of the Act or that by reason of "repugnancy in the subject" the definition is not applicable. It is conceded that the article is not within the terms of any notification issued under section 90. It is, however, contended that to Mrita Sanjivani Sudha, as a medicinal preparation manufactured, prescribed and sold by Kavirajes, the definition contained in the Act does not apply and in support of this contention reliance is placed on the cases reported as *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), *Emperor* v. *Moti Lal Chander* (2) and *Satish Chandra Roy* v. *Emperor* (3). It is unnecessary to discuss these cases which were all decided prior to the amendment of the Act made in 1914. Whatever may have been the state of the law at the time when the foregoing cases were decided, the intention of the law has been made clear by the amended Act of 1914, and to say now that a preparation containing alcohol is not within the provisions of the Bengal Excise Act simply because it is a medicinal preparation or may be used for medicinal purposes, would be to stultify this Court and ignore the plain purpose of the Legislature.

On the question of sentence, having regard to the fact that the manufacture of this Mrita Sanjivani Sudha has been continued on the strength of the decision in favour of the elder petitioner in *Gonesh Chunder Sikdar* v *Queen-Empress* (1) and the further fact that it does not appear that prior to the present proceedings the petitioners were warned by the excise authorities, we think that a lesser sentence will meet the ends of justice. We, therefore, reduce the sentence in each case to a fine of Rs. 100, in default three weeks' rigorous imprisonment.

*Sentence reduced.*

(1) 24 C. 157; 12 Ind. Dec. (N s) 770.

(2) 15 Ind. Cas. 961; 39 C. 1053; 16 C. W. N. 785; 13 Cr. L. J. 545.

(3) 19 Ind. Cas. 956; 17 C. W. N 939; 14 Cr. L J, 300.

## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 20, 21 AND 24 OF 1917.

March 7, 1917.

*Present*:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

KESHO SINGH—ACCUSED

*versus*

EMPEROR—PROSECUTOR.

*Criminal Procedure Code (Act V of 1898), ss. 271, 164—Joint trial several accused—Plea of guilty entered by one of accused—Procedure—Confession—Recording of confession by Magistrate—Magistrate, power of, to put questions—Inspection of scene of occurrence by Judge accompanied by confessing accused—Additional statements made by confessing accused and recorded by Judge, admissibility of.*

The trial of an accused does not necessarily come to an end as soon as he offers a plea of guilty, and where a Judge does not convict on such a plea the only other course open to him is to proceed with the trial of the accused. [p. 745, col. 2; p. 746, col. 1.]

When a plea of guilty is entered by one of several co-accused who are to be tried jointly, a Judge has, under section 271 of the Code of Criminal Procedure, a discretion to decide either that the accused be convicted on such plea or that he should be put on his trial in spite of his plea of guilty. The proper procedure to follow in such cases is that if the Judge convicts the accused on his plea of guilty, he should be removed from the dock in which case he can be called as a witness against the other accused; or the Judge should put it on record that he decides to put the accused on his trial in spite of his plea of guilty. [p. 746, col. 1.]

The Judge is bound to read and explain the charge to the accused and he ought to satisfy himself by interrogation of the accused, if necessary that he fully understands the responsibility which he assumes in making a plea of guilty. Having done so, the Judge is then in a position to exercise properly the discretion which the law allows and to put upon record the reasons which guide his discretion. The course which it is intended to pursue should not be left in doubt. [p. 746, col. 1.]

It is, however, not illegal for the Court to proceed with the trial of an accused who has pleaded guilty without previously placing upon record its reasons for doing so. [p. 746, col. 2.]

Though the law does not contemplate or authorise inquisitorial procedure by a Magistrate who is called upon to record a confession under section 164 of the Code of Criminal Procedure, he is not forbidden to ask questions to satisfy himself that the statement proposed to be made is voluntary or for the purpose of making clear and intelligible any particular passage of a statement made to him. [p. 746, col. 2.]

A Magistrate not trying a case can only record the confession of an accused person if voluntarily made under section 164 of the Code of Criminal Procedure, and it is not permissible for him to question the accused closely and at great length for the purpose of extracting statements to be afterwards used as evidence. [p. 747, col. 2.]

The statement of an accused elicited by the Magistrate in this way is not admissible in evidence. [p. 747, col. 2.]

In a case while the trial of several accused, one of whom had made a confession, was in progress, the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused, who showed him over the ground and made certain additional statements by way of comment or illustration of his confession, and the Judge made note of them:

*Held*, that the Judge was wrong in allowing the accused to make these additional statements which ought not to have been regarded. [p. 748, col. 2.]

Appeal against the order of the Additional Sessions Judge, Lucknow, at Unao, dated 19th December 1916.

Mr. *Ross Alston*, Pandit *Jagat Narain* and Mr. *B. B. Chandra*, for the Appellant.

Messrs. *Wallach* and *H. S. Gupta*, Babu *Gokul Chand Rai* and Mr. *N. N. Ghoshal*, for the Crown.

JUDGMENT.—These appeals have arisen out of a trial held in the Court of the Additional Sessions Judge of Lucknow sitting at Unao, in which five persons were charged with being concerned in the murder of a Brahmin named Suraj Bali, who was killed on the morning of the 14th August 1916 at a hamlet in the Unao District.

One of the men charged, Ram Ratan (or Ratnu), was acquitted: the other four, namely, Kesho Singh, Jungar Singh, Sirdar Singh and Ram Nath, were convicted. The two former have been sentenced to death, the two latter to transportation for life.

Kesho Singh, Jungar Singh and Sirdar Singh have appealed. The fourth man Ram Nath pleaded guilty in the Sessions Court and has not appealed: indeed in view of his plea he has no right of appeal except on the question of sentence and as he has been awarded the minimum punishment which the law allows for murder, it was obviously useless for him to attempt to bring his case before this Court

Apart from the appeals made by Kesho Singh and Jungar Singh we have the reference made in their cases by the Sessions Judge for confirmation of the capital sentences.

We may come now to the story of the murder and the narative of the investigation which ended in the five men being committed to the Sessions Court on the charge of murder.

KESHO SINGH *v.* EMPEROR.

The first information of the crime was given to the Bihar Police Station at 11 A. M., on the morning of the 14th August. The report was made by Panchan, the *chaukidar* of Bhadia, and the substance of it was that having heard an alarm of dacoity raised at about sunrise, he proceeded to the hamlet of Moti Khera where he found the corpse of Suraj Bali lying by a *gular* tree close to the houses of some *Ahirs*.

He represented that he had ascertained by inquiry that two men had been seen chasing Suraj Bali, that they had overtaken him and had beaten him with *lathis*. He had also discovered that Suraj Bali was on his way to Purwa and that he had been accompanied by Jawahir Singh. He mentioned the fact that there was litigation going on between Sirdar Singh on one side and Suraj Bali and Janaka on the other and that there was enmity between them. In describing the appearance of the body he mentioned that the only wound visible was one in the middle of the skull three or four fingers in breadth and bleeding profusely. Kesho Singh having been apprised of the report went off to the scene of the crime and began an inquiry.

Meantime a copy of the report had been sent to Mr. Darling, the District Magistrate, who passed an order dated the 15th of August directing that the inquiry should be taken at once out of Kesho Singh's hands. On the 16th, Mr. Darling and the Police Superintendent went themselves to the scene of the murder. The investigation was placed in the hands of Inspector Afzal Husain, who was assisted by Sub-Inspector Ram Chandar, the second officer of the Bihar Police Station. It was decided that Kesho Singh should be removed from Bihar while the inquiry was going on: orders to that effect were issued and Kesho Singh was posted to another station and left Bihar on the 23rd August.

Jungar Singh, the constable, was meantime removed to the Police lines at headquarters.

There seems to be no doubt that from the first Sirdar Singh fell under suspicion of having been concerned in the murder. Apart from what was stated in the *chaukidar's* report it appears to have become known that on the night before the murder two strangers had been putting up at Sirdar's house in Bhadia. It was from this village that Suraj Bali had started early on the morning of the murder: he had been staying the night at the house of *Musammat* Janka who lives there. To get to Purwa he would have to travel along the road which leads north-west from Bhadia. The hamlet of Moti Khera is about a mile along this road, north of Bhadia, and is a little distance off the road, towards the east. It is a small place consisting of only two or three houses.

The story of the two strangers staying at Sirdar's house seems to have been communicated to Kesho Singh as soon as he arrived and when Afzal Husain took over charge this matter necessarily became known to him.

He took up the clue and made various inquiries, statements being made to him by Ballu Nai, a resident of Bhadia, by Badlu Chamar of that village, by Raghunandan a relative of Sirdar Singh and by Sirdar Singh himself.

He took these witnesses (except the Chamar) into headquarters on the 23rd August with a view to having their statements recorded. Mr. Darling on the 25th August took down the statements of the *nai* and of Raghunandan, but for certain reasons explained in his evidence he did not consider it advisable to make any record of Sirdar's statement. Sirdar was allowed to go but was again produced before Mr. Darling on the 3rd September, when his statement was taken down. Meantime according to Afzal Husain's story he had heard from Sirdar Singh the names of two persons, Manna and Gunnu, Mangtas: it was from these he learnt the name of Ram Nath for whose arrest a warrant was issued on the 26th August. Ram Nath was arrested in his own village, Naikaman, on the 27th August by the Sub-Inspector Ram Chandar. He was brought on that day to the Takia Railway Station and was taken thence by train to Unao where he arrived on the night of the 27th. On the following day, he was placed before Mr. Darling and made a long confessional statement implicating Kesho Singh, Jungar, Sirdar, Ram Ratan (or Ratnu) and himself. Following upon this statement the other accused were arrested, and other evidence was obtained

KESHO SINGH *v.* EMPEROR.

Certain identification proceedings were held in the Unao jail on the 1st and 4th September and finally the case came into the Magistrate's Court and was eventually committed to the Court of Session, in which the trial began on the 9th November 1916. The proceedings in the lower Court lasted a considerable time, judgment not being delivered till the 19th December. Of the three assessors one was of opinion that all five accused were guilty of murder. He held that the story told by Ram Nath in his confession which was adhered to by him at the Sessions trial was true: that the murder had been committed by Ram Nath and Ratnu: that Kesho Singh instigated them to do the murder and that Jungar Singh and Sirdar both helped.

The other two assessors took the contrary view: they did not believe that Ram Nath and Ratnu did the murder: they considered Ram Nath's story to be false and that the whole case was false, manufactured in their opinion by Muhammadans because apparently the Inspector who held the inquiry was a Muhammadan and because the accused were always accompanied from the jail (to Court presumably) by Muhammadan constables.

The learned Judge found that the charge had not been brought home to Ratnu but held that the other accused were guilty, Ram Nath of the substantive offence and Kesho Singh, Jungar and Sirdar of the offence of abetment of murder. As already mentioned Kesho Singh and Jungar Singh were sentenced to death: Ram Nath and Sirdar Singh to transportation for life.

Before we proceed to deal with the merits of the case, we have to dispose of two pleas which have been raised on behalf of the appellants, both of these pleas of law regarding the admissibility in evidence of the confession made by Ram Nath. It is common ground that the confessional statement made by Ram Nath is the backbone of the case against the other accused: this is admitted by the learned Judge in his judgment. He found the other three accused guilty because he believed Ram Nath's story, which he held to have been adequately and materially corroborated by independent evidence on the record.

In order to understand the force of the first legal plea taken we must first of all refer to what took place at the commencement of the proceedings in the Sessions Court. The five accused were called upon to plead to the charge. Ram Nath pleaded guilty, the other four accused not guilty and the pleas were recorded.

Notwithstanding his plea Ram Nath was not then and there convicted, the trial commenced, Ram Nath being in the dock with the others. He was permitted to cross-examine the prosecution witnesses and he was, when the prosecution evidence had been closed, examined as an accused person. And finally after the defence evidence had all been taken the assessors were called upon to pronounce their opinion as to his guilt or innocence. We have already mentioned that two out of the three assessors found Ram Nath not guilty as they were convinced that the confession made by him was a false story: they did not believe that Ram Nath was concerned in the murder at all.

In his judgment the learned Judge sets out various reasons for trying out the case against Ram Nath instead of convicting him at once upon his plea of guilty. At present we only refer to this matter in order to show that it appears to have been the intention of the learned Judge that Ram Nath should stand his trial jointly with his co-accused. As we have pointed out all the procedure of a trial was observed in the case of Ram Nath.

Under section 30 of the Indian Evidence Act when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes the confession. The explanation to the section shows that the expression "offence" here includes the abetment or attempt to commit the offence. To justify the use of such a confession, therefore, as evidence against persons other than the one who makes it, there must be a joint trial and the argument addressed to us has been that in the present instance, although it may be said that the form of a trial was gone through in the case of Ram Nath, there was in law no joint trial of Ram Nath and the other four accused,

In support of this contention reliance has been placed upon the provisions of sections 271 and 272 of the Code of Criminal Procedure.

Sub-section (1) of section 271 provides that when the Sessions Court is ready to commence a trial, the accused is to be brought before it and asked to plead to the charge, which must in the first instance be read out and explained to the prisoner.

Sub-section (2) lays down that if after having the charge read and explained to him the accused pleads guilty, he "*may*" be convicted thereon.

Section 272 goes on to provide that if the accused refuses to or does not plead, or if he claims to be tried, the Court shall proceed to choose jurors and assessors to try the case.

According to the able argument put forward by the learned Counsel who appeared for Kesho Singh, the true construction of these sections is that a Court of Session can only proceed to the trial of an accused person in circumstances specified in section 272, that is to say, when the accused either (1) refuses to plead, (2) does not plead, or (3) claims to be tried. We think this proposition of law might hold good if we had to deal with the provisions of section 272 only. But it is impossible to disregard the terms of the second sub-section of section 271, according to which a discretion is left to the Court in the fourth of the possible cases which can arise, namely, the case where the accused pleads guilty. The Court "may" convict on the plea of guilty but if it does not elect to do so, what course is it to pursue? What is the alternative to the passing of an order of conviction under this sub-section? It was suggested by Mr. Ross Alston that as an alternative the Court might pass an order of acquittal, the argument being that inspite of the plea of guilty there might be present circumstances which would justify the conclusion that no offence had been committed. For example, it was said it might be made to appear that the case fell under one or other of certain of the general exceptions set out in Chapter IV of the Indian Penal Code: in particular the instance was cited of a child under seven years of age being sent up for trial, a case which would come under section 82, Indian Penal Code.

If it is possible to conceive of such a case, we should imagine that the proper ocurse for the Judge to follow would be to investigate the question of the child's age and come to a judicial decision based upon legally receivable evidence and the only way in which such an investigation could be carried out would be by means of a trial. And so in other cases which might fall within the general exceptions: it could only be by means of a trial that the existence of the circumstances which constitute the exception could be established.

We can see no possible way of avoiding the conclusion that where a Judge does not convict on a plea of guilty, the only other course open to him is to proceed to the trial of the accused.

So far we have been considering only the language of the Code itself. Mr. Alston cited to us various rulings which touch the question raised by this legal plea. He referred to the following authorities:—*Queen-Empress* v. *Pirbhu* (1), *Queen-Empress* v. *Pahuji* (2), *Emperor* v. *Dip Narain* (3), *Queen-Empress* v. *Paltua* (4), *Emperor* v. *Kheoraj* (5), *Queen-Empress* v. *Lakshmayya Pandaram* (6), *Queen-Empress* v. *Chinna Pavuchi* (7).

It is admitted that there is a conflict of judicial opinion regarding this point of law and it is impossible to reconcile the various 'dicta' which have been delivered from time to time. In some of the cases referred to the facts were not altogether similar to the facts before us: in others they were, and it is not to be denied that there is much to be found in some of these judgments which favours Mr. Alston's argument. He

(1) 17 A. 524; A. W. N. (1895) 111; 8 Ind. Dec. (N. S) 661.
(2) 19 B. 195; 10 Ind. Dec. (N. S.) 132.
(3) 28 Ind. Cas. 663; 37 A. 247; 13 A. L. J. 337; 16 Cr. L. J. 327.
(4) 23 A. 53; A. W. N. (1900) 192.
(5) 30 A. 540; A. W. N. (1908) 241; 5 A. L. J. 505; 4 M. L. T. 398; 8 Cr. L. J. 380.
(6) 22 M. 491; 2 Weir 746; 8 Ind. Dec. (N. S.) 351.
(7) 23 M. 151; 2 Weir 747; 8 Ind. Dec. (N. S.) 503.

admitted that the two Madras rulings are against him.

We have no authority of our own Court to guide us and in the circumstances we are at liberty to treat the matter as *res integra*. We may say that having carefully considered the law itself and the various rulings which have been quoted, we agree with what was said by the learned Judges in the case of *Queen-Empress* v. *Chinna Pavuchi* (7). It seems to us impossible to hold that the trial of an accused person necessarily comes to an end as soon as he offers a plea of guilty. To arrive at that conclusion we should have to interpret section 271, sub-section 2, as if it left no discretion to the Court: we should have to read "must" or "shall" in place of "may" and we agree with the learned Judges of the Madras Court when they say:—

"Strictly speaking, a trial does not come to an end until the accused has been either convicted or acquitted or discharged."

We also agree generally with the observations made by the learned Judges with regard to the proper procedure to be followed when a plea of guilty is entered by one of several co accused. The accused should either be convicted on the plea of guilty and removed from the dock, in which case he could be called as a witness against the other accused, or the Judge should put it on record that he decides to put the accused on his trial in spite of his plea of guilty. He has the discretion so to decide under section 271, sub-section 2, and that discretion ought to be exercised as soon as the plea is offered and recorded. He is bound to read and explain the charge to the accused, and he ought to satisfy himself by interrogation of the accused, if necessary, that he fully understands the responsibility which he assumes by making a plea of guilty. Having done so, the Judge is then in a position to exercise properly the discretion which the law allows and to put upon record the reasons which guide his discretion in either direction. The course which it is intended to pursue should not be left in doubt, as was done in the present instance.

It is, we think a matter for regret that the Code of Criminal Procedure has not laid down explicit provisions to meet cases of this kind, for it might well have been expected to do so. All we can say is that as the law now stands, we are unable to say that it is "illegal" for the Court to proceed with the trial of a person who has pleaded guilty without previously placing upon record its reasons for doing so: and consequently we cannot hold in the present case that there was not a legal joint trial of Ram Nath and the other four accused.

We may observe here that Mr. Wallach who appeared for the Crown in the Court below has informed us that he put the matter directly before the Sessions Judge before the trial commenced and declared his intention to call Ram Nath as a prosecution witness in case the Court thought proper to convict him on his plea of guilty. We may infer, therefore, from this and from the other circumstances already mentioned that although the Judge did not expressly say so at the outset, he did intend that the trial should proceed and that he had reasons for not accepting and acting upon the plea of guilty.

The next plea taken with respect to the statement of Ram Nath recorded by Mr. Darling on the 28th August is that it was not a voluntary statement and that as a confession it cannot, therefore, be used. Various arguments have been addressed to us in this connection.

It is pointed out that Mr. Darling, when recording the statement, asked Ram Nath a great many questions and the suggestion is that statements made in answer to such questions cannot be deemed voluntary. No doubt it is true that the law does not contemplate or authorise inquisitorial procedure by a Magistrate who is called upon to record a confession under section 164 of the Code of Criminal Procedure: but it cannot be argued that a Magistrate is forbidden to ask questions, for in the first place he must satisfy himself that the statement proposed to be made is voluntary and he can only do so by addressing questions to the person who is to make the statement. In the next place we do not see why a Magistrate should not ask questions for the purpose of making clear and intelligible any particular passage of a statement made to him. The record of Ram Nath's confession is to be found at pages 6 to 16 of the first volume of the printed record. We find that many questions were addressed to Ram Nath before he began to make his statement pro-

per. It was *inter alia* about the circumstances of his arrest and as to the manner in which he had been brought to Unao. So far as these questions are concerned we cannot say that they were improper: Mr. Darling was evidently anxious to ascertain whether any pressure had been put upon Ram Nath or any inducement offered to him after the date of his arrest. It was not perhaps strictly in order to ask him the question to be found at the bottom of page 7: "Did Manna and Gunnu know you before?", for up to that stage Ram Nath had not mentioned these men's names. Similarly with respect to a question containing the name of a *chaukidar* named Puswa. With regard to a question on page 8: "Did you previously know Sirdar Singh?" to which exception has been taken, we are unable to entertain the argument that it was put deliberately with the intention of eliciting a statement about Sirdar Singh which would not otherwise have been forthcoming though it probably had that result. Ram Nath had just mentioned Sirdar Singh for the first time and we think the question was legitimate. On the whole the record of the confession does not bear out the theory that the statement was otherwise than spontaneous: it certainly cannot be argued that it was extracted by means of persistent questioning.

While we are on the subject of Mr. Darling's procedure in connection with the recording of statements made by the other accused before the trial, we may observe that it is open to adverse criticism. The record of Sirdar Singh's statement (it is not a confession properly speaking) made by him on the 23rd September shows that a great many questions were put to him for the purpose of eliciting information regarding matters which had already come to Mr. Darling's knowledge. And we must put it on record that Mr. Darling had no authority to take down the statements of Jungar Singh and Kesho Singh on the 29th and 30th of August respectively. It is quite obvious that in neither instance was the statement a voluntary statement. In both cases we have the Magistrate's note that at the commencement of the proceedings he warned both these accused that they were being charged with murder and that their statements would be used as evidence against them. Both men were closely questioned at great length, and in Jungar Singh's case at any rate the nature of the proceeding is apparent from Mr. Darling's note appended to the record that he had obtained the statement of Jungar Singh with considerable difficulty as he was hedging nearly all the time and was very reluctant to give accurate dates and hours. His demeanour, it is added, was not satisfactory. It is not permissible for a Magistrate to question an accused person in this way, for the purpose of extracting statements to be afterwards used as evidence and the Sessions Judge was certainly wrong in allowing these statements of Kesho Singh and Jungar Singh to be put in as evidence.

Another suggestion made is that this statement of Ram Nath was the result of a promise of pardon. As to this we have the evidence of the Inspector Afzal Husain who denies that he ever offered any promise of pardon to Ram Nath. Mr. Darling was not put the question directly. He admitted having discussed the question of a pardon with the Inspector and others, but he nowhere says that any promise or hint of a pardon was conveyed to Ram Nath and we may take it that no such inducement was held out by Mr. Darling.

Ram Chandar, the Sub-Inspector, was not cross-examined as to this, so we find that there is no evidence of inducement in this form.

With reference to the treatment of Ram Nath in the jail subsequent to the making of the confession it is admitted both by Mr. Darling and the Medical Officer in charge of the jail that Ram Nath, who was detained in a solitary cell, was allowed certain privileges in the shape of tobacco, oil, milk, molasses and daily exercise. So far as this is concerned all we need say is that whether this indulgence was proper or discreet, it cannot in any way affect the decision of the question we are considering, namely, whether any inducement was held out to Ram Nath before he made his confession on the 29th August. We find that it is not proved that any such inducement was offered.

We have only to notice an argument put forward by Mr. Jackson on behalf of the appellant Jungar Singh. He would have

us exclude the confession on the ground that Mr. Darling was a Police Officer at the time he took down the confession.

Mr. Jackson refers to section 4 of the Police Act (V of 1861), which invests the District Magistrate with general control and direction of the administration of Police in his district. He also cited the rulings reported as *Queen* v. *Hurribole Chunder Ghose* (8), *Queen-Empress* v. *Bhima* (9) and *Empress* v. *Lester* (10), none of which seems to us to apply to the present case. It is true that Mr. Darling did interest himself deeply in the investigation of this offence, as indeed it was his duty to do. But that fact does not, in our opinion, constitute him a Police Officer, nor can he be held to be such an officer by reason of the language of section 4 of the Police Act. We are satisfied, therefore, that there was no legal obstacle in the way of using Ram Nath's confession as evidence against his co-accused in the trial in the Court below.

The important question which remains to be considered is the weight which ought to be attached to the confession.

* * * *

Having arrived at this stage we may express the opinion that so far as Ram Nath's share in the crime is concerned, his own confession of guilt is sufficiently corroborated to justify the conclusion that he at any rate was one of Suraj Bali's murderers: to that extent his statement is proved to be true.

* * * *

We have just mentioned that Ram Nath at the Sessions trial altered his statement so as to show that he and Ratnu got to Sirdar's house on this second occasion at 11 P. M. and not at 2 A. M., and we must now say a word or two in this connection. It appears from a note on the record that on the 28th November 1916 while the Sessions trial was in progress, the learned Judge accompanied by the Assessors, Ram Nath and the Pleader who was appearing for Sirdar and Ratnu paid a visit to Bhadia and the scene of the crime. He was shown over the ground by Ram Nath, who appears to have pointed out the various localities referred to in his confession, that is, places in the neighbourhood of Bhadia and Moti Khera. In the course of this peregrination it seems that Ram Nath made certain statements by way of comment on or illustration of his confession and the Judge made note of these. It was on this occasion that Ram Nath for the first time suggested that his second visit to Sirdar's house was at 11 P. M. and not at 2 A. M.

The learned Judge was clearly wrong in allowing Ram Nath to make these additional statements—statements which were given out behind the back of the other accused. The law does not recognise procedure of this kind. It is admitted by the Judge that these statements of Ram Nath produced a great impression upon his mind and helped him in a measure to reach the conclusion that Ram Nath's story was true. We need only say that the learned Judge ought not to have regarded these statements.

* * * *

We are left with the feeling that the prosecution evidence has not succeeded in convincing us that the case against Kesho and Jungar is devoid of reasonable doubt so as to justify our agreement with the finding of the Court below that these two men inspired the murder of Suraj Bali.

It is a case of "not proven" and these two appellants must have the benefit of our doubts.

* * * *

We are of opinion that the charge of abetment against Sirdar Singh is not established.

The result is that we allow these appeals, set aside the convictions and sentences of Kesho Singh, Jungar Singh and Sirdar Singh and acquitting them direct that they be released.

*Appeals allowed.*

(8) 1 C. 207; 25 W. R. Cr. 36; 1 Ind. Dec. (N. S.) 132.

(9) 17 B. 485; 9 Ind. Dec. (N. S.) 315.

(10) 20 B. 165; 10 Ind. Dec. (N. S.) 668.

KHUDA BAKSH *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 100 OF 1917.
April 12, 1917.
*Present*:—Mr. Justice Walsh.
KHUDA BAKSH AND OTHERS—
PETITIONERS
*versus*
EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 15—Bench of Honorary Magistrates—Trial by two out of three, legality of—Proceedings, part of, before three, but decision by two, effect of.*

A case was opened before a Bench of three duly appointed Honorary Magistrates, but one of them left at an early stage of the proceedings and took no further part in the proceedings. The other two Magistrates heard the whole of the case and one of them wrote the judgment but did not sign it, although he initialled certain corrections in the text. The third signed it:

*Held*, (1) that in the absence of a special order in the case, or applicable to all cases of the class to which the case belonged, requiring as a matter of law three persons to hear and decide it, the hearing and decision by two Magistrates was in accordance with law; [p. 749, col. 2.]

(2) that the mere fact that three or any other number of Magistrates happened to be present during any part of the hearing did not invalidate the trial of the case by two Magistrates. [p. 749, col 2; p. 750, col. 1.]

Criminal revision against the order of the District Magistrate, Bijnor, dated the 18th November 1916.

FACTS of the case appear from the judgment.

Mr. *Jamini Mohan Banerji*, for the Petitioners.—The proceedings began before a Bench of three Magistrates, but one of them absented himself and the other two heard the case. The judgment is signed by only one of these two. However, it appears from the record that the judgment was written by the other gentleman and the corrections therein have been initialled by him. The judgment should have been signed by both the Magistrates. But the other point which arises in this case is that the hearing of the case by the two only out of three Magistrates is illegal. The Bench constitutes one Magistrate and, therefore, where it consists of two or more members, all of them must hear and adjudicate upon the cases that come before it. Two Magistrates where the Bench consists of three have no power to decide a case [*King-Emperor* v. *Lado* (1)], and, therefore, when the trial began before the three Magistrates constituting the Bench and one of them absented himself and only the remaining two heard and decided the case, the conviction is bad. *Damri Thakur* v. *Bhowani Sahoo* (2).

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case the Bench, as originally constituted when the case was opened, consisted of three gentlemen (Honorary Magistrates) who were duly appointed members of the Bench. One of them left at an early stage of the proceedings when he had heard only part of the case for the prosecution and took no further part in the proceedings. The other two gentlemen heard the whole of the case. One of them wrote the judgment but did not sign it, although he initialled certain corrections in the text. The other one signed it. It is quite clear that both took part in the hearing of the case and the decision which was ultimately arrived at. It is, therefore, a case which has been heard and decided by two Honorary Magistrates. The point originally taken before this Court in revision was that the judgment should have been signed by both the Magistrates. But I have allowed arguments to proceed upon the other point, namely, that it should be presumed that the only Bench which could hear the case was the Bench of three Magistrates and, therefore, the hearing and decision were illegal as having been arrived at by two only. All I have before me is section 15 of the Criminal Procedure Code, which enables the Local Government to appoint persons to be members of a Bench of two or more Magistrates. Both the two gentlemen who took part in this case were legally appointed under that section, as appears by extracts from the Government Notification which has been supplied to this Court at my request by the District Magistrate. There is nothing before me to show that there was a special order in this case, or applicable to all cases of the class to which this case belongs, requiring as a matter of law three persons to hear and decide it. I hold that under these circumstances a hearing and decision by two Magistrates is in accordance with the law. The mere fact that three or any other number

(1) A. W. N. (1902) 148.

(2) 23 C. 194; 12 Ind. Dec. (N. S) 129.

happened to be present during part of the hearing does not invalidate the trial of the case by two. The application is dismissed.

*Application dismissed.*

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PATNA HIGH COURT.

CRIMINAL REVISIONS NOS. 157 AND 158 OF 1917.

May 9, 1917.

*Present*:—Mr. Justice Jwala Prasad.

TALEBAR CHOWDHRY—

ACCUSED – PETITIONER

*versus*

EMPEROR – OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 426—Mischief—Cutting of ripe crop in full time—Offence—Criminal Procedure Code (Act V of 1898), s. 424—Judgment of Appellate Court, rules to be observed in writing.*

Where accused acting in good faith and under a *bona fide* belief that he was entitled to the possession of certain land delivered to him by the Court in consequence of his purchase at an auction sale, cut away a ripe crop growing on the land in its full time;

*Held*, that he was not guilty of the offence of mischief under section 426 of the Penal Code. [p. 751, col. 1.]

Section 424 of the Criminal Procedure Code requires that a judgment, whether it be under section 421 or under section 423, should be written by an Appellate Court in accordance with the rules laid down in Chapter XVI, including section 367 of the Code, for the recording of a judgment. [p. 751, col. 2.]

When the order of an Appellate Court is liable to revision by the High Court, the former Court should give some reason for dismissing an appeal to show that the points raised in the appeal were properly considered by it. [p. 751, col. 2.]

Criminal revisions from the order of Deputy Commissioner, Hazaribagh.

Mr. *Bankim Chandra Dey*, for the Petitioner.

JUDGMENT.

IN CR. R. NO. 158 OF 1917.

The petitioner in this case was convicted by the Sub-Divisional Magistrate of Giridih for an offence under section 426 of the Indian Penal Code. The charge is in respect of paddy crop said to have been cut and removed by the accused on the 17th of November 1916. The accused was sentenced to rigorous imprisonment for two weeks and to pay a fine of Rs. 50. He appealed to the Deputy Commissioner of Hazaribagh who, by his order dated the 27th of February 1917, summarily dismissed the appeal. The petitioner has, therefore, moved this Court for setting aside the order of the Deputy Commissioner as well as that of the Sub-Deputy Magistrate convicting him of the offence referred to above.

It appears to me that the conviction cannot stand.

Neither in the complaint petition nor on the statement made on solemn affirmation by the complainant has any offence under section 426 been disclosed. The statement made in the complaint petition is that on the day of occurrence the accused forcibly cut and removed some paddy crops of the complainant from one plot of his land; and that when he remonstrated with him the accused was ready to quarrel. The reason given for this highhanded act of the accused is that the complainant had refused to serve the accused.

The facts appear to be as follows:—

There was a holding known as No. 3 in the Khas Mahal *jamabundi*. That holding originally stood in the name of one Gulab Dusadh. It was subsequently sub-divided among other co-sharers two of whom were Lalit Dusadh and Talebar Chaudhury—the latter is the accused in this case. Although the lands were split up, the rental or *jama* continued to be one in the records of the Khas Mahal, which is the proprietor of this holding. It is admitted by the Sub-Deputy Magistrate as well as by the Khas Mahal Tahsildar, and *peshkar* who have been summoned as witnesses in the case, that the entire holding was liable to be sold for arrears due from any of the co-sharers of the holding.

It appears, as has been held by the first Court, that Lalit and Talebar fell into arrears of rent for the year 1914-15. An application was made by the Khas Mahal for issue of a certificate in respect of the arrears. A certificate was accordingly issued but the arrear was not realized. The entire holding No. 3 was accordingly advertised for sale and the accused, in the name of his wife, purchased the holding at the auction sale held in execution of the certificate referred to above. This sale took place in November 1915 and a sale certificate was obtained. Thereafter, on the 27th of June 1916, delivery of possession was effected by a peon of the Court. The peon in his evidence says that he actually put the purchaser into possession of the property by having in his presence 5 or 6 plots of land ploughed up. The peon,

however, adds that he thought that only the lands of Lalit and Talebar, the judgment-debtors mentioned in the sale certificate, were being given possession of. Both in the sale certificate and in the *dakhildehani*, the holding has been described by its number which is No. 3 mentioned above. No boundary has been given in the sale certificate or in the *dakhildehani*. It appears, therefore, that the entire holding No. 3 was sold and purchased by the accused in the name of his wife and the effect of the delivery of possession would be to deliver the entire holding to the accused. The complainant, who is a co-sharer in the holding, was not made party either in the sale certificate or in the other execution proceedings relating to the delivery of possession, but it appears from the judgment of the first Court that these persons, after the delivery of possession, filed an objection to the sale of their lands which was rejected. Thus it is clear that the complainant and the other co-sharers of the land knew perfectly well of the sale of the land and of the delivery of possession of the same to the purchaser. Be that as it may, the conviction must be set aside upon the finding of the Court below. The Sub-Deputy Magistrate says in his judgment: "It is clear to me from the evidence that he (the accused) did not sow the crops he cut, but, as is usual with sale purchasers, after getting formal delivery of possession of some of the lands, allowed the claimants to sow the crops, then, when it was ripe for harvest, boldly cut it, setting up in defence good faith. In this case, therefore, the only point for decision is whether Talebar Chaudhuri acted in good faith."

The first question for determination was whether the facts, even if true, amounted to an offence of mischief under section 425 of the Indian Penal Code.

According to the Magistrate the crops were cut when they were ripe and in full time. The cutting of the crops, therefore, did not cause any deterioration in the value of the property and unless there is a deterioration caused by the act of the accused; there cannot be mischief within the meaning of the aforesaid section.

In this connection I would rely upon the case of *In the matter of Miras Chowkidar* (1). The facts of that case are very similar to those of the present case. The learned Judges in delivering judgment in that case said: "Taking these facts as found it appears to us that the accused could not be convicted of mischief, because he did not cause the deterioration of any property or any such change in any property or in the situation thereof as diminished its value or utility. Of course if the paddy had been unripe and not fit to be cut, he might have been convicted of mischief; but it is not found in this case that the paddy was not in a fit state to be cut."

The conviction of the accused must, therefore, be set aside on this sole ground. But I further hold that the accused in this case acted in good faith and under a *bona fide* belief that he was entitled to the possession of the land delivered to him by the Court in consequence of his purchase at the auction sale.

The learned Deputy Commissioner on the 27th January 1917 dismissed the appeal of the petitioner in the following words:— "Pleader heard. Appeal summarily dismissed." No reason has been given by him for dismissing the appeal. This is contrary to section 424 of the Code of Criminal Procedure, which requires that a judgment, whether it be under section 421 or under section 423, should be written by the Appellate Court in accordance with the rules laid down in Chapter XVI, including section 367 of the Code of Criminal Procedure, for the recording of a judgment. When the order of the Appellate Court is liable to revision by the High Court, it is expected that the Court would give some reason for dismissing the appeal to show that the points raised in the appeal were properly considered by the Court.

The application is, therefore, allowed, the conviction and sentence are set aside and the fine, if realised, must be refunded to the accused.

IN CR. R. No. 157 OF 1917.

This case is in all respects similar to Criminal Revision No. 158 of 1917, which has just now been disposed of.

The Magistrate who tried the case has

(1) 7 C. W. N. 713.

referred in his judgment to the reasons given in the judgment of the case from which Criminal Revision No. 158 of 1917 arises.

In addition to what I have said in my judgment in that case, I would mention that the Magistrate had framed a charge under section 379 of the Indian Penal Code in this case but he convicted the accused under section 426 of the Indian Penal Code, without giving any reason for altering in his judgment the charge that was originally framed by him.

The application is, therefore, allowed, the conviction and sentence are set aside and the fine, if realised, must be refunded to the accused.

*Convictions set aside.*

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MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 206 AND 283 OF 1916.

CRIMINAL REVISION PETITIONS NOS. 171 AND 235 OF 1916.

September 7, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar.

IN Cr. R. C. No. 206 of 1916

*In re* VEERAPPA NAICK AND OTHERS—ACCUSED—PETITIONERS.

IN CR. R. C. No. 283 of 1916

*In re* AIYAPPA NAICK AND OTHERS—ACCUSED—PETITIONERS.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 424—*Appeal, criminal—Judgment, contents of—Possession, determination of* factum *of—Court, duty of.*

The judgment of a Court of Criminal Appeal must show on its face that the Court has considered the facts and evidence in reasonable detail.

A person in possession of land has a right to protect his possession by show and use of reasonable force against trespassers and wrongdoers.

*Samba Pillai, In re*, 35 Ind. Cas. 823; (1916) 2 M. W. N. 213; 17 Cr L. J. 391; 4 L. W. 125, followed.

Where the *factum* of possession is the determining element in a case, a Magistrate must find which of the parties was in peaceable possession on the date of the offence and was trying to protect such possession, and which party was trying to acquire possession by use of force.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Sub-Divisional first class Magistrate, Sivakasi, in Criminal Appeals Nos. 8 and 9 of 1916, preferred against the judgments of the Court of the second class Magistrate, Sattur, in Calendar Cases Nos. 475 and 476 of 1915.

Mr. *T. Ranga Ramanuja Chariar*, for the Petitioners in Criminal Revision Case No. 206 of 1916.

Dr. *S. Swaminadhan*, for the Petitioners in Criminal Revision Case No. 283 of 1916.

The Public Prosecutor, for the Government.

ORDER.—The Appellate Magistrate's judgment is even more unsatisfactory than that of the second class Magistrate. The second class Magistrate says that he is unable to decide who was in possession on the date of the offence of the land and the manure heap and yet convicts the accused because (in his opinion), "granting that accused No. 1 was in possession of the land and the manure belonged to him", he had no right to protect his possession by show and use of reasonable force against trespassers and wrongdoers. This is opposed to the ruling in *In re Samba Pillai* (1), with which I respectfully agree. The Appellate Magistrate does not go into the evidence at all.

I set aside the Appellate Magistrate's decision in Criminal Appeals Nos. 8 and 9 of 1916 and direct him to re-hear the appeals and pronounce a proper judgment, which should show on its face that he has considered the facts and the evidence in reasonable detail. He should also come to a definite finding as to which of the two contending parties was in peaceable possession on the date of the offence and was trying to protect such possession and which party was trying to *acquire* possession by *use* of *force*.

*Petition allowed; Case sent back.*

V. R. P.

(1) 35 Ind. Cas. 823; (1916) 2 M. W. N. 213; 17 Cr L. J. 391; 4 L. W. 125.

ALI ASGHAR *v.* COLLECTOR OF BULANDSHAHR.

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 52 OF 1916.
March 21, 1917.
*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.
*Saiyad* ALI ASGHAR—PLAINTIFF—APPELLANT
*versus*
THE COLLECTOR OF BULANDSHAHR IN CHARGE OF THE ESTATE OF *Musammat* SUGHRA BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Custom, whether can be proved in derogation of Muhammadan Law—Custom—Succession—Daughters, exclusion of—Palwal, Gurgaon District.*

Evidence is admissible to prove a custom although it is at variance with Muhammadan Law. [p. 756, col. 2; p 761, col. 2.]

One *A.*, originally a resident of the town of Palwal in the Gurgaon District, obtained the village of Wair Badshahpur in the District of Bulandshahr from the Government for services rendered during the Mutiny of 1857. *A.* died in 1876 leaving him surviving two widows, a minor son and two daughters. The estate being crippled with the debts contracted by *A*, the two widows applied to the Government to take over the estate in the Bulandshahr District under the management of the Court of Wards. The Court of Wards took over the village under its management and it was assumed that it belonged to the widows, the minor son and the two daughters. In 1897 the minor attained majority and one half of the property was released to him, the other half remaining under the management of the Court of Wards on behalf of the daughters. The son sued for possession of the other half on the ground that according to the personal law and the custom prevailing in Palwal in the District of Gurgaon the daughters and their issue did not in any case get a share in the paternal estate in the presence of the son:

*Held*, that the plaintiff had failed to prove an ancient invariable custom prevailing in his family in derogation of Muhammadan Law whereby a daughter was excluded from inheritance. [p. 759, col. 2; p. 767, col. 1.]

Appeal against the judgment of Mr. Justice Rafique, dated the 13th April 1916, under section 10 of the Letters Patent, in First Appeal No. 93 of 1914.

FACTS appear fully from the judgment of Piggott, J.

The Hon'ble Dr. *Sundar Lal* (with him Pandit *Baldeva Rama*), for the Plaintiff-Appellant.—The parties are governed by custom.

[PIGGOTT, J.—Inheritance is a matter of religion and not of custom.]

In the Punjab there has been very extensive inquiry and it has been found that the custom prevails. In rural towns throughout the Punjab the Hindus and the Muhammadans neither follow Hindu nor Muhammadan Law. A widow under the Muhammadan Law gets a full estate while in the Punjab a widow gets only a life-estate. Similarly daughters are excluded by sons.

In 1848 when the Punjab was taken over by the British Government some British Officers were appointed as members of the Punjab Commission. They found out that the people in the Punjab were governed by special custom.

[BANERJI, J.—You have to satisfy us that you can prove custom in derogation of Muhammadan Law.]

In *Noor Jehan Begum* v. *Nawab Mahomed Ali* (1) it was held that the custom could be proved, but this view was changed in *Surmust Khan* v. *Kadir Dad Khan* (2) and this view was followed in *Jammya* v. *Diwan* (3) and *Ismail Khan* v. *Imtiaz-un-nisa* (4). In the last mentioned case an appeal was preferred to the Privy Council and their Lordships set aside the decision and remanded the case for taking of evidence. *Muhammad Ismail Khan* v. *Sheomukh Rai* (*Imtiaz-un-nissa*) (5).

There is another case of the Privy Council from Mombassa, *Abdurahim Haji* v. *Halimabai* (6). It is optional to Muhammadans to be governed by Muhammadan Law or adopt the custom of their domicile. Unless this is done they must be considered to have taken the custom of their original domicile with them.

My argument is that this family of Syeds was governed by a certain custom and they have not changed that custom. They lived in the Punjab and they still live there. In fact there is no change. If the suit had been brought in the Punjab, the Punjab Courts would have held that the whole property was governed by Customary Law. As the suit has been brought here this question arises. They are governed by custom. The question is of their own special Customary Law. In England the law of inheritance is a territorial law. On the continent they say that the

(1) (1864) S. D. A. Rep. N. W. P. 416 A.
(2) (1866) Agra F. B. Ruling 38.
(3) 23 A. 20; A. W. N. (1900) 181.
(4) 4 A. L. J. 792; A. W. N. (1908) 7.
(5) 18 Ind. Cas. 571; 17 C. W. N. 97; 15 Bom. L. R. 76; 17 C. L. J. 143; 12 M. L. T. 644; (1913) M. W. N. 27.
(6) 32 Ind. Cas. 413; 30 M. L. J. 227; 20 20 C. W. N. 362; (1916) 1 M. W. N. 176; 18 Bom. L. R. 635; 43 I. A. 35.

law of inheritance is a personal law. In India the law is a personal law. A man who is governed by the Benares School migrating to Bengal and acquiring property, there is still governed by the law of his original domicile. In Bombay people of all places are found and they are governed by their own law. In this case succession to the entire property was governed by tribal custom. It is only a matter of accident that a part of the property is in this Province. The question before the Chief Justice and Rafique, J., was whether custom was proved or not. Rafique, J., said that custom could not run to this Province. I submit that the succession in their own native place is governed by tribal law and daughters have no right.

[BANERJI, J.—Rafique, J., says that the custom is not proved].

I shall show that the custom is proved to the hilt.

[BANERJI, J.—You do not deny that the burden is heavy on you?]

I do not deny that, but I shall show that the custom has been admitted by the defendant though in qualified terms. The Hindus and the Muhammadans are governed by their tribal customs. Some incidents differ. The tribes in the Punjab are divided into two classes *viz.*, (1) exogamous and (2) endogamous, *i.e.*, those who marry, in their own *gotra* and those who marry outside it. The custom of succession of daughters is not proved. They do not want a member of another tribe to come in.

[BANERJI, J.—Custom must be proved to be an invariable custom.]

In the Punjab the Settlement Officers discovered that the people were not governed by Hindu and Muhammadan Law but by custom. The rural population is governed throughout by Customary Law in matters of succession. An inquiry was made as to custom.

[PIGGOTT, J.—Whatever custom may have been in the Punjab it did not prevail in the village in question. It was after mutiny that this part was taken in the Punjab.]

Dr. *Sundar Lal* then stated the procedure adopted in the Punjab for ascertaining custom.

In the case of these Syeds there is a clear indication that daughters do not inherit in preference to widows and sons. They accepted the law of the people among whom they settled. The tribal law should have the first place in the Punjab and if no custom is found, then and then only Hindu or Muhammadan Law is to be followed.

[BANERJI, J.—Muhammadan Law is to be applied unless modified by custom.]

Dr. *Sundar Lal* then distinguished between *wajib ul-arz* and *riwaj-i-am* and contended that *riwaj-i-am* was constantly regarded as some evidence of custom.

Mr. *Ryves*, for the Respondent.—I admit this.

Dr. *Sundar Lal*, after arguing on facts, contended that in proving custom hearsay evidence is admissible in evidence.

There are numerous cases among Syeds of daughters excluding collaterals. He referred to *Nabi Bakhsh* v. *Musammat Zebo* (7), *Musammat Gulab Khatan* v. *Mian Muhammad* (8), *Musammat Emna* v. *Sajawal Khan* (9), *Kutbuddin Khan* v. *Musammat Amir Begam* (10), *Muzaffar Ali* v. *Zainab* (11), Ellis's Note Book page 240, *Akbar Ali* v. *Allah Di* (12), *Zahid Hussain* v. *Karam Ali* (13).

After arguing on facts of the case he contended that among Syeds in several districts *riwaj-i-am* has been considered as good and binding.

*Musammat Ghulam Zohra* v. *Rukn Abdulla Shah* (14) *Ghulam Kadir* v. *Musammat Sahib un-nissa* (15), *Musammat Bano Begam* v. *Syad Ahmad Ali* (16), *Gosia Begam* v. *Umed Ali* (17), *Ranjha* v. *Jindwaddi* (18) and *Muzaffar Ali* v. *Zainab* (11).

There are some more cases in the Punjab Law Reporter.

These Syeds of Palwal are governed by the customary rule of succession. The family is a family of old *biswadars*.

(7) 86 P. R. 1900.
(8) 5 P. R. 1898.
(9) 37 P. R. 1898.
(10) 36 P. R. 1889.
(11) 7 Ind. Cas. 348; 58 P. R. 1910; 81 P. W. R. 1910; 107 P. L. R. 1910.
(12) 22 Ind. Cas. 2; 98 P. R. 1913; 132 P. L. R. 1914.
(13) 8 Ind. Cas. 667; 18 P. L. R. 1911.
(14) 18 P. R. 1889.
(15) 44 P. R. 1889.
(16) 32 P. R. 1892.
(17) 23 Ind. Cas. 541; 21 P. R. 1914; 137 P. L. R. 1914.
(18) 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914.

The rule laid down in the *riwaj-i-am* is the rule generally followed.

[BANERJI, J.—*Riwaj-i-am* is merely an opinion of the officer concerned or the officer who has taken evidence on the point.]

He was trying to find out the custom. He found that by unanimous consent this was the custom and he recorded it.

[BANERJI, J.—Shall we be justified in putting on the *riwaj-i-am* the reliance that you are asking? Is it evidence of so great a value?]

The Punjab Courts have done so. In case of Hindus daughters were entirely excluded. In case of Muhammadans if there were no sons widows and daughters came in.

There is no case exactly in point, the reason being that the cases have been between collaterals and sons.

[BANERJI, J.—You may say that the question was not gone into Court as nobody questions it.]

[PIGGOTT, J., referred to the Koran, Chapter IV, Sale's Translation.]

Dr. *Sundar Lal* referred to Palmer's Translation of the Koran, Chapter IV.

He then referred to Customary Law of several districts, *viz.* :—

| | | | |
|---|---|---|---|
| Ambala | ... | ... | p. 18 |
| Gurdaspur | ... | ... | p. 88 |
| Shahpur | ... | ... | p. 48 |
| Muzaffargarh | | ... | p. 34 |
| Peshawar | ... | ... | p. 16 |

In the Punjab they will take as axiomatic that sons exclude daughters. There is not a single case in which it is departed from. In our Province up to 1864 custom could be proved. From 1866 to (1907) 4 A. L. J. R., no custom in contravention of Muhammadan Law could be proved. The Privy Council held that this is a matter which the plaintiff is entitled to prove. The question is whether the practice prior to 1866 has been restored by the Privy Council. If the rule has been restored the whole question is whether a custom can be proved as in the Punjab. *Riwaj-i-am* is regarded as a document of very great importance by the Courts throughout the Punjab.

Mr. *Ryves*, for the Respondent.—Asghar Ali had no property in Palwal when the property in Bulandshahr was acquired. Could it be put forward that the rule prevailing in Palwal applied here? The practice has grown up in recent times that among certain Muhammadans daughters are excluded. Is that practice a custom having the force of law in these provinces so as to overrule the Muhammadan Law?

He referred to (1) The Punjab Census Report (1911) Part I, page 176, (2) Rattigan's Digest of the Customary Law (8th Edition) page 2, (3) *Raj Kaur* v. *Talok Singh* (19).

It was not till 1875 that people in Gujarat began to set up custom.

He then referred to *Muhammad Hayat Khan* v. *Sandhe Khan* (20), *Jamiat-ul-nisa* v. *Hashmat-ul-nisa* (21), *Maqsud-ul-nisa* v. *Kaniz Zohra* (22), *Gohra* v. *Hari Ram* (23).

I adopt the judgment of Rafique, J., as part of my argument.

He then referred to *Maya* v. *Gurdit Singh* (24), *Muzaffar Ali* v. *Zainab* (11), *Baij Nath* v. *Gulab Din* (25), *Elahi Bakhsh* v. *Khewni* (26), *Devi Singh* v. *Premi* (27), *Nathu* v. *Rahman* (28), *Moti Ram* v. *Sant Ram* (29), *Ayaz-ud-Din* v. *Mahfuzunnisa* (30), *Lelu* v. *Ram Chand* (31).

According to these rulings the property must be ancestral and the parties must be pure agriculturists so that custom may apply.

He submitted that he was not going to argue the point whether evidence could be

(19) 33 Ind. Cas. 992; 38 P. R. 1916; 99 P. W. R. 1916.
(20) 55 P. R. 1908; 105 P. W. R. 1908.
(21) 4 Ind. Cas. 638; 124 P. R. 1908; 3 P. L. R. 1909.
(22) 135 P. R. 1908.
(23) 115 P. R. 1907.
(24) 4 Ind. Cas. 947; 1 P. R. 1910; 128 P. W. R. 1909; 145 P. L. R. 1909.
(25) 8 Ind. Cas. 315; 90 P. R. 1910; 191 P. L. R. 1910.
(26) 116 P. R. 1906; 93 P. L. R. 1907.
(27) 9 Ind. Cas. 683; 11 P. R. 1911; 83 P. L. R. 1911; 57 P. W. R. 1911.
(28) 11 Ind. Cas. 11; 44 P. R. 1911; 85 P. W. R. 1911; 198 P. L. R. 1911.
(29) 103 P. R. 1902.
(30) 27 Ind. Cas. 542; 3 P. W. R. 1915; 32 P. L. 1915; 53 P. R. 1915.
(31) 31 Ind. Cas. 294; 174 P. W. R. 1915; 23 P. R. 1916.

given to prove a custom at variance with Muhammadan Law. The case has been argued on the assumption that the law on that point has been set at rest by the Privy Council.

Dr. *Sundar Lal* was called upon to reply.

JUDGMENT.

BANERJI, J.—The suit which has given rise to this appeal was brought by the appellant for possession of a half share of the village Wair Badshahpur in the District of Bulandshahr, which had been granted to his father Asghar Ali by the British Government for services rendered during the Mutiny of 1857. Asghar Ali was originally a resident of the town of Palwal in the Gurgaon District, now appertaining to the Punjab. He held various appointments and finally became Tahsildar of Azamgarh, where he rendered the good service for which he obtained the village of Wair Badshahpur. He died in 1876 leaving him surviving two widows, Moti Begam and Sakina Bagam, a son, Ali Asghar, the present plaintiff, and two daughters, Sughra Bagam and Saera Begam. The children were the issue of his marriage with Moti Begam. At the time of his death the son Ali Asghar was very young. Saera Begam is dead and her heirs are defendants to the suit, so also is Sughra Begam. In 1892 the widows applied to the Government to take over the estate in the Bulandshahr District under the management of the Court of Wards. An inquiry was held and it was reported that the property belonged to the two widows, the son and the daughters of Asghar Ali, they being his heirs under the Muhammadan Law. The Government declared the two widows and Sughra Begam, who were adults, to be disqualified proprietors and the Board of Revenue ordered that the Court of Wards should assume charge of the estate as the property of all the heirs of Asghar Ali (see page 758).

In 1897 Ali Asghar attained majority, but it was not until 1910 that one half of the property was released in his favour. The remaining half is still under the management of the Court of Wards on behalf of Sughra Begam and the heirs of Saera Begam. For this reason the Court of Wards has been made a defendant to the suit. The widows of Asghar Ali being dead, one half of the property devolved under the Muhammadan Law on Ali Asghar, the son, and the other half on his sisters or their heirs. It is this half share which is claimed by the plaintiff in this suit and his claim is founded on the allegation, as contained in the 7th paragraph of the plaint, that "according to the personal law and the custom prevailing in Palwal, the residence of the plaintiff and his ancestors, and in the District of Gurgaon... and the entire Province of the Punjab, the daughters and their issue do not in any case get a share in the paternal estate in the presence of the son."

A contention was raised that the alleged custom being contrary to Muhammadan Law which governs inheritance among Muhammadans, no evidence could be given to prove it. This contention is supported by the decision of a Full Bench of this Court in *Surmust Khan* v. *Kadir Dad Khan* (2), which was followed in *Jammya* v. *Diwan* (3) and *Ismail Khan* v. *Imtiaz un-nisa* (4). In the case last mentioned an appeal was preferred to the Privy Council and their Lordships set aside the decision of this Court and remanded the case with directions to take evidence in proof of the alleged custom. The judgment of their Lordships is reported as *Muhammad Ismail Khan* v. *Sheomukh Rai* (*Imtiaz-un-nissa*) (5). We must, therefore, take it that in the opinion of their Lordships evidence is admissible to prove the alleged custom, although it is at variance with Muhammadan Law. The Trial Court accordingly took evidence, but it came to the conclusion that the custom set up by the plaintiff was not proved and dismissed the suit. Upon appeal to this Court the learned Judges who heard the appeal differed in opinion on the question of custom, the learned Chief Justice holding that the custom was proved whilst the view of Mr. Justice Rafique was in accordance with that of the lower Court. Hence this appeal under the Letters Patent. I need hardly observe that the custom alleged by the plaintiff being contrary to the Muhammadan Law of inheritance, it lay heavily upon the plaintiff to prove it by very cogent evidence. He must show not only that the custom exists but also that it is ancient, certain and invariable. The plaintiff does not assert that the custom prevails in the District of Bulandshahr, where the property in dispute is

situate but he alleges that it obtains in the whole of the Punjab, in the District of Gurgaon and in the town of Palwal and that it is the personal law of his family whereby inheritance to his family property is governed. It must be remembered that the District of Gurgaon was a part of the North-Western Provinces, now called the Province of Agra, and was not annexed to the Punjab until the year 1858. In order, therefore, to establish the antiquity of the alleged custom it was necessary for the plaintiff to prove that it prevailed in Gurgaon before its inclusion in the Punjab. This, in my opinion, he has entirely failed to do. Of the numerous instances mentioned by the plaintiff's witnesses only a very few, not more than eight at the most, relate to the period when Gurgaon was a part of these Provinces and as regards even these instances the statements of the witnesses are vague and it has not been alleged that daughters had claimed their legal share and were excluded from it. No documentary evidence has been produced on the point and it seems that none exists. The *wajib-ul-arz* of Palwal prepared at the Settlement of 1854 appears to be extant, as the defendants have filed an extract from it, showing the names of co-sharers in that town (R 99). Had any custom such as that alleged by the plaintiff prevailed at Palwal it would have been recorded in the *wajib-ul-arz* and the plaintiff would undoubtedly have produced a copy of the record. The non-production of the *wajib-ul-arz* is, in my opinion, a very significant circumstance. I also find that in years subsequent to the annexation of Gurgaon, daughters succeeded to their father's property and transferred it by sale or mortgage. A number of documents have been produced and proved from which it appears:—

(1) That on 1st January 1864 and 4th July 1864, the widows and sister of one Azimullah of Palwal sold property to a resident of the same place as their ancestral property (see R 41 and R 44);

(2) that on December 26th, 1865, the son and the daughter of Wazir Ali of Palwal executed a sale deed of property inherited by them from their father (R 43);

(3) that in a sale-deed, dated 16th December 1867, it was stated that the son and daughters of Inayat Ali of Palwal were in possession of his property as heirs (R 48);

(4) that in 1868 three sale-deeds were executed on 23rd and 25th July and 13th December, respectively, the first by the daughter and the widow of Bakhsh Ullah, the second by the daughter of Ismat Ullah, Nur Mohammad and Pirbakhsh and the third by the daughter of Ghulam Ghaus, all of Palwal, in respect of their "ancestral" shares in that town (R 50, R 53 and R 55); and

(5) that on 27th February 1869, the widow and daughter of Ghulam Ghaus of Palwal executed a mortgage (R 69).

The fact that daughters transferred property and described it as ancestral clearly shows that they inherited property and remained in possession thereof and were not excluded from inheritance. There is nothing to justify the assumption that they had acquired the property otherwise than by inheritance. It is said that the transferees, in order to secure themselves against any possible claim by the daughters, got them to join their male relatives in executing the documents, but this would have been unnecessary had an invariable custom of exclusion prevailed. The very fact of the purchasers being apprehensive of a claim by the daughters negatives the existence of a well established custom which was certain and invariable. The vendors and the purchasers were both residents of Palwal and the latter would have been well aware of the custom had any prevailed. Furthermore, the executants of most of the documents mentioned above were ladies only and there is, therefore, no room for the suggestion made on behalf of the plaintiff.

It appears that in 1876 a daughter—belonging to Palwal—claimed her share under the Muhammadan Law, in respect of property in that town, against her brother and transferees from him and obtained a decree on 31st May 1876 (R 70). The suit was contested by the brother but neither he nor his transferee set up the custom now put forward and alleged that a daughter was by custom excluded from inheritance. This also is, in my opinion, a strong circumstance against the existence of an invariable custom of exclusion of daughters.

The chief reliance of the plaintiff is on

the document called the *riwaj-i-am* which records customs ascertained by the Settlement Officer as existing in particular localities. In the *riwaj-i-am* of Palwal and of the District of Gurgaon (A 225 and 227) it is stated that "the right of inheritance does not devolve on a daughter in any case." The custom prevailing among 18 castes is mentioned and it is recorded that "in the caste of Saiyids and Sheikhs the right of inheritance devolves on the widow, son, grandson, and great-grandson in preference to a daughter." The Settlement of the Gurgaon District was begun in 1865 and the *riwaj-i-am* was prepared in 1877. The mode in which an enquiry as to existing custom was made and the *riwaj-i-am* was prepared is narrated in Tupper's Punjab Customary Law and in the Settlement Report of the Gurgaon District. It appears that numbers of headmen were assembled and questioned and the result of the enquiry so made was recorded. It is more probable, so far as the Gurgaon District was concerned, that the custom recorded was the custom which the residents desired to adopt in common with the agriculturists of other neighbouring districts in the Punjab, where the custom was of great antiquity, than that it was a custom which had previously obtained in that district. As observed by Sir William Rattigan in his well-known work, The Digest of Civil Law for the Punjab, the evidential value of the *riwaj i-am* "varies considerably as to what that unwritten law is" He says that..."when based on authenticated precedents the value of such records is great. But where the Settlement Officer, charged with the preparation of such records, has shaped public opinion on most questions in the direction in which he himself and others of longer experience thought equitable, as Mr. Thorburn candidly acknowledges he did in the Bannu District, the value of entries purporting to expound local customs is obviously reduced to zero. And it must, I fear, be added, that in the Settlement Records of other districts also, although we may not have a similar candid avowal with respect to them on the part of the Settlement Officer, such as Mr. Thorburn supplies, identical influences would nevertheless explain many of the most dogmatic statements of alleged customs which occur in them, for which no precedents are cited and for which probably none would be found to exist" (page 2). In a foot note on page 13 he remarks that "the *riwaj-i-am* not being a part of the Settlement Record, its authority is just that due to the precedents on which it rests, which should be examined and tested." And in support of this opinion he has cited a number of rulings of the Punjab Chief Court. It does not appear what the precedents are on the authority of which the *riwaj-i-am* of Gurgaon was prepared. It is, therefore, difficult to place on that document the value which is claimed for it. Moreover, it is stated in the document itself that "there are many instances.....in which on the death of a father, the property devolves on his daughter," but it is said "that this does not appear to be by right of inheritance".

The reason assigned appears to be merely a surmise but the fact remains that according to the particular *riwaj-i-am* on which the plaintiff relies the property of an owner has in many instances devolved on his daughter thus negativing the existence of an invariable custom. I notice that in certain recent decisions the Punjab Chief Court has held that the *riwaj-i-am* by itself is not sufficient to prove a custom and raises no presumption as to its existence. The value of each *riwaj-i-am* depends on its own circumstances.

It is conceded on behalf of the plaintiff that the *riwaj-i-am* records customs by which agricultural tribes and agriculturists are governed. It has been held by the Punjab Chief Court that by an agricultural tribe is meant a tribe whose principal means of livelihood is agriculture [see *Muhammad Hayat Khan* v. *Sandhe Khan* (20)] and that a non-agricultural tribe is not governed by the custom recorded in the *riwaj-i-am* [*Gohra* v. *Hari Ram* (23)]. We have, therefore, to see whether, Asghar Ali was an agriculturist or *biswadar*. The evidence clearly shows that he was not originally a co-sharer (*biswadar*) in Palwal. An extract from the *wajib-ul-arz* of that town for 1854, which has been produced on behalf of the defendants, sets forth a complete list of the *biswadars* (proprietors) of *kasba* Palwal, but in that list the name of Asghar Ali or that of any of his ancestors finds no place. The great portion of his life was spent in service outside the Punjab and it was not until after the mutiny that he acquired

some property in his native place Palwal. All that he owned was a few *bighas* of land attached to a well known as Sailahgarh Well. My learned colleague has dealt at some length with this part of the case and has referred to the evidence on the point. I deem it unnecessary to go over the same ground. It is sufficient to say that I fully agree with him in holding that it has not been proved that Asghar Ali was a *biswadar* and agriculturist. The custom recorded in the *riwaj-i-am* does not, therefore, govern the succession to his property.

A large amount of oral evidence has been adduced on behalf of the plaintiff to show that in numerous cases daughters have not succeeded to their father's property. I am unable to place much value on this evidence. The instances cited relate mostly to the period subsequent to the preparation of the *riwaj-i-am* and hardly any case has been cited to show that a daughter was excluded after contest. It may be that in the instances referred to, the daughters were married into well-to-do families and did not like to claim their shares from their brothers. It may also be that they lived with their brothers and were supported out of the income of the paternal estate. In the absence of clear and satisfactory evidence on these points the bare fact of daughters not taking a share proves very little. The witnesses for the defendants have, on the other hand, referred to a fairly large number of instances in which daughters have shared their father's property with their brothers. Although these instances are not as numerous as those mentioned by the plaintiff's witnesses, they clearly establish that an invariable custom of exclusion does not exist. It is noteworthy that we do not find in the Punjab Record any precedent in which in the district in question a brother was held to exclude a sister.

It is said that the fact of the name of the plaintiff alone being entered in the revenue papers of Wair Badshahpur after the death of Asghar Ali raises the inference that it was conceded by his daughters that they had no right because of the existence of the alleged custom. In my opinion this circumstance is entitled to very little weight. It is common knowledge that in many districts is this Province, where admittedly no custom of exclusion of daughters exists, the name of the brother alone is entered, specially when daughters live with their brother. In the present case the plaintiff was very young when Asghar Ali died. The whole family, consisting of the two widows, the son and the two daughters, lived together and were maintained out of the income of the property. Both the widows got themselves appointed guardians of the minor and both of them applied to Government to take over the estate and place it in charge of the Court of Wards. Asghar Ali had left heavy debts and the family was in an impecunious condition. It was for the payment of these debts that the widows prayed that the estate should be managed by the Court of Wards, the family undertaking to support itself, apparently in penury, from the income of the little property they had in Palwal. All this shows that it was never intended that the daughters had no interest in the property. I have already stated that the Court of Wards took charge of the estate not only on behalf of the plaintiff but also on behalf of the widows and the daughters. It went so far as to fix a separate allowance for Sughra Begam. It is also a significant circumstance that although the plaintiff attained majority in 1897 he did not claim the whole estate until 1910.

After giving the case my best consideration I am unable to hold that the plaintiff has proved an ancient invariable custom in derogation of Muhammadan Law, whereby a daughter is excluded from inheritance. The suit was, therefore, rightly dismissed and I would dismiss the appeal.

PIGGOTT, J.—The suit out of which this appeal arises relates to a portion of the estate left by one Saiyed Asghar Ali, who died as long ago as the year 1876. His personal history requires to be noticed as an aid to the correct appreciation of the questions which arise for disposal. He was born at the town of Palwal in the Gurgaon District, at a time when that district formed part of the territories administered by the Lieutenant-Governor of the North-West Provinces. He went abroad at an early age to seek his fortune. He first enlisted as a *sipahi* with the Raja of Ballabgarh but

afterwards took service under the District Government, becoming a Sub-Inspector of Police and later a Tahsildar. During the mutiny he was stationed at Azamgarh, where he rendered faithful and distinguished service. As a reward he received from Government a grant of the entire village of Wair Badshahpur in the Bulandshahr District. The same sort of influence which made William Shakespeare in later life a landed proprietor at Stratford-on-Avon drew Saiyed Asghar Ali back to his native town. He made purchases of land there; and it seems fair matter of inference from the evidence that he must have lived beyond his means in order to cut a figure in the eyes of his townfolk. He left him surviving two widows, Moti Begam and Sakina Begam, a son named Ali Asghar and two daughters, Sughra Begam and Saera Begam. In the Bulandshahr District the son, Ali Asghar, was recorded as sole proprietor of Wair Badshahpur, under the guardianship of his mother and step-mother. The estate, however, was crippled with the debts contracted by the father, and in 1888 we find a decree for a large amount passed in favour of the Bank of Upper India, Limited. In 1893 the two widows threw themselves on the mercy of Government, asking that the Bulandshahr property might be taken under the management of the Court of Wards and nursed into solvency. The ladies offered to support themselves and their minor children on the income of the Palwal property, though protesting that it was barely sufficient for the purpose, and to leave the entire income of Wair Badshahpur available for clearing off the debts. The Court of Wards took over the village, substantially on these terms. The usual preliminary inquiries were made as to the names of the owners of the property and it was assumed, without question raised at the time, that it had devolved in accordance with the rules of the Muhammadan Law of inheritance and belonged to the two widows, the son and the two daughters of the original grantee. The question of ownership was raised later, when Ali Asghar opposed an application by one of his sisters for the grant of a maintenance allowance out of the income of the village. It was brought to a head when the Court of Wards released only half the village to Ali Asghar on the latter's attaining majority. One of the daughters, Saera Begam, is now dead; and it has been assumed in argument before us that the present possession of the parties represents correctly the devolution of the property concerned according to the rules of the Muhammadan Law. The plaintiff Ali Asghar is in possession of one half of the village of Wair Badhshahpur; he is suing to recover possession of the other half from the Court of Wards, which is holding the same on behalf of the surviving sister, Sughra Begam, and of the heirs of Saera Begam.

The parties are Sunni Muhammdans, and it lies on the plaintiff to satisfy the Court that he is not bound by the law of inheritance generally applicable to his co-religionists. He is in fact seeking to deprive his sisters of a right expressly conferred on them by the revealed law. The directions on the subject are to be found in the Fourth Chapter of the Koran, entitled "Women." I quote the relevant passages from Sale's Translation: "Men ought to have a part of what their parents and kindred leave behind them when they die and women also ought to have a part of what their parents and kindred leave, whether it be little, or whether it be much, a determinate part is due to them." Then, a few lines further on, prefaced by the emphatic words, "God hath thus commanded you concerning your children," comes the definite rule: "A male shall have as much as the share of two females, but if they be females only and above two in number, they shall have two-thirds of what the deceased shall leave."

The plea with which the plaintiff came into Court was that "according to the personal law and the custom prevailing in Palwal, the residence of the plaintiff and his ancestors, and in the District of Gurgaon, part of the Province of the Punjab, and the entire Province of the Punjab, the daughters and their issue do not in any case get a share in the paternal estate in the presence of a son." In the witness-box the plaintiff stated his case thus: "In our family the daughters do not get the inheritance in the presence of sons, widows and greatgrandsons. Daughters do not get a share even in the presence of near relatives. The custom prevails among both the Hindus

and the Muhammadans. It has been in vogue from the time of the ancestors..... I have never come across any instance of a girl who may have inherited any property, nor did any girl of our family ever inherit any property." The first Court having decided against the plaintiff, the latter's position is thus defined in the memorandum of appeal to this Court: "The succession to the estate of Asghar Ali is governed by the personal and Customary Law governing the succession to the estates of the members of his community at Palwal."

The defendants in reply may be said to have entrenched themselves behind a triple line of defence:—

(I) *First* they plead that it was not open to the plaintiff to set up, or to prove, any custom in derogation of the Muhammadan Law of inheritance.

(II) *Secondly*, while admitting that there is "a local custom at Palwal" under which daughters do not succeed to any share in the paternal inheritance in the presence of sons, they plead that this custom prevails only amongst "old *biswadars*," that is, co-sharers in landed property, and that neither the plaintiff himself, nor his father before him, nor the immediate ancestors of family could be correctly described as "old *biswadars*."

(III) *Thirdly*, they plead that the alleged custom, even to the limited extent to which its existence is admitted, is "one of the incidents" of the ownership of agricultural land in Palwal, and could in no case govern the succession to property situated in the District of Bulandshahr.

It is an essential part of the plaintiff's case, as laid before us in argument, that the evidence on the record should first of all be considered in reference to the pleadings of the defendants as above set forth. He claims, if I may so express it, that he has carried these three lines of entrenchments by direct assault. He denies the proposition of law enunciated in the first plea. He claims to have proved that his family are "old *biswadars*" of Palwal, within the meaning of the admission contained in the second plea; and he contends that, if this be once established, there is nothing on the record to warrant the limitation sought to be imposed by the third plea on the admission contained in the second.

Over and above this, the plaintiff claims to have turned the second and third lines of entrenchments by a wide flanking movement. He is in no way bound to establish a custom limited to "old *biswadars*" of Palwal. He sets up a custom which the Court is at liberty to call a "local", a "tribal" or a "family" custom, as it may think proper, but at any rate he claims to have established that, in the family to which the parties belong, daughters take no share in the paternal inheritance in the presence of sons.

The first line of defence the plaintiff may be said to have carried, though not without appreciable losses. A few years ago it would have been held by this Court to be impregnable. For many years this Court adhered inflexibly to a principle first laid down in *Surmust Khan* v. *Kadir Dad Khan* (2) and re-affirmed in *Jammya* v. *Diwan* (3). This principle was, in effect, that the provisions of section 37 of the Bengal Civil Courts Act of 1887 forbade the Civil Courts of this Province to entertain a plea that Muhammadan litigants, admittedy governed in a general way by the ordinary rules of Muhammadan Law, were subject in matters of inheritance to any custom of succession at variance with that law. It so happened that the question came up again before this Court in connection with a litigation the parties to which were not residents of this Province, but belonged to a family of immigrants from Baluchistan. In that case—*Ismail Khan* v. *Imtiaz un nisa* (4)—this Court applied the old rule. The case was taken to the Privy Council in appeal, and their Lordships directed evidence to be taken in proof of the alleged tribal or family custom. *Vide Muhammad Ismail Khan* v. *Sheomukh Rai* (*Imtiaz-un-nissa*) (5). The Court below has, therefore, rightly permitted the plaintiff to adduce evidence in proof of the custom set up by him, and that evidence it is our duty to consider.

It seems important, however, to appreciate fully what it is that the plaintiff sets out to prove. He belongs to an ancient family of Saiyeds, claiming descent from the Founder of Islam. The presumption is that

there was a time when this family observed the rules of inheritance as laid down in the revealed law. The first we hear of them in India is as a family of settlers in the town of Palwal, living presumably under Muhammadan rule and at no great distance from the capital of the Moghal Empire. From the rule of the Moghals the District of Gurgaon passes under the control of the British Government, and it belongs thereafter to a Province where the Bengal Civil Courts Act enjoins upon the Local Courts to administer to Muhammadan litigants the Muhammadan Law on questions of inheritance. It seems to lie very heavily on the plaintiff to satisfy the Court as to when and how, under the circumstances above stated, it first became an established custom in his family for the sons to deprive the daughters of the share in the paternal inheritance expressly and emphatically reserved to the latter by the words of the Prophet himself.

The second line of defence is not to be carried by direct assault in the manner suggested on behalf of the plaintiff. I feel no hesitation in holding that neither Syed Asghar Ali himself nor any of his ancestors, as to whom information is available on this record, can be correctly described as an "old *biswadar*" of Palwal. The word "*biswadar*" is derived from the *biswa*, the twentieth portion of a *bigha*, the common land measure unit of Northern India. It is defined in Platt's Dictionary as meaning the "holder of a share or shares in a co-parcenary village." It crops up again in a judgment printed at pages 132A *et seq.* of this record, a judgment arising out of a litigation in this very town of Palwal, in which it is clearly explained that Muhammadan residents of that town who are not *biswadars* are presumably governed by the ordinary law in matters of inheritance, though it is presumed that *biswadars* are not. Elsewhere in this record it is used as the equivalent of the common word "*biswadars*" or "co-sharers," familiar in the revenue records of these Provinces. The defendants have placed on the record (pages 99 and 100 R) a copy of the list of *biswadars* of *patti* Khel and *malguzars* of *Kasba* Palwal, prepared at the Settlement of 1854. This list does not contain the name of Syed Asghar Ali or of any ancestor of his, or of any member of his family. There are only two Syeds in the list, and they are recorded as in possession as "lessees" presumably holding on a farming lease the shares of certain defaulting co-sharers. Their possession must have ripened later into full ownership, for we find Syed Asghar Ali purchasing land in Palwal from these men, or their descendants. Palwal itself is not an agricultural village, it is a small town. It has been a Municipality since 1880, and its population at the census of 1901 was close on thirteen thousand souls. Its agricultural lands seem to be divided, so far as this record shows, into "*patti* Khel" and "Khel Khurd." In the latter the plaintiff admitted that he held no landed property. The houses in *kasba* Palwal and the bulk of the lands in *patti* Khel at present in his possession the plaintiff admitted to have been purchased by his father. The defendants' document above referred to seems to prove incontestably that Syed Asghar Ali owned no agricultural land in *patti* Khel in the year 1854. Nevertheless, the plaintiff claims to have proved the contrary, and to have proved it mainly out of the mouth of Sarfaraz Ali, the principal witness for the defendants, whose evidence is at pages 9, 10 and 11 of the respondents' book. The witness begins by deposing in unqualified terms that "there was no ancestral property in Palwal in Asghar Ali's family. Asghar Ali was not an old *biswadar*. The members of his family and mine used to take up service from of old." In cross-examination he was asked first about a place called "Hajipura", which seems to be a portion of the town of Palwal. He said there was an old graveyard there and a grove, which belonged to the family of which Asghar Ali and himself are members; also that Asghar Ali had, presumably after his return to Palwal with his fortune made, settled certain *Chamars* in "Hajipura." It was not seriously contended before us that anything could be made in favour of the plaintiff out of these admissions, which constitute the whole available evidence as to any family property in "Hajipura." The witness went on to depose: "Sailahgarh is four or five

hundred years old. It belongs to Asghar Ali and his ancestors. Asghar Ali purchased 500 *bighas* of land and included it in that very land. The well that is in Sailahgarh is an old one; it was built by Asghar Ali's ancestors. That well appertains to a cultivatory holding and cultivators use it. Formerly Asghar Ali used to realise the rent of that land." Along with this statement the plaintiff relies on documents printed at pages 72A, 248A, and 250A for further information about this well. On this evidence the learned Chief Justice of this Court has been satisfied that the ancestors of Saiyed Asghar Ali must have been originally landed proprietors in Palwal, and that Asghar Ali himself also must, despite the testimony to the contrary afforded by the Settlement Record of 1854, have always retained some fragment of proprietary interest in agricultural lands appertaining to that town. I admit that the evidence is somewhat doubtful and is susceptible of inferences favourable to the plaintiff's case; but on the whole I cannot see that it bears the weight of the superstructure sought to be raised thereon. To begin with, the plaintiff himself has explained precisely what the parties meant by the word "Sailahgarh." He says, "Sailahgarh is a well, and has been in our possession since the time of our ancestors. About 5 or 6 *bighas* of culturable land appertain to it." The first and oldest document, that at page 72 A, simply shows that there is "in *Kasba* Palwal" an ancient well, believed to have been built by one Muhammad Salah, that it holds drinkable water, but is used to a small extent for irrigation purposes. It is so used "under the supervision of the lessees of *patti* Khel." This was the state of things in 1863. The later documents printed at pages 248A and 250A were prepared in 1877 and in 1907-08. It is quite probable that some of the "remarks" entered in these papers represent merely attempts on the part of Sayed Asghar Ali, and of the plaintiff after him, to enhance their dignity in the eyes of their neighbours by claiming connection with the old proprietary body of *Kasba* Palwal on the strength of an ancient well, known by the name of one of their ancestors. The area actually irrigated from the well is only six or seven *bighas* in any one year; for many years in succession there is no land irrigated from it at all, and a note in the latest document shows that the well is no longer used for irrigation purposes. In any case these last two papers were prepared long after Saiyed Asghar Ali had acquired land in Palwal, in the neighbourhood of this well, and had acquired it from the very "lessees" referred to in the paper of 1863. The evidence of Sarfaraz Ali on the point seems to have been recorded in a somewhat confused fashion; but I do not understand him to mean that Saiyed Asghar Ali was collecting the rents of any cultivated lands in Pawal during the years that he was away on service. On the whole, what seems to me to be proved is something of this sort. There is in, or on the outskirts of, the town of Palwal an old well as to which the tradition is that it was built by one Muhammad Salah, this tradition may be accepted as well founded, and the evidence makes it fairly certain that this Muhammad Salah was an ancestor of Saiyed Asghar Ali. Near this well is a small patch of cultivated land which used at times to be irrigated from it. I consider it not proved that this well was primarily an irrigation well; the record of 1863 seems rather to suggest the contrary. I am not satisfied that it is proved that this land was regularly in the cultivation of the plaintiff's ancestors; but I am quite satisfied that it is not proved that, if they did cultivate it, they ever did so otherwise than as tenants holding from the proprietors of *patti* Khel. The testimony of the Settlement Record of 1854, to the effect that neither Syed Asghar Ali, nor any ancestor of his, held any proprietary rights in agricultural lands appertaining to *Kasba* Palwal stands, in my opinion, substantially unrebutted. In fact, the plaintiff's family are not "old *biswadars*" of Palwal. The plaintiff's direct assault having thus failed at the second line of defence, I do not think it necessary to discuss the third. In the form in which the plea is taken in the written statement I do not think there is much in it. What the evidence on the record does suggest to my mind is that a distinction is often drawn in the Customary Law of the Punjab between ancestral and self-acquired pro-

party. If I thought that the plaintiff had made out a strong case for the proposition that his family was governed by a tribal custom under which the ancestral lands of the family descended to the sons, to the exclusion of daughters, I might find it necessary to inquire further whether it was certain that the custom applied to property so very definitely and peculiarly "self-acquired" as the estate of Wair Badshahpur. Looking at the fact that the grant was made by the Government of the North-Western Provinces of land situated in those Provinces, there seems an opening for the presumption that it was intended to be a grant subject to the ordinary incidents of the Muhammadan Law of inheritance.

I do not press this point further because, in my opinion, the plaintiff has failed to prove that the devolution of property in his family is subject to any custom, whether local or tribal, entitling the sons of a deceased member of that family to deprive their sisters of the share in the paternal inheritance reserved to the latter by the law of Muhammad. In my opinion the plaintiff's turning movement fails as completely as his direct assault on the position taken up by the defendants.

The principal piece of evidence relied on for the plaintiff is the document known as the *riwaj i-am* (see page 225A of the record), supported by the extract from the record of the general customs prevailing in the Gurgaon District prepared in 1877—*vide* page 227A. These documents record the existence, amongst the old Saiyed families of that district, of a custom under which the right of inheritance devolves on the son, grandson or greatgrandson, and even on the widow to the exclusion of the daughters of the deceased. No doubt this custom applies to Saiyeds belonging to the agricultural classes in Palwal as well as in other parts of the district, but the conclusion I have come to is that these documents have no real bearing on the present case because we are not dealing with a family of agriculturists at all. I have already dealt with the evidence bearing on this point. In my opinion the statement of Sarfaraz Ali to the effect that "from of old" the occupation of members of this family was "to take up service" stands unshaken by anything in his cross-examination and is supported by the list of proprietors prepared in 1854. The Settlement Records which include the *riwaj i-am* were drawn up years later. We know what the Settlement Officer was told as to the Customary Law of succession amongst the "Saiyeds and Shaikhs," but we have nothing on the record as to the instances put forward at the time to prove the existence of this custom amongst the Saiyed families of Palwal. It was contended that this particular *riwaj-i am* had been accepted by the Punjab Chief Court as a particularly reliable record of custom; but we were referred on behalf of the defendants to another case in which the same Court had refused to act upon it, in the absence of evidence as to the instances put forward at the time as the basis for the Settlement Officer's conclusions. When this Settlement took place the District of Gurgaon had not long been transferred to the Punjab Government, it was not difficult for any Saiyed family or for any group of such families to agree amongst themselves that they would find it convenient to accept a custom generally prevalent amongst Hindus and amongst the descendants of Hindus converted to Islam, and so rid themselves from the irksome obligation of following the strict requirements of Muhammadan Law on the subject of female inheritance. The mere fact that those leaders of the Saiyed community in the Gurgaon District or in *kasba* Palwal in particular, who were questioned on the subject by the Settlement Officer, told him that in their community the daughters did not inherit in the presence of sons, grandsons, great-grandsons or widows does not seem to me a very strong piece of evidence, when I do not know what instances they laid before the Settlement Officer in proof of their assertion. In any case the Settlement Officer's inquiries were limited to the question of the customs prevailing amongst agriculturists; he had nothing to do with the question whether what one may call "Punjab custom" had or had not ousted Muhammadan Law on questions of inheritance amongst ancient Saiyed families residing in the town of Palwal, holding no share in the proprietary rights in respect of the agricultural lands appertaining to Palwal and depending for

their livelihood, in the main, on military or other service.

One aspect of the case which I must not ignore, and which I can most conveniently deal with at this point, is the argument by which the plaintiff seeks to support his case by inferences drawn from the conduct of other members of his family, and more particularly of his mother and step-mother. Stress is laid on the fact, already noticed, that the plaintiff Ali Asghar was recorded as sole proprietor of Wair Badshahpur after his father's death. Even more emphatically our attention is called to the fact that the plaintiff is in sole and undisputed possession of the property at Palwal itself. The argument is that this state of things would be impossible if the widows of Saiyed Asghar Ali, and his daughters as they came of age, had not known perfectly well that they had no claim to succeed to any portion of the estate in the presence of the plaintiff. There is no question of any estoppel ; it is merely a matter of inference from conduct. To my mind the possession of the property at Palwal means nothing. The ladies may have considered themselves bound by an "incident" of the tenure of landed property in that place, such as they have (I think erroneously) set up in the pleadings. Apart from this, it remains to be proved that the property at Palwal is worth fighting about. The papers of 1907 08 (page 250A) show that even the lands acquired by Saiyed Asghar Ali near the ancestral well were, at that date, still in possession of the mortgagees. The old gentleman left a heavily encumbered estate behind him ; the Palwal property was thought to be barely sufficient to support the widows and young children. Later on we find them complaining that they cannot live on it at all. For aught that appears from this record, the Palwal property may consist wholly of mortgaged lands and residential houses acquired by Saiyed Asghar Ali in the days of his greatness, which the family does not care to part with but finds it a burden on their resources to keep up. As for the conduct of the two widow ladies, it was at most ambiguous and capable of more than one interpretation. Certainly, when they were importuning the Local Government to take the Bulandshahr property under the Court of Wards they put the plaintiff well into the background and themselves forward as the widows of a man who had deserved well of the Government, who had an interest of their own in what remained of his estate. The very fact that both the widows jointly obtained the guardianship of the minor plaintiff is inconsistent with the idea that they regarded him as sole owner of Wair Badshahpur. A very shady episode in this litigation is represented by certain evidence as to attempts made by the plaintiff to obtain from his sister Sughra Begam some sort of relinquishment of her rights, or admission that she had none. This evidence was touched on very lightly in argument on behalf of the appellant, it is enough to say that it does not help his case.

Having said all this, I feel that I have not yet dealt with the most substantial, certainly the bulkiest, part of the appellant's case. He has tendered a mass of oral evidence directed towards proving the prevalence in the Punjab generally, in the District of Gurgaon in particular, and even in the town of Palwal, of the custom that daughters do not take any share in the paternal inheritance. He claims to have proved at least one hundred instances in which daughters have been excluded from the share in the inheritance reserved to them under the Muhammadan Law. Of these instances thirty-four are claimed as coming from Palwal itself, thirty-one more from other villages in the same Tahsil, and seventeen more from other parts of the Gurgaon District. Now it can be readily ascertained from any standard book of reference, or digest of the decisions of the Punjab Chief Court, that the custom of excluding daughters and their issue from all share in the paternal inheritance is widely prevalent amongst the agriculturists of the Punjab. The custom is of Hindu origin, arising from the custom of exogamy and the reluctance to see ancestral landed property pass out of the possession of the family, sept or clan. It is beyond question that many Muhammadan families, descendants of converts from Hinduism, have never consented to follow the precepts of Islam in this matter, but have retained the ancient custom in their families of excluding daughters from inheritance. It cannot be denied there is abundant evidence

of the fact on this record, that the position of Saiyed and other families claiming descent from Muhammadan immigrants is not quite the same. Even the *riwaj-i-am* on which the plaintiff so greatly relies distinguishes the case of the Saiyeds and other ancient Muhammadan families from that of the majority of their co-religionists; it represents them as permitting daughters to inherit in preference to more distant kindred, but excluding them only in favour of a son, a grandson or a widow of their deceased father. The oral evidence tendered by the plaintiff betrays a constant fluctuation and conflict of testimony on this point, some witnesses say bluntly, "in our family daughters never succeed," others limit the custom of exclusion in the manner suggested by the *riwaj-i-am* or to some lesser extent. Our attention was drawn in argument to a significant passage in the last Punjab Census Report as illustrating the attitude of old Muhammadan families on this point; they constantly betrayed marked reluctance to admit that they did not follow the precepts of the Koran in matters of inheritance as in all others; but would sometimes put forward the explanation that, in their families, daughters were always persuaded to renounce their right of inheritance.

This suggests an aspect of the case which I think of considerable importance. In Muhammadan families generally the girls are married young, almost certainly while still minors. In the case of an inheritance opening in favour of a married daughter the question of her claiming the share reserved to her by Muhammadan Law would be a matter for her husband and his family to decide. She may have married into a family in which the custom of daughters' exclusion prevails and her husband's people may have felt that they could not consistently claim a share for a daughter-in-law while refusing a share to their own daughters. Or again the whole question may have been settled by a bargain, express or understood, between the two families at the time of the marriage. In cases where the inheritance opens in favour of unmarried girls, the management of the property would naturally pass into the hands of a brother, mother or stepmother. The question whether any of the girls would ever claim her strict rights in the matter of the paternal inheritance would depend on the extent of the property, the way in which the girls were treated, and more particularly, on the arrangements made for their marriage.

In view of these considerations the mass of oral evidence relied on by the plaintiff does not greatly impress me. Much of it is devoted to proving the general prevalence of the custom, and has but little bearing on the case of a Saiyed family, residents of a town and not primarily agriculturists. Then again, there is no definite instance of a brother depriving a sister of her share in the paternal inheritance, after contest, or in the teeth of her protests. Out of the whole number of instances sought to be proved there are only eight in which the persons concerned are both Saiyeds and residents of Palwal. In two of these cases, those of the family of Yakub Ali (deposed to by Mohammad Yasin, page A3, and a number of other witnesses) and of Amir Ali (*vide* the witness Ali Abbas, page 52A), the persons concerned are old *biswadars* of Palwal. That leaves six instances, Irshad Ali (page A3), Barkat (page A 27), Ausaf Ali (pages A32 and A 35), Irshad Ali II (page A52), Jiwan Ali (page A 56) and Bahadur Ali (page A58), in which the exclusion is alleged to have taken place in families mainly non-agricultural, and in respect of property consisting principally of dwelling-houses. Except for Ausaf Ali's case, each of these instances is proved by a single witness. We know nothing of the circumstances beyond the bald statement that the daughter or daughters concerned did not receive a share in the house property. To take the last instance, that of Saiyed Bahadur Ali (page A58), we are told that he left four sons and two daughters and that the daughters took no share in the paternal estate. We do not know to whom and under what circumstances the girls were married or where they were living at the time of their father's death: the alleged "exclusion" may amount to nothing more than this, that the sons occupied and shared amongst themselves residential houses for which the daughters had no use, and that the whole matter was amicably settled by some assignment of jewelry or other moveable property of which the witness knew nothing. I do not say that the whole of the evidence can be disposed of by considerations such as these. Instances like those of Ausaf Ali (deposed

to by his own son Imtiaz Ali, page A35) and Irshad Ali, who is said to have owned some land as well as house property, must be regarded as going some way in support of the plaintiff's case. On the whole, however, the oral evidence seems to me to fall a good deal short of proving an ancient, certain and invariable custom.

I would, therefore, concur in dismissing this appeal with costs, including fees on the higher scale.

BY THE COURT.—The appeal is dismissed with costs, including fees on the higher scale.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL CASE NO. 1462 OF 1916.

June 12, 1917.

*Present*:—Mr. Justice Scott-Smith.

IMAMI—PLAINTIFF—APPELLANT

*versus*

ALLAH DIYA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Pre-emption—Re-sale to vendor before suit, effect of—Right of pre-emption, whether defeated.*

A claim to pre-emption cannot be defeated by the re-sale of the property to the original vendor, even though the re-sale takes place before a suit for pre-emption is instituted. [p. 768, col. 1.]

*Sukha* v. *Arura Mal*, 135 P. W. R. 1908; 165 P. L. R. 1908, followed.

*Liakat Husain* v. *Rashid-ud-Din*, 29 A. 125; 3 A. L. J. 794; A. W. N. (1906) 313, dissented from.

**Second appeal from the decree of the District Judge, Ambala, dated the 24th March 1916, reversing that of the Munsif, 1st Class, Ambala, dated the 30th August 1915, decreeing the claim.**

Lala *Durga Das*, for the Appellant.

Messrs. *Muhammad Iqbal* and *Badr-ud-Din Kureshi*, for the Respondents.

JUDGMENT.—The facts of the case out of which the present appeal has arisen are as follows:—

On the 23rd July 1914 Muhammad Idris, defendant No. 2, sold a house in Ambala City to Allah Diya, defendant No. 1, for Rs. 300. On the 10th August 1914 Allah Diya re-sold it to Sharif Hussain defendant No. 3. the minor son of Muhammad Idris the original vendor. The plaintiff brought a suit for pre-emption as regards the original sale in favour of Allah Diya. The first Court gave him a decree for pre-emption on payment of Rs. 300. Upon appeal the District Judge held that the sale to Sharif Hussain was *benami*, the real vendee being his father Muhammad Idris, original vendor of the house. In other words, the sale was really a re-purchase by the vendor which, in the opinion of the District Judge, he was perfectly entitled to make in order to defeat the pre-emptor. The original vendor is said to have a right of pre-emption by reason of vicinage. The District Judge relying upon *Liakat Husain* v. *Rashid-ud-Din* (1) held that plaintiff's claim to pre-emption must fail as he had no better right than Muhammad Idris, the original vendor.

The plaintiff has filed a second appeal to this Court. The point as stated by the admitting Judge is whether there was any legal bar to the original owner and the vendor defeating the would-be pre-emptor by purchasing the house from his vendee prior to suit and taking his stand on the plea that he, the original owner and new vendee, owns the adjoining house. The ruling relied upon by the lower Appellate Court reported as *Liakat Husain* v. *Rashid ud-Din* (1) is no doubt against the plaintiff, but the previous decisions of this Court are in support of the proposition that such a re-sale cannot defeat the pre-emptor's rights. The matter was fully discussed in Civil Appeal No. 886 of 1902, which is reported as *Lachhu* v. *Maheshu* (2). There it was held that whenever a pre-emptor sues for pre-emption upon a sale and it is found that before his suit the vendee has transferred the property to a third party, the test is whether the pre-emptor has a superior right of pre-emption in regard to the first sale as compared with the transferee, and that where it is re-conveyed to the original vendor, the pre-emptor must succeed as the former cannot have any right of pre-emption whatever in regard to the sale which he himself made. In that case the Division Bench followed the cases reported as *Kahna* v. *Dewa Sing* (3) and *Shiv Charn Singh* v.

(1) 29 A. 125; 3 A. L. J. 794; A. W. N. (1906) 313.
(2) 134 P. W. R. 1908.
(3) 62 P. R. 1879.

*Secretary of State*, (4), and in Civil Appeal No. 493 of 1908 reported as *Sukha* v. *Arura Mal* (5) a single Judge of this Court took the same view and refused to follow *Liakat Husain* v. *Rashid-ul-Din* (1). I agree with the decisions of this Court and following them hold that the plaintiff was entitled to a decree and that his claim cannot be defeated by the re-sale of the property to the original vendor, even though that re-sale took place before the present suit was instituted.

In the lower Appellate Court the plaintiff filed cross-objections as to the price fixed by the first Court. The price entered in the sale-deed was Rs. 300, but the first Court found that Rs. 100 out of that was fictitious and that only Rs. 200 was the price actually fixed. I agree with that finding and I, therefore, accept the appeal and give the plaintiff a decree for possession by pre-emption of the house in dispute on payment of Rs. 200. If plaintiff has not already deposited in Court the sum fixed, he should deposit it within two months of this date. On his failing to do so the suit will stand dismissed with costs. If he pays in the money as ordered, his costs in all the Courts shall be paid by the defendants.

*Appeal allowed.*

(4) 80 P. R. 1888.
(5) 135 P. W. R. 1908; 165 P. L. R. 1908.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3196 OF 1915.

June 15, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

AMULYA CHANDRA ROY CHOW. DHURY—DEFENDANT—APPELLANT

*versus*

SHIVA KRISHNA BOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Purchaser of lessee's interest, liability of, to pay interest stipulated in lease—Interest on arrears of rent, whether payable down to date of decree in rent suit.*

The purchaser of a leasehold is bound to pay interest on the rent falling into arrears at the rate stipulated in the contract of lease. The contractual rate ought to be allowed by the Court from the date of institution of the suit down to the date of the decree. [p. 769, col. 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 27th August 1915, affirming that of the Munsif, 2nd Court at that place, dated the 30th July 1914.

FACTS material to the report will appear from the following extracts from the Munsif's judgment:—

"In this case, the two plaintiffs together seek to recover arrears of rent in respect of a 9½-annas share of the plaint lands on account of the years 1316 to 1319 *B. S.* as per details set forth in the schedule to the plaint. There is claim for interest on the arrears at the rate of 5 per cent. per mensem.

* * * * *

"The plaintiffs will, therefore, have rent and cesses for the period in suit proportionate to the said 8½-annas share. They will also have interest on the arrears at the rate of 5 per cent. per month as claimed. The *kabuliyats* of the defendant's predecessor, which were executed long before the enactment of the Bengal Tenancy Act, stipulate for the payment of interest on defaulted *kists* at that rate and no reason has been shown why that contract should not be enforceable or enforced. It appears that the said contract was already enforced in the previous suit. The defendant admits to have satisfied that decree. It is no valid defence to the claim to say that the plaintiffs have not always realised interest at that rate."

Against this decision of the Munsif the defendants preferred an appeal which was dismissed with the following observations:—

"* * * * As regards the first point it appears that the name of the plaintiff No. 1 is registered in respect of the said share under Act VII (B. C.) of 1876. Under section 60 of the Bengal Tenancy Act the defendant is not entitled to plead that the rent for that share is due to any third person. As regards the second point, it appears that the interest claimed is payable under registered *kabuliyats* which were executed long before the passing of the Bengal Tenancy Act. The plaintiffs are, therefore, entitled to get interest at the rate claimed."

Babu *Brojolal Chakraburty* (with him Babu *Susil Coomar Bose*), for the Appellant.—This is a suit for arrears of rent. The question in controversy is as regards the amount of interest allowed. The lower Courts have allowed 60 per

cent. (Refers to section 74, Indian Contract Act). It is not an ordinary case of bond-debt, it is a case of arrears of rent. Is the Court bound to give plaintiff a decree at such an exceedingly high rate of interest? The Court was not bound to do so by reason of default. The Judge thinks that because it is in the written contract, it should be allowed. There is no question of money being insecure here. Then again under section 34, Civil Procedure Code, the Court has discretion as to interest after institution of suit. The Court has not exercised its discretion. The Judge not having exercised his discretion as enjoined by section 34, his allowing of interest at 60 per cent. even after the institution of the suit is erroneous in law. Under law and equity a Court has ample powers to relieve a party against liability to pay interest at an exorbitant rate. Interest at the rate of 60 per cent. is too much, it can never be urged by the landlord that by non-payment of rent on the due dates, the landlord had been put to such a loss that he would not be compensated unless he got interest on the arrears at 60 per cent.

Babu *Bepin Behari Ghose II*, for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This appeal must be dismissed. The defendant appeals against the rate of interest which he has to pay according to the terms of the contract under which the property is held. He purchased the property with full knowledge apparently of what the terms of the contract were. He knew that, if he did not pay his rent on the proper day, the rent in arrears would carry interest at the heavy rate of 60 per cent. per annum. He might have avoided this liability, *first* of all, by not purchasing the property and, *secondly*, by paying his rent in proper time. It seems that there is no case of hardship against the defendant-appellant at all. He has put his head deliberately into the noose and for good or bad, he is a tenant holding his land at a rent which carries interest at 60 per cent. per annum when in arrears. The other point argued is that the learned Judge of the lower Appellate Court ought not to have allowed interest at the contractual rate from the date of the institution of the suit down to the date of judgment. The learned Judge says that that is the rate agreed upon and, therefore, presumably there is no reason, because the defendant has put the plaintiff to the trouble of coming to Court to realize the rent in arrears, why the defendant should pay a rate smaller than the contractual rate. Otherwise, it would be encouraging the defendant who is liable to pay interest at 60 per cent. per annum on the rent in arrears to avoid payment every time when the rent becomes due, on the ground that the rent during the pendency of the suit, which by a judicious set of movements and applications for postponement can, we all know, be extended for a long period of years, should be at a smaller rate. I think the learned Judge exercised his discretion very wisely, when he held that if the defendant did not pay his rent in time he would have to pay the contractual rate of interest. I see no reason why we should dissent from the view taken by the learned Judge of the lower Appellate Court. The present appeal fails and must be dismissed with costs.

NOWBOULD, J.—I agree.

*Appeal dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 632 OF 1915.

February 28, 1917.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

VENKATAGIRI PATTAR AND ANOTHER—PLAINTIFFS NOS. 1 AND 3—APPELLANTS

*versus*

MANAVIKRAMA, THE ZAMORIN RAJA AVERGAL OF CALICUT—DEFENDANT—RESPONDENT.

*Malabar Law*—Adima *or* anubhavam *tenure, nature of—Inalienability.*

Inalienability is a characteristic of *adima* or *anubhavam* tenure. [p. 770, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Appeal Suit No. 457 of 1914, preferred against that of the District Munsif, Alatur, in Original Suit No. 148 of 1913.

Messrs. *C. Madhavan Nair* and *P. Appu Nair*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.—Counsel for appellant argues that the lower Appellate Court was wrong in holding that inalienability is a condition of *adimayavana* tenure: and contends that the decision in *Ukkandath* v. *Puliyakot Kunhi Kuttan* (1) of Sadasiva Aiyar and Hannay, JJ., relied on by the Subordinate Judge, proceeds only on a consideration of the terms of the particular document in that case. We are clear on a perusal of the judgment and record that this is not so. The decision of the Sudder Court in its proceedings dated 5th August 1856, which is quoted at page 307 of Moore's Malabar Law, has been referred to as authoritative in two judgments of this Court, *Theyyan Nair* v. *Zamorin of Calicut* (2) and *Achutha Menon* v. *Sankaran Nair* (3), and lays down in unmistakeable terms that inalienability is a characteristic of *adima* or *anubhavam* tenure. It has not been seriously argued that any distinction is to be drawn in this respect between tenures termed *adimayavana* or *anubhavam* and as shown at pages 195-6 of Moore's Malabar Law this nomenclature merely varies with the caste of the grantee. *Vide* also *Theyyan Nair* v. *Zamorin of Calicut* (2).

The only other point sought to be argued is one of estoppel based on the defendant's receipt of *michavaram* from plaintiffs This was not raised in either of the lower Courts and we cannot allow it to be set up in second appeal.

The second appeal is dismissed with costs.

*Appeal dismissed.*

V.R.P.

(1) 27 Ind. Cas. 10.
(2) 27 M. 202.
(3) 12 Ind. Cas. 1007; (1911) 2 M. W. N. 520; 22 M. L. J. 118; 10 M. L. T. 521; 36 M. 380.

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1433 OF 1916.

May 22, 1917.

*Present*:—Mr Justice Chapman and Mr. Justice Atkinson.

SAHDEO SINGH—APPELLANT

*versus*

KARIMAN SINGH AND OTHERS—RESPONDENTS.

*Contract Act (IX of 1872), s. 74—Mortgage—Mortgagor, stipulation by, to pay by instalments—Default—Interest, whether penalty.*

A mortgagor undertook to pay the mortgage-money in instalments and it was agreed that in case of breach of promise the creditors would have the right to realize the instalment money as regards the expired and unexpired period, principal with interest at 2 per cent. per month from the expiration of the *kist* till realization:

*Held*, that the stipulation to pay the interest was not by way of penalty.

Appeal from a decision of the District Judge, Shahabad.

Mr. *Syad Muhammad Tahir*, for the Appellant.

Messrs. *Parmeshwar Dyal* and *Rajendra Prasad*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit upon a bond. The mortgagor undertook to pay in instalments and it was agreed that in case of breach of promise the creditors would have the right to realise the instalment money as regards the expired and unexpired period, principal with interest at 2 per cent per month from the expiration of the *kist* till realization. Both the lower Courts have agreed that there is no reason why the bond as it stands should not be given effect to. In appeal before us it is first of all contended that the intention was that the interest should fall due only at the expiration of the period of the *kists*, although it was agreed that on failure to pay an instalment the whole of the money should fall due. Such an interpretation appears to be quite impossible. The next contention is that the stipulation of the payment of interest was by way of penalty. It does not appear to us to be a stipulation by way of penalty and if it was, the promise being to pay only at the rate of 2 per cent. per month was in the circumstances of the case stated in the judgment of the first Court, was rightly allowed.

The appeal is dismissed with costs.

ATKINSON, J.—I agree.

*Appeal dismissed.*

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PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1419 OF 1916.

May 21, 1917.

*Present*:—Mr. Justice Mullick.

RAGHUNATH KURMI AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

DEO NARAIN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal—Finding on particular point against party in whose favour decree is made*—Res judicata.

Where it is necessary to decide a particular point between the parties to the suit and the Court comes to a finding upon that point, the finding operates as *res judicata* between them and the aggrieved party can prefer an appeal against that finding, although the decree is in his favour. [p. 772, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Mr. *Abani Bhushan Mukerji*, for the Appellants.

Messrs. *Krishna Sahai*, *Khurshed Husnain* and *Nirsu Narain Sinha*, for the Respondents.

JUDGMENT.—The case of the plaintiffs is that they hold 3 *raiyati* holdings under defendants Nos. 2 and 3, but that while the Record of Rights shows them correctly to be the tenants of defendants Nos. 2 and 3 in respect of the holding of 1 *bigha* 1 *cottah*, bearing a rental of Rs. 3-10-3, it wrongly shows them to be the tenants of defendant No. 1 in respect of the other two holdings which measure 2 *bighas* 19 *kottas* and 2 *bighas* 2 *kottas* 18 *dhurs*, respectively. They also allege that this defendant has been wrongly shown in the Records of Rights to be a tenure-holder under defendants Nos. 2 and 3 in respect of these holdings and further that the Record of Rights has wrongly omitted survey plots Nos. 348 and 482 from the holdings. The plaintiffs accordingly ask for the following reliefs:—

(1) That the relationship of landlord and tenant does not exist between the plaintiffs and defendant No. 1;

(2) That the defendant No. 1 is not a tenure-holder; and

(3) That plots Nos. 347, 348 and 482 are not parts of the tenure of defendant No. 1 but parts of the *raiyati* holdings of the plaintiff.

The suit was dismissed. There was an appeal by the plaintiffs and a cross-appeal by defendant No. 1 with the result that the appeal was dismissed, while the cross-appeal was decreed. The subject of the cross-appeal was this, that the Trial Court had found that the plaintiffs were tenants under defendant No. 1 in respect of the holdings in suit and that defendant No. 1 in his turn was a tenure-holder under defendants Nos. 2 and 3.

The case of defendant No. 1 in the trial Court was that there was no connection between him and the plaintiffs and that the Record of Rights to that extent was incorrect. Therefore, the order of the learned Subordinate Judge on appeal was in favour of defendant No. 1 and the effect of his order decreeing the cross-appeal was that defendant No. 1 was a tenure-holder and that the plaintiffs had no *raiyati* interest in the lands in suit.

With regard to the finding as to plots Nos. 347, 348 and 482 the plaintiffs have not taken any objection before me and the finding that these plots do not belong to the plaintiffs is conclusive and final. The only grievance that the plaintiffs have in second appeal is that the learned Subordinate Judge has made a decree declaring that the plaintiffs are not *raiyats* of the land at all. As this declaration will be *res judicata* they desire that the learned Subordinate Judge's decree should be corrected and the Munsif's decree restored. The point of law taken by the learned Vakil for the plaintiffs before me is that the whole suit having been dismissed by the Munsif, it was not competent to defendant No. 1 who was the successful party to prefer either an appeal or a cross-appeal, and it is observed that the Code only allows appeals against decrees; it allows no appeal against a finding so that if the decree of the Munsif was in favour of defendant, the finding as to the plaintiffs' tenancy under the defendant must be treated as merely *obiter* and could not be attacked in appeal. Now it is quite clear that although the learned Munsif's decree is expressed in very general terms, it must be construed as

a decree refusing the reliefs prayed for in the plaint and which have been set out in full in the opening paragraphs of the decree. One of these reliefs, as has already been shown, was for a declaration that the plaintiffs were not the tenants of defendant No. 1 and a distinct and specific issue was framed for the purpose of determining this question. The learned Munsif decided the question against the plaintiffs and held that they were *raiyats* of defendant No. 1. The decree of dismissal, therefore, must be construed as involving the declaration that the plaintiffs were the *raiyats* of defendant No. 1. Now admittedly the defendant No. 1 is aggrieved by such a declaration and, therefore, he had the right to attack by cross-appeal that part of the decree. He might also without having preferred a cross appeal have supported the decree of the Munsif by filing a cross-objection against the finding as to the tenancy of the plaintiffs and by satisfying the Subordinate Judge that that finding was wrong. But the defendant chose to prefer a cross-appeal and there was no obstacle in law to his doing so. It is not really necessary for the purposes of this second appeal to go into the question whether or not the finding of the Munsif as to the tenancy of the plaintiffs under defendant No. 1 would have been *res judicata* in any event and whether the learned Vakil for the appellants is right in contending that it would not have been *res judicata* if the Subordinate Judge had not embodied that finding in his decree. Reliance in this connection is placed upon *Jamaitunnissa* v. *Lutfunnissa* (1) and *Run Bahadur Singh* v. *Lucho Koer* (2). No doubt these cases are authority for the proposition that where a particular finding is not necessary for the purposes of the decree made by the Court, then that finding must be treated as an *obiter dictum* but that is not the case here. Here the declaration that the plaintiffs are the *raiyats* of the defendants, was one of the main reliefs of the suit and the dismissal of the suit means that that declaration has been refused by the Munsif and the finding that the plaintiffs were the tenants of defendant No. 1 was a vital and integral part of the decree. If it were necessary to decide this point, my opinion would be that the finding is *res judicata*, apart from the fact that the Subordinate Judge's order is now definitely incorporated into the decree.

The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

(1) 7 A. 606; A. W. N. (1885) 89; 4 Ind. Dec. (N. S.) 657.

(2) 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1154 OF 1913.

April 30, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

PHARAYA MAL AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

ILAHI BAKHSH AND ANOTHER—PLAINTIFFS,

MUHAMMAD HUSSAIN—DEFENDANT—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 100, 101—Finding of fact grossly erroneous—Appeal, second, whether maintainable—Punjab Courts Act (III of 1914), s. 41.*

The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. [p. 774, col. 2.]

*Durga Chowdhrani* v. *Jewahir Singh Chowdhri*, 18 C. 23; 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16, followed.

Where in a suit for pre-emption the lower Appellate Court found that a portion of the consideration stated in the sale-deed was fictitious and that the price had not been fixed in good faith, the finding being based on the evidence of the vendee produced by the plaintiff as well as certain books of account:

*Held*, that the Chief Court was precluded from disturbing this finding in second appeal, even though the correctness of the lower Appellate Court's conclusions was open to doubt. [p. 774, col. 2.]

Second appeal from the decree of the Divisional Judge, Gujranwala Division at Lahore, dated the 15th March 1913, varying that of the District Judge, Multan, dated the 19th December 1911, decreeing claim on payment of Rs. 9,000.

FACTS of the case are given in sufficient detail in the judgment.

The Hon'ble Mr. *Muhammad Shafi, K. B.*, for the Respondents, raised the preliminary objection that the question involved was a pure

question of fact and that the finding of the lower Appellate Court being final, no second appeal lay.

The Hon'ble Pandit *Sheo Narain*, *R. B.*, for the Appellants.—The finding of the lower Appellate Court is based on no evidence whatever and can be upset in second appeal. *Harendra Lal Roy* v. *Hari Dasi Debi* (1). The Court has arbitrarily disallowed certain items, there is no evidence of the return of the purchase money and the Local Commissioner rejected our evidence on no grounds. It is enough if the price was fixed in good faith. The phrase "good faith" has in the new Act been retained only as regards the fixing of the price and not with regard to payment. Ellis's Law of Pre-emption in the Punjab, Edition I, page 352. The Court has applied a wrong *ratio decidendi* and its finding is perverse.

Mr. *Muhammad Shafi*.—The appellant's argument amounts to this that the finding is based on no evidence and, therefore, it is grossly erroneous. That is no ground for second appeal. *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2). The suit was instituted in 1911 and is, therefore, governed by the Act of 1905. The onus is on the vendee to prove that the price was fixed or paid in good faith.

[SCOTT-SMITH, J.—Do you mean to say that if the vendee has a charge on the land he must prove everything even after a long time?]

Yes, because it is a matter between the vendor and the vendee and not between the pre-emptor and the vendee. *Gulab* v. *Ram Singh* (3).

[SCOTT-SMITH, J.—It does not appear that the lower Appellate Court has considered all the evidence on the record. Its finding is perverse.]

Even if so, the Privy Council ruling is clear and this Court as a Court of second appeal has no jurisdiction to disturb that finding.

(1) 22 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 1 L. W. 1050; 16 Bom. L. R. 400; 12 A. L. J. 774 (P. C.).

(2) 18 C. 23 at p. 30; 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec (N. S.) 16.

(3) 102 P. R. 1890.

Mr. *Sheo Narain*, in reply.—A finding based on no evidence is no finding in law and is liable to be set aside even in second appeal.

[SCOTT-SMITH, J.—The onus was on your client. How is it a case of no evidence?]

Where there are deeds of a prior date what is sold is the equity of redemption. The deciding factor is the time that elapses between the prior charge and the sale. The standing charge ought to be accepted as such and accounted for.

JUDGMENT.—On the 14th of August 1910 one Muhammad Hussain sold the property in suit to Lal Chand and Pharaya Mal for Rs. 9,000. On the 14th of January 1911, the plaintiffs-respondents Ilahi Bakhsh and Murad Bakhsh instituted a suit for possession of the said land by pre-emption, alleging that the price as shown in the sale-deed was not fixed or paid in good faith. The consideration was made up as follows :—

1. Rs. 2,100 for a previous mortgage deed with possession of the land in suit.
2. Rs. 5,10 4-0 for interest on No. 1 and cost of improvements.
3. Rs. 800 due on a mortgage of Khakarawala well in favour of Pharaya Mal, vendee, and one Sohara Mal.
4. Rs. 469-12-0 on account of a decree against the vendor and in favour of a certain Pharaya (Bhambri). [In the sale-deed it is stated that the decree-holder is really Pharaya Mal, vendee, but this appears to be a mistake.]
5. Rs. 3,050 for a decree in favour of Lal Chand, vendee, and the widow of Sohara Mal.
6. Rs. 170 due to Ilahi Bakhsh and Khuda Bakhsh tenants of the vendor, which debt is undertaken by Pharaya Mal, vendee.
7. Rs. 125 paid in cash.
8. Rs. 125 for stamp and other deed expenses.
9. Rs. 1,650 paid in cash before the Sub-Registrar.

The Trial Judge held that out of this Rs. 9,000, Rs. 7,530 had been paid in cash, the balance of the consideration money being made up of interest payable on the moneys actually paid. He accordingly decreed the suit on payment of Rs. 9,000.

GOWHAR ALI *v.* ENAYAT ALI.

On appeal by the plaintiffs to the Divisional Judge it was held that, as a matter of fact, out of Rs. 9,000 only 5,016-4-0 had been paid in cash. Of the balance it was held that Rs. 1,700 had been fictitiously entered and the balance consisted of interest. Both the lower Courts held that the market value of the property was Rs. 6,000, and the learned Divisional Judge, therefore, granted the plaintiffs a decree for pre-emption on payment of Rs. 6,000. Against this decree the defendants-appellants, vendees, have preferred this second appeal through Mr. Sheo Narain, and we have heard Mr. Shafi on behalf of the plaintiffs-respondents.

Mr. Shafi urged that inasmuch as the learned Divisional Judge had held that Rs. 1,700 out of the consideration stated in the deed was fictitious, and that the price had not been fixed in good faith, this was a finding of fact which could not be disturbed on second appeal, and we were referred to *Durga Chowdhrani* v. *Jewahir Singh* (2). Mr. Sheo Narain contended that *Harendra Lal Roy* v. *Hari Dasi Debi* (1) applied and that where findings have been arrived at on no evidence they could be challenged on second appeal, and he endeavoured to show us that there was no evidence to support the finding with regard to this sum of Rs. 1,700. This sum is made up of two items—of Rs. 700 and Rs. 1,000 respectively. With regard to the item of Rs. 700 which forms a part of item No. 1 [Rs. 2,100], the learned Divisional Judge holds that inasmuch as there is no receipt from the vendor and no evidence that this sum was actually paid, it must be regarded as fictitious. With regard to the item of Rs. 1,000, it was admitted that this sum was actually paid in cash before the Sub-Registrar. The onus of proving that this sum had been subsequently returned clearly lay on the plaintiffs-respondents. *Gulab* v. *Ram Singh* (3).

Mr. Shafi urged that the evidence of the vendee, who was put into the witness-box by the plaintiff, clearly shows that this sum of money could not possibly have been paid by Pharaya, who is alleged to have made the payment. The learned Divisional Judge has considered this evidence as well as the account books produced by Pharaya and Lal Chand, and on this evidence has held that it was impossible for Pharaya to have paid this money. In *Durga Chowdhurani* v. *Jewahir Singh* (2) their Lordships of the Privy Council held that there is not jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Even if we felt inclined to doubt the correctness of the conclusions arrived at by the learned Divisional Judge on this evidence, it seems clear that we are precluded from disturbing his finding in a second appeal. In these circumstances it follows that the finding that the price in the sale-deed was not fixed in good faith is one that cannot be challenged in second appeal and we, therefore, reject this appeal with costs.

*Appeal rejected.*

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## PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 47 OF 1917.

June 6, 1917.

*Present*:—Sir Edward Chamier. KT., Chief Justice, and Mr. Justice Mullick.

*Sheikh* GOWHER ALI—APPELLANT

*versus*

*Sheikh* ENAYAT ALI—RESPONDENT.

*Bengal Tenancy Act* (*VIII B. C. of* 1885), *Sch. III, Art.* 3, *applicability of—Dispossession of tenant by landlord as auction-purchaser of* jote—*Suit to recover possession—Limitation.*

Article 3 of Schedule III of the Bengal Tenancy Act applies to a suit by a tenant to recover possession of the holding from the landlord, whether the dispossession of the tenant was by the landlord in his capacity of landlord or that of an auction-purchaser of the *jote*. [p. 775, col. 1.]

Letters Patent Appeal against the decision of Mr. Justice Atkinson, dated the 5th February 1917, reported as 38 Ind. Cas. 777, confirming that of the Subordinate Judge, Purnea, dated the 30th November 1914, reversing that of the Additional Munsif, Purnea, dated the 10th April 1913.

Mr. *Lalmohan Ganguli*, for the Appellant.

Mr. *Muhammad Mustafa Khan*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The only question in this appeal is whether the suit is governed by the provisions of Article 3, part I, Schedule

III of the Bengal Tenancy Act, which provides a period of two years for a suit to recover possession of land claimed by the plaintiff as an occupancy *raiyat* or under-*raiyat*. The two years are to run from the date of dispossession. The facts found are that the plaintiffs are tenants of an area of about 51 *bighas*. The defendant owns a 12-annas 6-pies share as a co-sharer *malik* of the village. The plaintiffs' case was that at the survey proceedings the defendant got his name entered as *milkdar* in respect of the land in question, suppressing the fact that the plaintiffs were *raiyats* of the land. The Settlement Authorities entered the land as being in *khas* possession of the defendant. The plaintiffs state that on the strength of the entry made by the Settlement Authorities, the defendant ejected them from their *jote*. It has been found that the suit was brought about seven years after the date on which the plaintiffs were dispossessed. The contention is that the special period of limitation provided by the Bengal Tenancy Act does not apply, inasmuch as the defendant when dispossessing the plaintiffs was not acting in the capacity of landlord The Court of first appeal assumed that the suit was governed by the 12 years' rule of limitation and did not consider the question in what capacity the defendant had ejected the plaintiffs. The learned Judge of this Court before whom the case came held that the defendant, when dispossessing the plaintiffs, was acting as purchaser of the *jote* right There appears to be no direct evidence of this but whether it was so or not, I am of opinion that the suit is governed by the two years' rule of limitation. The same question arose in Letters Patent Appeal No. 53 of 1916 [*Kunti Dai* v. *Jharu Lal Das Mazumdar* (1)] and we then held that Article 3 of Schedule III to the Bengal Tenancy Act applied to a case of this kind, whether the landlord when dispossessing the *raiyat* acted in the capacity of landlord or not. In my opinion the present case is covered by the decision in the case cited and, therefore, this suit should have been dismissed. I would allow this appeal, set aside the judgment of the learned Judge of this Court and of the Court of first appeal and restore the decision of the Court of first instance with costs of both hearings in this Court and in the lower Appellate Court.

MULLICK, J.—I agree.

*Appeal allowed.*

(1) 40 Ind. Cas. 907 *Infra*; 2 P. L. W. 16; (1917) Pat. 247.

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## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2139 OF 1913.

April 4, 1917.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

NANAK CHAND—PLAINTIFF—APPELLANT

*versus*

LACHHMAN DAS—DEFENDANT—RESPONDENT.

*Hindu Law—Joint family—Partition—Presumption—Burden of proof—Assignment of property to different sons for business purposes, effect of—Property acquired by member from nucleus of family property, nature of—Acquisition in name of one member, whether exclusion—Suit for partition—Hotch pot.*

Where a Hindu family has been found to be joint at a certain date the presumption is that it continues to be joint, and the onus of proving that there was a partition or separation subsequent to that date is on the person who alleges it. [p. 777, col. 2.]

The mere assignment by the father of certain property to his sons to enable them to start in business on their own account has not the same effect as a formal partition of the joint property. [p. 778, col. 1.]

Where a family is joint and there is a nucleus from which property may be acquired, the presumption is that property acquired by any member is joint property and the onus of proving that it is self-acquired is on those who allege it. [p. 777, col. 2; p 778, col. 1.]

*Pran Kristo Mojoomdar* v. *Sreemutty Bhageerutee Gooptia*, 20 W. R. 158, followed.

The mere fact that any particular acquisition is in the name of one or more of the brothers does not warrant the assumption that it is the exclusive acquisition of the person or persons named and not of the whole of the joint family [p. 778, col. 1.]

*Sham Das* v. *Pohlo Ram*, 18 Ind. Cas. 604; 18 P. W R. 1913; 24 P. R. 1913; 16 P. L. R. 1912 Sup., followed.

In a suit for possession of joint family property by partition, it appeared that *R.* the deceased father of the parties had three sons, one of whom had received a share of the property and executed a deed renouncing all further claim thereto on the 25th April 1886 Subsequently *R.* and his other two sons continued to liv together, but some years before 1895 *R.* gave a house, a shop and some moveable property to the plaintiff who thereafter lived separately and conducted a separate business. On the 29th October 1895 *R.* executed a Will in which after reciting these facts he bequeathed all his remaining property to the defendant who was then in possession. On the 4th April 1896 the plaintiff sued for a declaration to the effect that this Will should not affect his rights of inheritance in the property to the extent of a half share.

NANAK CHAND *v.* LACHHMAN DAS.

This suit was decreed as it was held that there had been no formal partition or separation of the plaintiff from the family and he was not, therefore, bound by the terms of the Will. The plaintiff brought this suit for possession of his share:

*Held*, (1) that the family having been found in the earlier suit to be joint and there being no formal partition thereafter, all property acquired by the defendant out of the original nucleus of ancestral property was joint family property, as also was the property in the possession of the plaintiff which must be brought into hotch-pot at the time of the partition; [p. 778, col. 2; p. 779, col. 1.]

(2) that the plaintiff was entitled to a half share in all the family property which was in the defendant's possession as well as in his own possession. [p. 779, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Sialkot, dated the 31st March 1913, decreeing the claim in part.

Mr. *Gokal Chand Narang*, for the Appellant.

Mr. *C. Kirkpatrick*, Kanwar *Dalip Singh* and Rai Sahib Lala *Moti Sagar*, for the Respondent.

JUDGMENT.—In the suit out of which this appeal arises the plaintiff, Nanak Chand, sued for possession by partition of one half of certain property, moveable and immoveable, specified in the plaint, said to have left by his and defendant's father Ralla Shah, who died on the 18th November 1908. Lachhman Das, defendant, was said to be in possession of all the property left by Ralla Shah. The plaintiff admitted that he had a house and a shop out of the ancestral property and he included them in the claim. Ralla Shah deceased had three sons, Ram, Nanak Chand and Lachhman Das. Ram admittedly received a share of his father's property and executed a deed renouncing all further claim thereto on the 25th April 1886. Subsequently Ralla Shah and his other two sons, the present parties, continued to live together as a joint family, but some years before 1895 Ralla Shah gave a house and a shop and some moveable property to Nanak Chand plaintiff, who thereafter lived separately and conducted a separate business. Lachhman Das continued to live with his father. On the 29th October 1895 Ralla Shah executed a Will, which will be found on page 9 of the printed paper book, in which he recited that he had separated off his sons Ram Chand and Nanak Chand previously and that since then all the three sons had been carrying on separate businesses, and that at the time of the separation he had kept with himself Rs. 1,200 in cash besides certain outstanding debts and houses. He then went on to say that he bequeathed all this property to his son Lachhman Das, who was living with him and rendering him services.

On the 4th April 1896 Nanak Chand brought a suit against Ralla Shah and Lachhman Das, in which he asked for a declaration to the effect that the Will above mentioned should not affect his rights of inheritance in the property to the extent of a half share. This suit was tried by the District Judge of Sialkot, who held that some eight years prior to the Will Ralla Shah had separated off Nanak Chand and had given him an adequate share of the family property and that Ralla Shah had authority to dispose of the property which he had kept with himself in any way he chose. The suit was accordingly dismissed. The Divisional Judge upheld the finding of the first Court and upon this Nanak Chand filed a further appeal in this Court. The judgment is printed at pages 13 to 16 of the paper-book. We extract the following portions from it:—

"On the whole, we are disposed to believe that a considerable nucleus of property came from Jiwan Shah, father of Ralla Shah, and what Ralla Shah subsequently acquired by utilizing the income of this nucleus must be treated as ancestral and not as self-acquired property. The rule as to equal distribution of ancestral property on occasions of partition by the father or after his death according to Mitakshara Law is to be found in section 488 of Mayne's Hindu Law, 6th Edition. According to it Ralla Shah had no power to make any unequal distribution amongst undivided sons, as he might have done in a case of self-acquired property....."

"With reference to the evidence discussed above and the interpretation we put on it, we consider that the defendants have not succeeded in rebutting the presumption as to jointness of property after Ram's separation which they admit, and are unable to treat this as a case of a

family having become dissolved and afterwards re-united."

* * * * *

"We hold, then, that the suit, as brought, lies and that on the record there is no sufficient proof that a formal partition or separation of plaintiff from the family was ever made and consequently he ought not to be held bound by the terms of the Will of 29th October 1895, to which Ralla Shah, defendant, has still expressed his adherence, the property being treated by us as ancestral.

"In this view of the case we accept the appeal and grant plaintiff a decree as prayed for with costs throughout."

The judgment is dated the 24th February 1902. We start then with the propositions that Ralla Shah and the parties to the present suit formed a joint Hindu family, that there was a nucleus of ancestral property, that, therefore, all the property acquired by Ralla Shah must be treated as ancestral property, that Ralla Shah some years before 1895 allotted separate property to each of his sons and that thereafter they lived separately and conducted separate businesses, but that there was no formal partition of the joint family property prior to the date of the Chief Court judgment of the 24th February 1902.

Now what the lower Court has held is that there was a partial partition. In its judgment at page 145, line 26 of the paper book, the lower Court says: "It is quite clear from the said wording (of the Will) that the property then in question was wholly ancestral and that the rest of the property was separately given by Ralla Shah to his sons according to proportionate shares." By this the Court means that there was a partition of the whole of the property with the exception of that mentioned in the Will. Now there is no doubt that the members of a joint Hindu family can agree among themselves to make a partition of part of the joint family property and to keep another part of it as joint, but it was distinctly found by this Court in the previous case that there had been no formal partition of any of the joint family property. The mere allotment by Ralla Shah of some property to one son and another property to another in order that they might conduct separate businesses did not amount to a partial partition of the ancestral property. It, therefore, seems to us that the lower Court's view that there was a partial partition is opposed to the finding of this Court in the previous case. It follows from the latter that all the property in the possession of the parties and of Ralla Shah at the time of the previous suit must be considered to be joint family property, which was acquired from the original nucleus of ancestral property. The first Court, in accordance with the view it took of the case, with certain small modifications which we need not here refer to, gave the plaintiff a decree for a half share of the property referred to in the Will made by Ralla Shah in 1895. From this decree the plaintiff has appealed and the defendant has filed a cross-appeal in regard to a sum of Rs. 1,300 which has been decreed to the plaintiff.

It has been argued by Mr. G. C. Narang on behalf of the plaintiff-appellant that as the parties formed a joint Hindu family in 1902, the presumption of law is that the family continued joint unless it is shewn to have become divided since that date. In support of this proposition he referred to Mulla's Principles of Hindu Law, page 185, *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1), *Dhurm Das Pandey* v. *Musammat Shama Soondri Dibiah*(2) and *Musammat Cheetha* v. *Baboo Miheen Lall*(3). These authorities support the argument advanced by Mr. Narang and Mr. Kirkpatrick has nothing to say to the contrary. As then the family was held to be a joint family in 1902, the presumption is that it continued to be joint and the onus was upon the defendant to prove that there was a partition or separation subsequent to that time. It is contended by plaintiff's Counsel, and we think rightly, that the lower Court has improperly considered that the onus was upon the plaintiff to shew what ancestral property was left by Ralla Shah. In *Pran Kristo Mojoomdar* v. *Sreemutty Bhageerutee Gooptia* (4) it is laid down that where a family is joint, and there is a nucleus from which

(1) 9 M. I. A. 66; 1 W. R. (P. C.) 30; 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 826; 19 E. R. 666.

(2) 3 M. I. A. 229; 6 W. R. (P. C.) 43; 1 Sar. P. C. J. 271; 1 Suth. P. C. J. 147; 18 E.R. 484.

(3) 11 M. I. A. 369; 2 Sar. P. C. J. 303; 20 E. R. 140.

(4) 20 W. R. 158.

property may be acquired, the presumption is that property acquired by any member is joint property, and the onus is with those who allege that it is self-acquired. In *Sham Das* v. *Pohlo Ram* (5) it was pointed out that the mere fact that any particular acquisition is in the name of one or more of the brothers does not warrant the assumption that it is the exclusive acquisition of the person or persons named and not of the whole of the joint family. Mr. Kirkpatrick has argued that the family remained joint as to the property mentioned in the Will and was separated as to the other property which had been given to them by their father. The Chief Court judgment in the previous case, however, stands in the way of such a view, for there it was distinctly held that there had been no formal partition. As already pointed out by us, the mere assignment by the father of certain property to his sons to enable them to start in business on their own account has not the same effect as a formal partition of the joint property.

Turning now to the evidence produced in the present case, we find that the plaintiff produced evidence to shew that Ralla Shah died possessed of a large amount of property valued by the witnesses at forty or fifty thousand rupees, that he used to live with Lachhman Das, the defendant, and that there was never any formal partition of the joint property. Lachhman Das has himself admitted that he used to take care of his father and supply him with food. There is no doubt that all the property that Ralla Shah died possessed of came into the possession of the defendant. The defendant's evidence was to the effect that the parties lived and carried on business separately and that defendant acquired various properties in his own name. The witnesses, however, for the most part distinctly state that they know nothing about any division of the property. Any evidence as to separation which has been given obviously refers to what took place prior to the previous suit. See in this connection the evidence of Nihal Chand at page 58 of the paper-book where he says that after the separation, Nanak Chand refused to execute a deed of relinquishment. This fact was referred to by this Court in its judgment in the previous case and was one of the grounds for its decision that there had been no formal separation. There is no doubt that a number of deeds have been executed in Lachhman Das's name, but as pointed out in *Sham Das* v. *Pohlo Ram* (5), this fact alone does not prove that the property acquired by those deeds is the exclusive acquisition of Lachhman Das. Prior to the previous suit each of the present parties had received a certain amount of ancestral property and working with that as a nucleus acquired other property, all of which must, in our opinion, be considered, in accordance with the authorities, to be joint family property unless it is shewn that there was a subsequent separation. After the decision in the previous suit the parties continued to live separately and to conduct separate businesses, but there is absolutely no evidence that there was any formal partition between them.

Our conclusions then are as follows:—

(1) Ralla Shah and his three sons constituted a joint Hindu family.

(2) One of the sons, Ram, was finally separated off in the year 1883 and executed a deed of relinquishment.

(3) After this Ralla Shah and the present parties continued to be a joint Hindu family.

(4) Some years before 1893 Ralla Shah gave Nanak Chand a separate house to live in, a shop to carry on business therein and some moveable property and thereafter Nanak Chand lived and conducted business separately from his father and Lachhman Das. Lachhman Das continued to live with his father.

(5) In 1895 Ralla Shah executed a Will by which he bequeathed certain property to Lachhman Das.

(6) In a suit brought by Nanak Chand this Court held in 1902 that the Will was invalid and that there had been no formal partition between the parties.

(7) Since that time the parties have continued to live and to transact business separately. Lachhman Das prospered and acquired a good deal of immoveable property, many deeds being executed in his name. There was, however, no formal partition even after 1902 and, therefore, all the property acquired by Lachhman Das out of the origi-

(5) 18 Ind. Cas. 604; 18 P. W. R. 1913; 24 P. R. 1913; 16 P. L. R. 1912 Sup.

nal nucleus of ancestral property which he received must be held to be joint family property. Similarly all the property in the possession of the plaintiff is joint family property and must be brought into hotch-pot at the time of partition.

(8) The plaintiff is, therefore, now entitled to a half share in all the family property, both that in the defendant's possession and that in his own possession.

We, therefore, accept the plaintiff's appeal and setting aside the order of the lower Court give him a preliminary decree for possession by partition of a half share of all the property, moveable and immoveable, in possession of both the parties and of Ralla Shah at the time of the latter's death. The lower Court will now proceed to ascertain exactly what this property is and will pass a final decree dividing the property between the parties. If any mortgages have been redeemed or property sold by either party, the amounts realized must be ascertained and taken into account.

As regards defendant's appeal we do not approve of the lower Court's method of arriving at its finding that Ralla Shah must have had some Rs. 2,600 cash in his possession at the time of his death. Whatever he had when he made the Will was probably used by defendant in the conduct of his business, and was part of the nucleus out of which he acquired property. The plaintiff had to prove what assets were in Ralla Shah's possession at the time of his death, and conjecture cannot take the place of proof. In view of our order accepting plaintiff's appeal we must also accept that of the defendant; the stamp on his appeal will be refunded.

Plaintiff's claim is an exaggerated one and we, therefore, direct that the parties shall bear their own costs in both Courts, but the Court-fee due to Government (the suit and appeal having been heard *in forma pauperis*) will be paid by the parties in equal shares.

*Appeal accepted.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 132 OF 1915.

December, 22, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Srinivasa Aiyangar.

GOLLA NAGAYYA AND OTHERS—DEFENDANTS NOS. 1, 3, 4 AND 6 TO 14—APPELLANTS

*versus*

THUNUGUNTLA VENKATA SUBBARAYUDU AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 5—RESPONDENTS.

*Trust - Trustee for payment to creditors—Transfer of bonds and book debts to trustee—Accounts—Negligence in collection—Damage or loss, liability of trustee for—Mortgagee in possession—Interest, liability to pay—Trusts Act (II of 1882), s. 23.*

A trustee, appointed by a person for payment to his creditors to whom the debtor transfers bonds and book debts for collection and payment as aforesaid is bound to realize the amounts due thereon with due diligence and is liable for loss caused to his appointor by his laches. The trustee should, in that event, be debited with the face value of the documents and should not be allowed the costs of suit incurred by him for his belated enforcement of the bonds. [p. 782, col. 1.]

In the matter of liability for interest, there is a difference between a trustee and a mortgagee in possession. A mortgagee in possession, as soon as his debt is paid off, will be bound to pay interest on any money which he may retain thereafter, while the liability of a trustee would depend on whether he is guilty of a breach of trust. [p. 782, col. 1.]

Where there has been negligence in the trustee and contributory negligence in the debtor who appointed him which has occasioned loss to the latter, the trustee should not be charged with interest. [p. 782, col. 2.]

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 10 of 1914 (Original Suit No. 54 of 1913 on the file of the Court of the Temporary Subordinate Judge of Guntur).

Mr. *T. V. Venkatarama Aiyar*, for the Appellants.

Mr. *T. Rangachariar* (with him Messrs. *T. Ramachandra Rao* and *M. Purushothama Naidu*), for the Respondents.

This appeal and the memorandum of objections filed on behalf of the respondents Nos. 2 and 3 coming on for hearing on the 27th July 1916, and the case having stood over for consideration till the 28th July 1916, the Court delivered the following

JUDGMENT.—The plaintiffs who are traders got into difficulties in the beginning

of 1908 and being unable to pay their debts, compounded with their creditors and agreed to pay 9 annas in the rupee. They paid one anna with the aid of two friends and arranged with the defendants for the payment of the balance amounting to Rs. 41,638-2-0. To re-pay this sum, the plaintiffs proposed to transfer to the defendants certain immoveable property valued at Rs. 9,500, goods valued at Rs. 20,000 and certain book-debts and mortgage-debts of the value of Rs. 12,138 2 4, making a total of Rs. 46,638-2 0. The defendants were not sure that they would be able to realise the full value of the moveables and debts and also anticipated some difficulty in obtaining possession of the goods and the immoveable property. They, therefore, required the plaintiffs to give security for any balance that may remain due to them after realising the debts and selling the goods and also for any loss they might sustain by not being able to obtain possession of the moveables and immoveables. The plaintiffs agreed to this and deposited Rs. 4,000 in cash and endorsed promissory notes of the value of Rs. 2,100 6 9 as security and caused one P. Bapanayya to execute a bond for Rs. 2,000 as additional security. As the defendants declined to take the risk of the moveables and the debts not realising their full value, the plaintiffs in their turn insisted on the defendants accounting to them for the actual amount realised by the sale of the goods and collection of the debts, to which the defendants agreed. The transaction was carried through by the execution of Exhibits I, II and III by the plaintiffs to the defendants and of Exhibit A by the defendants to the plaintiff. Exhibits I, II and III are transfers of the moveable and immoveable property, the book-debts and mortgage-debt respectively and Exhibit A is the contract of the defendants to account to the plaintiffs. Besides these P. Bapanayya executed Exhibit XX to the defendants at the request of the plaintiffs as further security for Rs. 2,000 and this document recites the terms on which the security of Rs. 6,100 6 9 was deposited. Plaintiffs now sue for accounts on the covenant contained in Exhibit A. The Subordinate Judge in the Court below has taken the accounts and awarded to the plaintiffs the sum of Rs. 5,968-7-4 as the amount due to them with interest at six per cent. from the beginning of 1909, when he thinks the amount due to the defendants had been fully discharged. The defendants appeal objecting to the disallowance of several items of credit in their favour. Before we deal with the items it is necessary to dispose of two other points raised by the appellants.

The first is this: In taking the accounts, the lower Court deducted the value of the immoveable property Rs. 9,500 from the Rs. 41,638-2-0 found by the defendants for payment to plaintiffs' creditors, thus treating the defendants as owners of the immoveable property. The defendants contend that this is wrong, and that they are only liable to account for the immoveable property as trustees and the sum of Rs. 9,500 should not be deducted from the amount due to them. We think the lower Court was right in treating the defendants as owners of the immoveable property and in deducting Rs. 9,500-0-0 from the amount due to them. Exhibit A is quite clear on this point and is in these terms: "We shall at once re-sell the moveable property which we purchased from you, and we shall add up the sale-proceeds thereof to the amount that will be realised under the transfer deeds which you executed to us and if the total amount should exceed the amount of the balance after deducting Rs. 9,500-0-0 relating to the immoveable property, from Rs. 41,638-2-0 which we now paid for you, such excess amount and the pro-notes of the value of Rs. 2,100-6-9 which you kept with us in advance, or the balance of the pro-notes (if any amounts should be collected under some of the pro-notes), and the cash Rs. 4,000 0-0, these items will be accounted for." Exhibit I is in terms a sale of the moveable and immoveable properties for a sum of Rs. 29,500-0 0. It is only as regards moveables and the debts that the risk of loss was undertaken by the plaintiffs and security given for the deficiency. As to the immoveables the sale operated as an immediate extinguishment of the debt due to the defendants of the sum of Rs. 9,500 0-0, the value of the immoveables. The learned Pleader for the appellants wanted to refer to certain subsequent documents which, he said, showed that was not what

the parties intended. We think that Exhibit A is quite plain and unambiguous and we are not at liberty to qualify or deviate from the plain meaning of the document by reference to subsequent statements or conduct of the parties. We must, therefore, disallow this contention.

The next point argued is that the lower Court should have assessed and allowed the loss sustained by the defendants owing to the non-delivery of certain of the immoveable properties conveyed to them under Exhibit I. The learned Subordinate Judge has declined to go into this question and has referred the defendants to a separate suit. In this, we think he was wrong. It is to be observed that the security given by the plaintiffs was intended to cover this loss also. (See Exhibit XX.) The decree of the Subordinate Judge in effect directs the return of their security to the plaintiffs freed from the charge of the defendants. Now coming to the several items for which the defendants claim credit, the first is a sum of Rs. 1,000 for commission as stipulated in Exhibit A. The plaintiffs contend, and their contention has been accepted by the lower Court, that this commission of Rs. 1,000 is payable only in the event of the moveables and the debts transferred to the defendants realising more than the amount for which they were transferred; and as admittedly they realised less the defendants are not entitled to any commission. The language of Exhibit A is not as clear as it might be, but we think that on a fair construction of Exhibit A, the defendants are entitled to the commission claimed. Exhibit A recites that the plaintiffs agreed to pay Rs. 1,000 as commission for conducting "all these affairs" as for their trouble in selling the moveables and realising the debts; their trouble would be the same whether they realised more or less than their estimated value. It cannot be the intention of the parties that if the defendants realised one rupee more than the estimated value they should get the Rs. 1,000, but if they realised one rupee less they should lose their commission. The commission, it is to be observed, is a fixed sum and not a proportion of the excess. We allow this item.

The next item is a sum of Rs. 951 the value of goods sold by the 2nd defendant to the plaintiff which had not been paid for. This sum is admittedly included in the debt for which the plaintiffs agreed to pay the dividend of 9 annas in the rupee. It is said that though the plaintiffs purchased the goods they did not take actual delivery. We are not inclined to believe this story. The goods were admittedly weighed and after weighment the plaintiffs were debited with the price in the defendants' books and the plaintiffs signed the entry. The title to the goods passed to them and if they did not take actual delivery it must have been included in the goods transferred to the defendants under Exhibit I, for the value of which the defendants have accounted in this suit. We allow this item.

The next item consists of two sums of Rs. 1,130 and 140 making a total of Rs. 1,270. The plaintiffs signed an acknowledgment of having received these two sums from the defendants and expressly stipulated that they will re-pay this sum with interest if on taking accounts it was found that no money was due to them from the defendants. The acknowledgment shows that this sum was paid for railway and other charges for goods, which was not included in the sum of Rs. 41,000 and odd which the defendants undertook to pay on behalf of the plaintiffs. The plaintiffs now say that these two sums are really part of the aforesaid Rs. 41,000 and odd; in fact their previous acknowledgment of the receipt of these sums for railway charges, etc., is false. We see no reason to believe their present story and allow this item also.

The next two items are items of charge against the defendants in respect of a mortgage-bond and a promissory note transferred to the defendants. The defendants did not take any steps to realise the sums due till nearly two years after the transfer and when they sued, the position of the debtor had materially changed for the worse. The result was the defendants, though they obtained a decree on the note, have not been able to recover anything from the debtor and it is said he has now become an insolvent. They have not realised the mortgage either and the security, it is said, is not sufficient to pay even a half of the mortgage-money. If they had sued soon after the transfer

to them, the defendants, as the Judge finds, might have realised the whole sum due from the mortgagors personally on their covenant. In these circumstances we agree with the lower Court that they were negligent in realising these two debts and were properly charged with their value. A distinction was sought to be drawn between the mortgage-debt which was transferred to the defendants, it is said, as trustees and the promissory note which was deposited as security, which the defendants were not bound to realise and which they were entitled to return to the plaintiffs in specie. Exhibit A, no doubt, gives the defendants liberty to return the pro-notes deposited as security, but the document contemplates that the matter should be completed in two months. Whether the debts were transferred to the defendants as trustees or mortgagees, in either case they were bound to realise the debts with due diligence [Coote on Mortgages, page 319. *Shyam Kumari* v. *Rameswar Singh* (1)]. The lower Court was right in debiting the defendants with the face value of the documents. The learned Judge was also right in not allowing the defendants the costs incurred by them in suing on the note.

The only other question which remains is the allowance of interest on the amount found due to the plaintiff. Both the parties proceeded to trial in the first Court on the footing that the jural relationship between them was that of trustee and beneficiary and the same assumption was made in the arguments in appeal. We are not certain that the true relationship was not that of mortgagor and mortgagee. The distinction, however, is hardly material as regards the taking of accounts, though in the matter of charging interest it may make a difference. A mortgagee in possession, as soon as his debt is paid off, will be bound to pay interest on any money which he may retain thereafter, while the liability of a trustee would depend on whether he is guilty of a breach of trust [see *Wilson* v. *Metcolfe* (2), *Ashworth* v. *Lord* (3) and compare section 23 of the Indian Trusts Act.]

(1) 32 C. 27; 31 I. A. 176; 8 C. W. N. 786; 6 Bom. L. R. 754; 8 Sar. P. C. J. 688 (P. C.).

(2) (1826) 1 Russ. 530; 38 E. R. 204; 25 R. R. 128.

(3) (1887) 36 Ch. D. 545; 57 L. J. Ch. 230; 58 L. T. 18; 36 W. R. 446.

In this case, however, there were *bona fide* disputes as to the amount payable to the defendants and it is far from clear that the amounts due to the defendants had been paid in the beginning of 1909. The total sum found due to the plaintiffs by the lower Court was Rs. 5,968-7-4; we have now allowed the defendants Rs. 3,221 and there can be no doubt that there was a *bona fide* dispute as to the liability of the defendants with respect to the non-realisation of the promissory note and the mortgage-debt. If this had been allowed in their favour there would have been no balance to pay to the plaintiffs. Again the defendants were entitled to be paid any loss they may have sustained owing to the default of the plaintiffs in the delivery of possession of the immoveable properties sold to the defendants. We, therefore, think that the lower Court was wrong in charging the defendants with interest. These are our conclusions on the various points raised in appeal. Before we can dispose of this appeal finally we must have a finding from the Subordinate Judge's Court of Guntur on the following issue: "Whether the defendants sustained any loss by the non-delivery (if any) of possession of the immoveable properties sold under Exhibit I, and if they did, what is the amount of the loss." The parties will be at liberty to adduce fresh evidence. Finding will be returned in two months and seven days will be allowed for filing objections. We dismiss the memorandum of objections with costs.

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This appeal coming on for final hearing after the return of the finding of the lower Court upon the issue referred to it for trial by this Court, the Court delivered the following

JUDGMENT.—The finding is that the defendants have sustained a loss of Rs. 1,943-5-9 on account of non-delivery of the immoveable property. We have already allowed certain items of claim in favour of the defendants. The parties agree that on taking the accounts as stated above the amount due to the plaintiffs is Rs. 954-11-3. The decree of the lower Court will be modified and plaintiffs will be entitled to Rs. 954-11-3 with interest from date of plaint and at 6 per cent. till date of deposit by the defendants in the lower Court. The

parties will pay and receive proportionate costs in both Courts.

*Appeal partly allowed*; *Decree modified.*

V.R.P.

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 123 OF 1915.

April 4, 1917.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

MOHAMAD UMAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

*versus*

*Musammat* MAN KOER—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow, re-marriage of—Forfeiture of property granted for maintenance—Hindu Widows' Re-marriage Act* (XV *of* 1856), *s.* 2, *effect of—Construction of document—Intention.*

A Hindu widow on her re-marriage, although such re-marriage is permissible and legal according to the custom of the caste to which she belongs, forfeits her interest in the property allotted to her by a family arrangement based upon her right to maintenance out of the interest which her deceased husband had in the ancestral estate. [p. 789, col. 1; p. 790, col. 2.]

It would make no difference in her position whether section 2 of Act XV of 1856 does or does not apply to her case, as that section has not introduced any change in the Hindu Law so far as it relates to the forfeiture of a widow's interest on her re-marriage. [p. 789, col. 1; p. 790, col. 2.]

For the purpose of construing a document the Court has to look at the whole of the document and consider all its terms one with the other, and for the purpose of ascertaining the intention of the parties the Court is also entitled to look at the position of affairs at the time when the document was entered into and also at the position of the parties who executed the document. [p. 787, col. 2.]

Per *Chatterjea, J.*—If the expressions used in a deed are capable of two constructions, that construction should be adopted which is consistent with the law to which the parties are subject. [p 790, col. 1.]

Letters Patent Appeal against the decree of Mr. Justice Mullick, dated the 8th July 1915, in Appeal from Appellate Decree No. 2661 of 1913.

FACTS material will appear from the following judgment of Mullick, J.:

"The property in dispute in this suit is a house which has admittedly been let to defendant No. 1 at a rental of Rs. 3 per month. It is a part of the estate of Har Lal Bhagat. The plaintiff is the widow of Har Lal's son, Kishen Ram, who predeceased his father. Har Lal had another son named Thakur Ram, who has left a widow named *Musammat* Bifo, and he had a daughter named *Musammat* Jago, the defendant No. 3, who has a son called Chamari Lal the defendant No. 4. Defendants Nos. 3 and 4 allege that they are the sole proprietors by inheritance of the house as well as Har Lal's other properties and by a *kobala*, dated the 24th March 1911, they have sold the house to Mohammad Ibrahim the defendant No. 2.

The plaintiff's case is that, by a family arrangement or an *ekrarnama*, dated the 19th August 1907, the house was assigned to her and that she had received rents for the same from defendant No. 2 for the years 1909-10. In the present suits he claims rent for the period between May 1910 and September 1911 and further asks that as defendant No. 1 has, after service of notice, refused to quit, a decree for ejectment may be passed in her favour. Defendants Nos. 2 to 4 had been impleaded because they are alleged to be in collusion with defendant No. 1, it being asserted that defendant No. 2 is a *benamdar* of defendant No. 1. The learned Munsif found that defendant No. 1 had paid rent to the plaintiff for the years 1909 and 1910. It was contended before him that by her re-marriage the plaintiff had forfeited her right to the property in suit, but the learned Munsif held, upon the authority of *Gajadhar* v. *Kaunsilla* (1), that re-marriage by a widow who was permitted, by her caste rules, to re-marry, did not work a forfeiture. The Court declared the plaintiff's title for life but the prayer for ejectment was dismissed for want of proof of service of notice.

On appeal the learned District Judge held that the learned Munsif's view of the law was incorrect and that upon the authority of the Full Bench decision in the case of *Matungini Gupta* v. *Ram Rutton Roy*(2), the re-marriage of the plaintiff caused an absolute forfeiture of her estate. He, therefore, dismissed the plaintiff's suit. The plaintiff now appeals. The first point taken bafore me is that the Full Bench decision in *Matungini Gupta's* case (2) does not apply to a widow, who is by her caste rules permitted to re-marry. It is contended that as her case is not covered by the Hindu

(1) 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107.
(2) 19 C. 289; 9 Ind. Dec. (N. S.) 638.

Widows' Re-marriage Act, the Full Bench decision has no application. I think this view is correct. But the widow is governed by the general provisions of the Hindu Law, and the question is whether under these provisions the re-marriage causes forfeiture of the estate inherited from her deceased husband. On this point with the exception of an Allahabad case, namely, *Gajadhar* v. *Kaunsilla* (1), there is no authority in support of the plaintiff. On the other hand, *Ganga Prasad Shahu* v. *Ramasrey Shahu* (3) and *Rasul Jehan Begum* v. *Ram Surun Singh*(4) are authorities for the proposition that, under the Hindu Law, re-marriage by a widow causes a forfeiture. I think, therefore, that if the property in suit is the property of her deceased husband, the plaintiff by her re-marriage has lost her title to it and her suit fails. But it is argued that it is not the property of her deceased husband, and that by virtue of the family arrangement, an *ekrarnama*, the plaintiff got an absolute title to the property. In reply, it is contended by the respondents that the *ekrarnama* merely conferred upon the plaintiff the right to draw maintenance by realising the rent of the house in suit, and that as the plaintiff by her re-marriage has lost her right to maintenance, she has also lost her title to realise the rent. With regard to this it is to be observed in the first place that the *ekrarnama* does not make any mention of maintenance. It was executed by the plaintiff, defendant No. 3 and Bifo Kuar, under the impression that they were all heirs to the property of Har Lal. Such an impression was not justified by the Hindu Law, for under that law defendant No. 3 alone was the sole heir. But, however that may be, the parties to the *ekrarnama* seem to have been under the impression that they were all co-sharers in the properties. If then they, by way of family arrangement, agreed to assign some property to the plaintiff, it cannot be said that the title to that property was a charge for maintenance. It also further appears that as the value of the house was Rs. 1,200 and her interest in the property of Har Lal was valued at Rs. 782, she actually paid in cash to defendant No. 3 the balance of Rs. 418. This being so, I cannot see upon what ground the learned District Judge states that the house in question was given to the plaintiff by way of maintenance. Her interest seems to be that of an absolute proprietor. As this finding depends on the construction of a document which is the basis of the plaintiff's title, it is competent for me to set it aside in second appeal.

It appears, however, that the learned Munsif came to the conclusion that the *ekrarnama* conferred upon the plaintiff a title for life only, and that the plaintiff did not cross-appeal against that finding to the District Judge. Although, therefore, I think the plaintiff acquired an absolute title to the property, I ought not in second appeal to give a declaration to the plaintiff to that effect. In my opinion the house was not assigned to the plaintiff as an allowance for maintenance, and if that is so, then the question whether by the subsequent re-marriage she lost her title to the property, does not arise. But even if we admit that the house was given for the purpose of maintenance, still she cannot be said to have lost her right by re-marriage, as the house was not the property of her husband. The learned Vakil for the respondent relies upon those cases in which the widow has been held to forfeit her maintenance on proof of unchastity. He argues on the principle that a widow on her re-marriage, whether such re-marriage is allowed by custom or not by custom, loses her right to claim maintenance. There is no authority in support of the proposition that re-marriage is synonymous with unchastity. On the contrary there are observations in *Gajadhar* v. *Kaunsilla* (1) to show that re-marriage cannot be classed in the same category as unchastity. In these circumstances, the plaintiff is entitled to succeed. The decree of the learned District Judge will, therefore, be set aside and that of the Munsif restored. I do not allow the successful appellant before me any costs in this appeal, as by not printing the *ekrarnama*, he has caused a great loss of time of this Court, but he will get costs in the lower Courts."

Babu *Panchanan Ghose*, for the Appellant.

Babu *Satya Charan Sinha*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the suit was brought by the plaintiff asking for several reliefs, *mainly* for a declaration that

(3) 10 Ind. Cas. 69; 13 C. L. J. 558; 38 C. 862; 15 C. W. N. 579.

(4) 22 C. 589; 11 Ind. Dec. (N. S.) 392.

she was entitled to a certain house and for possession and for arrears of rent.

The defendant No. 1 is the tenant of the house; defendant No. 2 is a person who purchased the house on the 22nd of March 1911 from the defendants Nos. 3 and 4, the daughter and grandson of one Har Lal Bhagat.

The first Court gave the plaintiff a decree for arrears of rent only. That Court would have awarded a decree for possession of the property to the plaintiff but for the fact that the requisite notice had not been served.

The first Appellate Court reversed that decision on the ground that the plaintiff had obtained whatever right she had to the house in question by way of maintenance, and that she being a Hindu widow and having married again had forfeited that right, and, consequently, it gave a decree in favour of the defendants.

Mr. Justice Mullick, sitting alone to hear the second appeal, reversed the decision of the first Appellate Court and confirmed the decree of the learned Munsif, and he came to the conclusion that the interest which the plaintiff had in the house was that of an absolute proprietor, but that as the plaintiff had not appealed from the Munsif's judgment her title must be taken to be for life only, that she had not obtained her interest in that house by way of maintenance and that her re-marriage did not consequently result in forfeiture. As there was no cross-appeal he could do no more than confirm the decree of the first Court. Consequently, the plaintiff obtained merely a decree for arrears of rent.

Now, the question which is before us in this case depends upon the construction of an agreement in writing which was entered into on the 19th of August 1907 by three individuals the plaintiff, the lady called *Musammat* Bifo, and the defendant *Musammat* Jago. For the purpose of construing this document it is necessary to consider the position of the parties at the time when that agreement was made. That position was this. One Har Lal Bhagat had died on the 16th of April 1906. He had had two sons, and one daughter *Musammat* Jago. Both his sons Thakur Ram and Kishen Ram died during his lifetime, and he left surviving him his daughter *Musammat* Jago. There were also living the widow of Thakur Ram, *Musammat* Bifo, and the widow of the second son, *Musammat* Man Koer, the present plaintiff. Apparently, these three women after Har Lal's death were living together and had been carrying on a shop which had been the joint property of the Hindu family. That was the position at the time when this agreement was entered into.

Now, on the one hand, it is alleged on behalf of the defendant that the interest of the plaintiff in the house in question was merely given to her under a family arrangement, in order that she might maintain herself out of the profits of that house, and that consequently when she married again, as undoubtedly she did between the dates, the 19th of August 1907 and the 22nd of March 1911, the exact date is not ascertained, she lost her right to maintenance and, therefore, lost all interest in this house. On the other hand, stated shortly, the plaintiff's case is that she did not obtain her interest in the house by way of maintenance but that under a family arrangement she got an absolute right in it, and that her interest in the family house at all events would subsist as long as she, the plaintiff, lived and as long as the defendant *Musammat* Jago lived.

Now, the agreement came into existence in this way: Apparently there was a dispute between the parties. The exact nature of the dispute is not specified, but it is stated in the agreement that "Various kinds of differences have arisen between us the declarants, and there is likelihood of quarrels occurring." Then the agreement recited that "this gave rise to the reflection as to what was the extent of the property on which there were liabilities amounting by accounts to Rs. 1,852-8-0, and in case of disputes occurring there would be further loss in costs of litigation, and eventually there would be no other result besides loss and waste of the properties belonging to the estate of the late Hara Lal Bhagat *alias* Hassani Bhagat." Consequently, the parties apparently agreed to refer their differences to certain arbitrators whose names are stated in the agreement, and to abide by the result of their award. The arbitrators made their award and this agreement was entered by the three declarants, whose names I have mentioned, for the purpose of carrying out the effect of the

award. Apparently, there were three houses of the value of Rs. 3,100 and the stock of the shop was of the approximate value of Rs. 1,100. The agreement recites that Har Lal Bhagat died on the date I have mentioned, leaving him surviving the three declarants, *his heirs*, so that from the date of his death the declarants became and continued to be joint possessors of the entire property and shop and moveable and immoveable property and were carrying on the business of the shop. The plaintiff relies upon that part of the agreement as well as other parts of it for the purpose of showing that this interest which the plaintiff undoubtedly obtained, whatever the extent of it was, was not by way of maintenance of the plaintiff, and she points to the word 'heirs' in the clause which I have just read. I shall have to say more about it later on. Then it recites that "in consideration of the above reflection it was thought advisable for a settlement to refer the matter to a *panch* of fellow-castemen and those who are respectable and trustworthy, and whatever settlement they make in respect of the estate, shop and liabilities be and do remain binding on us the three declarants." Then it recites that the *panch* has come to the conclusion that the value of the estate of the deceased person was ascertained to amount to Rs. 4,200 and the liabilities of the shop were proved to amount to Rs. 1,852-8-0. It then proceeds to apportion the shares, and I may state it quite generally. The principle upon which the property was to be divided, if I may use that as a neutral word for the present, was that each was to get a third. The surviving daughter was to have possession of the more valuable house and was to take over the business and the liabilities attached thereto and she would have power to sell some of the property apportioned to her, in order to meet the liabilities. The agreement goes on to state that "property of the value of Rs. 782-8-0 be given to each of the two declarants *Musammat* Bifo and *Musammat* Man Koer," these are the two daughters-in-law, "so that they may *maintain themselves* from the profits of their respective properties and one may not have any concern with the other, whereby quarrels and animosities may be averted, and the ancestral estate of Har Lal Bhagat may not be ruined." That is a portion of the agreement upon which the defendant very strongly relies, because he says it shows what the real intention of the parties was. He says, this was an ancestral property, and the object of the agreement was that the ancestral property should not be ruined in useless litigation and that the shares which the two daughters-in-law were to obtain were for the purpose of maintaining themselves without having recourse to the daughter, so that friction in future might be avoided.

Then the agreement recites that "the ancestor had three houses, one the dwelling-house with shop valued at Rs. 1,800, the second house valued at Rs. 1,200 and the third house valued at Rs. 100 and the stock existing in the shop valued at Rs. 1,100, of which we the declarants have all been from the date of the death of the said ancestor, and are, joint in possession up to the present time, and similarly Rs. 1,815-8-0 the liabilities are justly chargeable to and payable by us three declarants." That is a clause upon which the plaintiff's Vakil strongly relies. He says it shows that the three declarants had been jointly interested in the property, that they had been jointly carrying on the business, that they had been treated as in equality and consequently they were being treated in equality in this distribution of the assets, and that that being so the clause was not consistent with the interest of the plaintiff in the house being merely for the purpose of maintenance. On the other hand it is urged by the defendant that that is a clause which does not hurt the defendant's case, because the parties had obviously been carrying on the business together and this is not a declaration of their strict liability to debts according to law, but having regard to justice and equity, inasmuch as they had been carrying on the business together since the death of the ancestor, it would be right to say that the liabilities were justly chargeable to each of the three declarants.

Then comes the operative part of the agreement. First of all, it begins by saying—"Now of our own free-will and accord while sound of mind and understanding without coercion, instigation or unlawful pressure by anybody, we the declarants have partitioned between us the properties

above mentioned and hereunder described according to our respective shares in accordance with the direction and decision of the *panches*, and we the declarants have become separate possessors thereof. From this date one of us the declarants has not any sort of concern with another of us the declarants nor shall we have any in the future. If contrary to this, any of the parties take any action or make any claim against any of the parties, that shall be altogether invalid and void. We the declarants have acquired full right and authority in respect of the property apportioned to us respectively, so that each may take whatever she thinks fit and proper with respect thereto without consulting and without reference to another." I draw attention to those words because they are important for the purpose of ascertaining the real intention of the parties. Then the last clause to which I need refer in this agreement is the 10th clause, which sets out the method by which the award of the arbitrators is to be carried out, and it says, "Of the estate of the said ancestor there are three houses of different values, consequently we have got a house and *by refund of the excess*", that is an inartistic way of expressing the intention of the parties; I understand the meaning of that is, that as each of the three ladies was to get a house, and the houses being of different values, as one of them must get a house more valuable than the other, she would have to make up the difference in value by payment of money to the other or others, so that the shares might be equalized. "Thus the first house with shop, the value of which is approximately Rs. 1,800, and the stock existing in the shop, the value of which is Rs. 1,100, the aggregate value of the house with shop amounting to Rs. 2,900 has been taken by me, *Musammat* Jago Kuar, for my rateable share and for payment of debts to creditors, so Rs. 265 the amount which is in excess of my *Musammat* Jago Kuar's share has been made good by me in cash to *Musammat* Bifo Kuar, the declarant. Now we the declarants Nos. 2 and 3 have not and shall not have any sort of claim and lien in respect of the house and the properties existing in the shop against me *Musammat* Jago Kuar or my heirs and successors." That deals with the share of the daughter.

Now, I come to the important part which deals with the share of the plaintiff: "The house of which the approximate value is Rs. 1,200 is apportioned to the share of me *Musammat* Man Kuar" (*i.e.*, the present plaintiff) and as the share of *Musammat* Man Kuar amounts to Rs. 782 8-0 and the value of the said house is Rs. 1,200, so by this calculation I have made good Rs. 417-8-0 in cash to *Musammat* Jago Kuar (*i.e.*, the daughter), now we the declarants Nos. 1 and 2 have not any claim in respect of the said house against *Musammat* Man Kuar or her heirs and successors." That, as I have said, is the plaintiff's share. Then comes Bifo's share: "The share of me *Musammat* Bifo Kuar amounts to Rs. 782-8-0. Consequently I have received Rs. 265 in cash from *Musammat* Jago Kuar as per details....And I have received Rs. 417-8-0 from *Musammat* Man Kuar." That must be the particular sum which the plaintiff has alleged to have paid to the defendant daughter, and which obviously by this arrangement passed from the defendant daughter to *Musammat* Bifo, so in this way the three shares of these ladies were equalized. Then it concludes by saying: "None of us have any concern with any other. If anything be done contrary to this, it shall be altogether invalid and void."

That is the agreement.

Now we have to ascertain what was the real intention of the parties. There is no doubt that for the purpose of construing the document we have to look at the whole of the document and consider all its terms one with the other: and for the purpose of ascertaining the intention of the parties we are also entitled to look at the position of affairs at the time when the document was entered into and also at the position of the parties who executed the document and, having regard to such a document as this, I cannot do better than quote a passage, which was referred to this morning, in the case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (5);

(5) 6 M. I. A. 526 at p. 550; 4 W. R. (P. C.) 114; 1 Ind. Jur. (N. S.) 37; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 1 Boulr. Rep. 228; 19 E. R. 198.

that no doubt refers to a testamentary document but, in my opinion, it is equally applicable to the construction of an agreement such as we have now before us. The passage is as follows: "The Hindu Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected." And in construing the terms of a document, it has been pointed out in the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (6) that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses." If any further authority were needed, I might refer to the case of *Srcemutty Rabutty Dossee* v. *Sibchunder Mullick* (7) (which again is reported in the same Volume at page 1, the passage being at page 23), where it is said by the Judicial Committee of the Privy Council: "You must look at the words of the deed with reference to the parties who use them, and the grant must be consistent with that; consistent with the interests of those who make the grant." That being so, I have first of all to consider the position of the parties: the plaintiff was the widow of a man who had been a member of a joint Hindu family governed by the Mitakshara Law. Her husband, therefore, had an interest in his father's property since he was born and when he died, that property of the plaintiff's husband passed to his father subject to his widow's right of maintenance and when the husband's father died, as he died in this case, leaving the defendant daughter surviving him, the property passed to the defendant daughter again subject to the right of the widow to maintenance.

Now, that being the position of the parties, I have to consider what was the intention of the parties when this agreement was entered into. Having given due consideration to the arguments which were advanced on the one side and on the other, I have come to the conclusion that the intention was first of all to get rid of what was apparently a constant source of friction among the three women living together and trying to carry on a joint business in the same premises. That was the first intention. The second intention was that the two daughters-in-law or rather the daughter-in-law, the plaintiff, I need not say two daughters-in-law, because I am only concerned with one, the plaintiff, should have certain property, in order that she might maintain herself out of the profits of that property; and this agreement was entered into upon the basis of the plaintiff's right to maintenance which existed in her according to the Hindu Law. I think the word "heirs" in this agreement, having regard to the other provisions of it, was not used in the strict legal sense, but rather as a word implying person interested in the estate.

That being the true construction of the document, the question then arises did the plaintiff by her re marriage forfeit her interest in the house? The position of the plaintiff in this respect was this: she belonged to a caste which by custom allowed the re-marriage of a widow. But that in itself would not prevent her from forfeiting her right to maintenance out of her deceased husband's property, and the case of *Rasul Jehan Begum* v. *Ram Surun Singh* (4) was referred to, where the headnote is to the following effect: "A Hindu widow, on re-marriage, forfeits the estate inherited from her former husband, although according to custom prevailing in her caste, a re-marriage is permissible." That case, it is to be noted, deals with the estate which is inherited by a widow from her former husband. This is not a case of inheritance: and as I have already pointed out, in my opinion, this is an agreement which is based upon the widow's right to maintenance which is a charge upon the property of her deceased husband. It is not disputed that but for this agreement she would forfeit that right on her re-marriage.

In my judgment, inasmuch as I have come to the conclusion that this agreement was

(6) 6 M. I. A. 393; 18 W. R. 81 *note*.; Sevestre 253*n*; Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.
(7) 6 M. I. A. 1; 1 Sar. P. C. J. 484; 19 E. R. 1.

based upon the plaintiff's right to maintenance out of her deceased husband's property, and that the provisions contained in it were intended to secure the efficient carrying out of that right, I am of opinion that the plaintiff when she was married again forfeited her interest in the house in question.

There is another argument which has been brought forward, and I must deal with that. It is said that the property, in which the plaintiff by reason of this agreement obtained an interest, was not that of her deceased husband, and that is one of the grounds on which the learned Judge who decided the case in favour of the plaintiff relied. The answer to it is that which I have already given, and that is this: The deceased husband having had an interest in the ancestral property out of which she would be maintained during her life, the obligation to maintain her out of that property continued after his death, when the property passed by survivorship, and as I have already mentioned, the property passed to the defendant No. 3 subject to the plaintiff's right of maintenance, and part of that property was the subject-matter of the agreement.

It has been argued that section 2 of Act XV of 1856 does not apply to this case, because of the facts which I have already mentioned. I do not think that it much matters whether this Act applies or not, because it has been admitted during the course of the argument that this section is practically a statement of the Hindu Law as it existed apart from the Act, so far as it related to the forfeiture of a widow's interest on her re-marriage under the circumstances mentioned.

I ought to say before concluding my judgment in deference to the learned Judge that he had not the translation of the agreement before him when he gave his judgment, and, therefore, he had not the advantage which we have had in this Court, and, as far as he knew, the agreement did not make any specific reference to maintenance: Whereas it turns out, when we look at the translation of the agreement, that, as I have already explained in the beginning of my judgment, the object specifically mentioned in this arrangement was that the plaintiff and the other daughter-in-law might maintain themselves from the profits of their respective properties.

For these reasons I think that the learned Judge's judgment cannot stand. But inasmuch as the plaintiff has paid the sum of Rs. 417-8-0 in respect of this property for the purpose of equalizing the shares as they are called in the agreement, it will be wholly inequitable to allow the defendants to deprive the plaintiff of the house in question, unless the defendants or some of them refund the sum of Rs. 417-8-0 to the plaintiff.

N. R. CHATTERJEA, J.—The main contention in this case turns upon the construction of the *ekrarnama*. It states that in accordance with the decision of the *panch*, each of the three parties was to get a specific property: *Musammat* Jago Kuar, the daughter, was to get the dwelling-house and the shop together with the stock of the shop, and she was to pay the debts due from the shop. It was provided that she would be competent to part with some of the property allotted to her and thus pay the debts to creditors, or she could pay the same with her own funds. Then dealing with the two daughters-in-law it stated that each would get property of the value of Rs. 782-8-0, so that "they may maintain themselves from the profits of their respective properties, one not having any concern with the other, whereby quarrels and animosities may be averted and the ancestral estate of Har Lal Bhagat *alias* Hassani Bhagat may not be ruined."

The object of the arrangement, therefore, was to provide maintenance for the parties and that the ancestral estate of Har Lal might be preserved.

There was, no doubt, the word "heirs" used with reference to all the three parties; but I think the word was used in the sense of "persons interested" in the estate left by the deceased. The daughters in-law were entitled only to maintenance but they were living as members of the family and carrying on the shop. The *panch*, it is true, directed that the property should be divided into three equal shares, the two daughters in-law and the daughter each getting a share.

That by itself does not show that the property allotted to plaintiff was given to her otherwise than by way of maintenance, because specific properties are sometimes given to persons entitled to maintenance to be enjoyed by them in lieu of cash payments. The parties had, no doubt, become separate

possessors but that was the arrangement made in order to avoid disputes. The *ekrar* then says, "We the declarants have acquired full right and authority in respect of the property apportioned to us respectively, so that each may take whatever she thinks fit and proper with respect thereto, without consulting and without reference to another, wherewith any other of the parties or her heirs shall not have any sort of concern or have any lien." This clause should, I think, be read in connection with the passage which I have already set out, and which appears to me to be the object of the *ekrar*, namely, that the parties might maintain themselves from the profits of the property, and that the ancestral property might not be ruined. I think the clause must be limited to the purpose of the arrangement, which was that each party should have separate possession and enjoyment of the property allotted to her for maintenance. The word "heirs" was used, but it seems to me that the word was here used in the sense of "successors." *Musammat* Jago, the heiress of Har Lal, herself had no absolute right, and it is not disputed and cannot be disputed that she could not confer an absolute right. In construing the document we should bear in mind the position of the party making the grant and of the person taking it. If the expressions used in the deed, relied upon on behalf of the respondent, are capable of both constructions, that construction should be adopted which is consistent with the law to which the parties are subject. As I have said, a daughter herself has no absolute right, and a daughter-in-law has a right to maintenance only: and I do not think that we ought to construe the words in the document so as to hold that the daughter intended to give an absolute right to the daughters-in-law. In any case the plaintiff cannot be said to have obtained the property independent of her right to maintenance, and an absolute right in the sense of a right accruing to her not as widow of Kishen Ram, and not by way of maintenance, but independently of her position as such widow could not have been intended to be conferred on her.

It was contended before us on behalf of the plaintiff that the plaintiff's husband having predeceased his father, his interest in the estate passed by survivorship to the father and, therefore, was no longer the property of her husband which was liable for her maintenance: and that being so, she had no interest in her husband's estate which she would forfeit by her re-marriage. This contention is clearly erroneous. Her husband had an interest in the property (which was ancestral property), out of which she was entitled to be maintained during his life, and the obligation to maintain her out of that property continued after his death, whether it passed by inheritance or by survivorship. This being so, there is no doubt that the property that the plaintiff obtained under the document was by way of maintenance out of the property of her deceased husband in the hands of *Musammat* Jago.

The plaintiff, no doubt, paid Rs. 417-8-0 for equalizing the share in respect of the house which had been allotted to her, the value of which was Rs. 1,200. The parties agreed that each would get property valued at Rs. 782. To that extent the property must be taken to be the property given by way of maintenance, but the remaining portion of the property representing Rs. 471-8-0 which had been paid by the plaintiff did not constitute such property.

The question whether section 2 of Act XV of 1856 is inapplicable to this case, because, the plaintiff, according to the custom of the caste to which she belongs, could have re-married independently of the Act, is of no practical importance, as on the general principles of Hindu Law, a widow, whose re-marriage may be legal according to the custom of the caste to which she belongs, would forfeit any interest which she had in her husband's estate, on her re-marriage. I think, therefore, that the plaintiff forfeited her interest in the property to the extent to which she obtained it by way of maintenance.

(Case adjourned till the 4th of April for final order.)

SANDERSON, C. J.—It appearing that the defendant No. 2 purchased one-third only of the entire house and that the suit is with reference to the said one-third only, upon the plaintiff and defendants Nos. 1 and 2 consenting and upon the defendant No. 2 depositing

within three months from to-day one-third of Rs. 417-8-0, namely, Rs. 139-2-8 in the Court of first instance for payment to the plaintiff, the suit will be dismissed. If the said sum is not paid within the said three months, the appeal will be dismissed. No order as to costs in all Courts.

N. R. CHATTERJEA, J.—I agree in the order proposed by the learned Chief Justice to-day.

*Appeal allowed.*

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 29 OF 1915.

August 31, 1915.

*Present*:—Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C.

MRS. ELKINS AND ANOTHER—APPELLANTS

*versus*

REV. DR. CULLEN—RESPONDENT.

*Will—Bequest to charity, construction of—Uncertainty*—Cy-pres, *doctrine of—Trusts Act (II of 1882), applicability of.*

Where a disposition in a Will indicates an intention to benefit charities, or a class of charities generally, treating the particular named objects of gift as mere instruments for carrying out such general intention, the general purpose of charity will be executed according to the doctrine of *cy-pres*. [p. 795, col. 2.]

If a devise in a Will can be construed as a bequest to "charity", in the sense in which that word is understood in English Law, then the disposition is valid, and is governed by the Indian Trusts Act. If, however, it is a devise in the alternative for purposes which are not charitable, though benevolent or philanthropic, then the bequest is void. [p. 797, col. 2.]

*Morice* v. *Bishop of Durham*, (1804) 9 Ves. Jun. 399; 32 E. R. 656; 7 R. R. 332, relied upon.

In India the Courts will only recognise the validity of trusts which they can either themselves execute or can control when in process of being executed by trustees. [p. 798, col. 1.]

Case law discussed and reviewed.

A testatrix devised her estate to a trustee that "he of his own judgment (may) give as a donation or apply or invest the balance to or for any person or persons, for his, her or their use or benefit, or to or for any charitable or religious institution or object, as he may think proper":

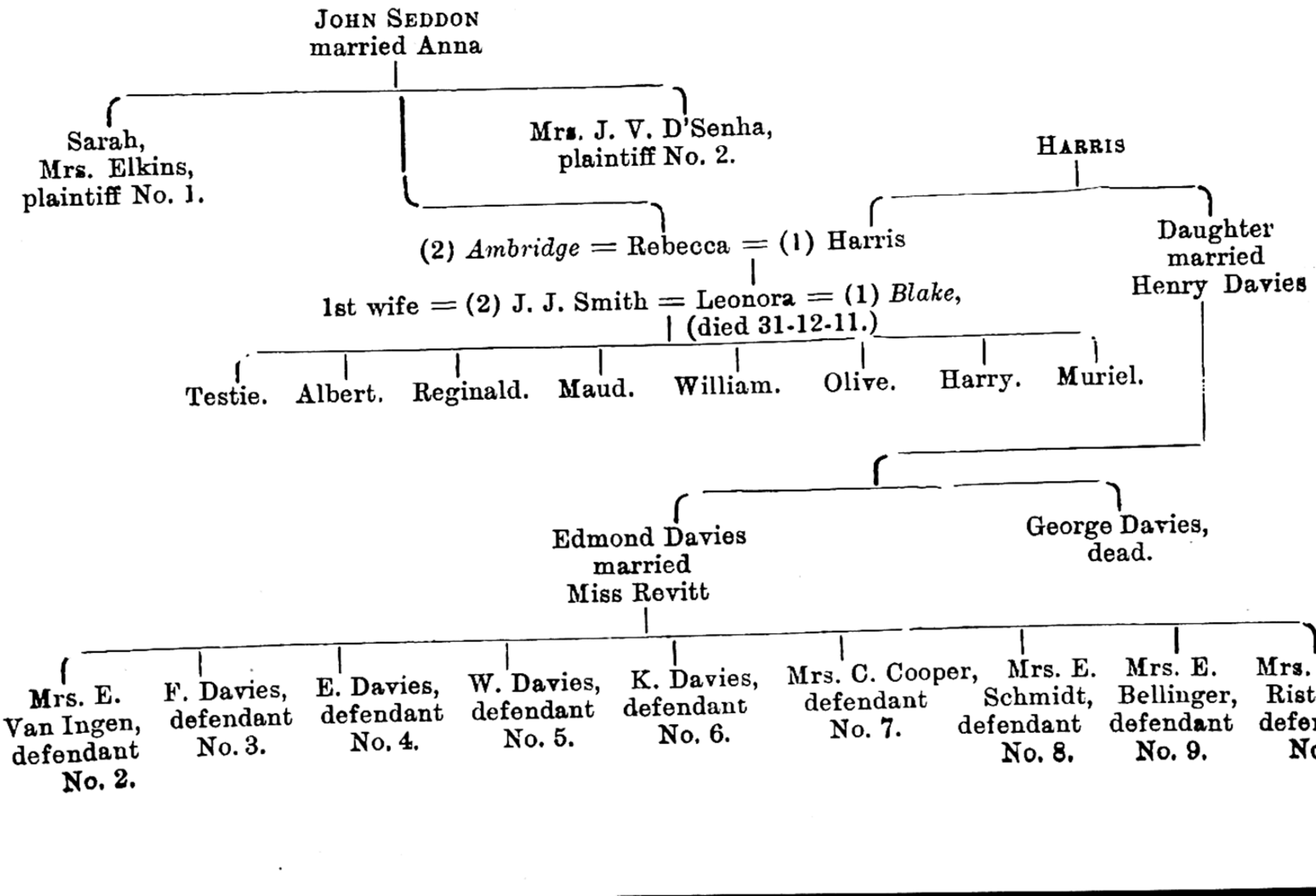
*Held*, that the bequest was void for uncertainty. [p. 799, col. 2.]

First appeal against the decree of the District Judge, Jubbulpore, dated the 23rd December 1914.

Mr. *J. C. Ghosh*, for the Appellants.

The Hon'ble Mr. *M. B. Dadabhoy*, for the Respondent.

JUDGMENT.—The facts of this case are few and simple, but the application of the law thereto presents some difficulty. The following genealogical tree, evolved from the record, will assist comprehension of the case :—



MRS. ELKINS *v.* REV. DR. CULLEN.

The above tree gives the defendants Nos. 2 to 10 as serially numbered in the proceedings, and not in the order of their births. The names of the children of J. J. Smith follow the order in which they appear in the Will of his widow Leonora Smith (*nee* Harris). In the course of this litigation the defendants Nos. 2 to 10 disputed the legitimacy of the plaintiff No. 1, but this plaintiff has proved the following facts to our satisfaction by the production of duly certified copies of extracts from Registers of Marriages and Baptisms maintained in the Diocese of Madras :—

1. *John Seddon*, a Trumpeter in the 2nd Regiment, N. L. Cavalry, a bachelor, was married to *Anna*, a native spinster, at Tripassore, Poonamallee, in the Madras Presidency, on the 18th November 1829, the marriage by banns being celebrated by the Reverend F. Spring, Chaplain.

2. *Sarah*, the plaintiff No. 1, apparently the first issue of the above marriage, was born at Arcot on the 27th July 1832, and baptized at Tripassore by the said Reverend F. Spring (Junior Presidency Chaplain) on the 15th September 1833.

3. *Rebecca*, the next issue of the above marriage, was born at Arcot on the 21st October 1834, and was baptized at St. George's Church, Madras, by the Reverend H. Harper, Senior Chaplain, on the 3rd March 1835.

The legitimacy of the plaintiff No. 1 and her relationship to her sister's daughter, Leonora, whose Will is in dispute in this case, is thus well established : and we are surprised to see that the District Judge recorded no finding on this point, and left her under the stigma of a doubtful paternity which a body of rival claimants to the estate of her niece cast upon her. All the other parts of the above genealogical tree are admitted, and the tree may be taken as correct for the purposes of this appeal.

Leonora Smith died at Jubbulpore on the 31st December 1911, being at the time a widow, for the second time, without any issue of her own. She had a power of appointment over certain property under the Will of her second husband, and certain other property was her own and at her absolute disposal. On the 11th September 1911 she executed a Will in the following words :—

"This is the last Will and Testament of me, Leonora Smith, widow of Joseph John Smith, who was a Guard on the Great Indian Peninsula Railway. I give and bequeath all my moneys, Rs. (2,000) two thousand being lent on interest to the Methodist Mission at Jubbulpore (of which the Reverend Dr. Felt is Minister), or elsewhere lodged or invested, together with my house No. 58, situated in the Sadar Bazar, Cantonment of Jubbulpore, with all my furniture therein or elsewhere located, and such jewellery as I may have, and all my livestock of whatever kind, to the Reverend Dr. P. Cullen, Lieutenant-Colonel, Indian Medical Service, retired, as Trustee, and appoint him my sole executor of this my Will; that he, knowing my wishes, and those of my mother the late Mrs. Ambridge, he after my death let on rent or sell the house No. 58 above mentioned and furniture and other items of property and realize the money; and after all my just debts and funeral expenses have been paid, he of his own judgment give as a donation or apply or invest the balance to or for any person or persons, for his, her or their use or benefit, or to or for any charitable or religious institution or object, as he may think proper.

"Of the money left by my husband, *viz.*, Rs. (4,000) four thousand for my life-time and after my death be divided equally among his children. Of this I have spent Rs. (1,500) one thousand five hundred in paying his debts, in obtaining Probate of his Will, in erecting a tomb-stone to his memory, and in other petty expenses and have yet to spend more on these. The balance that may remain my executor will divide equally between his eight children Testie Smith, Albert Smith, Reginald Smith, Mrs. Maud Smith, William Smith, Mrs. Olive Martin, Harry Smith, Miss Muriel Smith, and if any of these die before I do, his or her share shall be added to the total sum and divided equally among the living.

"And in case Dr. Cullen decease before me, I reserve my right to appoint another executor to carry out the provisions of this my Will with such instructions as any altered circumstances of time may have rendered necessary.

"In witness whereof I have hereto set my hand this eleventh day of September in the

year of our Lord nineteen hundred and eleven."

This Will was duly signed by the testatrix and attested according to law by Mr. W. J. Bagley, an Extra Assistant Commissioner, and Mr. A. Smith, a Guard on the G. I. P. Railway.

The Reverend Dr. Cullen, who appears as the first defendant in this litigation, was formerly a Lieutenant-Colonel in the Indian Medical Service and a Civil Surgeon of Jubbulpore. He has since retired, and is now a Minister in Holy Orders of the Church of England. He was admittedly the medical adviser, and presumably also the spiritual preceptor, of the testatrix: but the language of the Will makes it manifest that he had no hand in drawing it up, and it is not alleged, or at any rate there is no proof, that he actively influenced the testatrix in making it. He applied to the District Court for Probate of the Will in due course, but Probate was refused, on a caveat filed by the plaintiff No. 1, the learned District Judge holding that the Will, so far as it purported to dispose of the estate of the testatrix for charitable purposes, was void for uncertainty. Caveats were also filed by the children of Edmond Davies who claimed to be the heirs of the deceased, repudiating the claim of the plaintiff No. 1, on grounds already referred to and decided. Dr. Cullen appealed to this Court [*Cullen* v. *Mrs. Elkins* (1)], and a Judge of this Court, following *Gopaldas* v. *Musammat Bandan* (2), decided that a District Court, in its capacity as a Court of Probate, has no jurisdiction to determine any question of title regarding the property of which the Will purports to dispose, or to decide whether any of the bequests in the Will are void or valid, because of the nature of such bequests. The order of the District Court refusing Probate was, therefore, set aside and the case remanded for disposal on the merits. Subsequently an order for the grant of Probate was made by the District Court, but Dr. Cullen has wisely abstained from paying the necessary fees and taking out Probate pending the disposal of this litigation. Two suits resulted from the order granting Probate. One was brought by the plaintiffs Sarah Elkins and Mrs. I. V. D'Senha against Dr. Cullen and the children of Edmond Davies: the other was brought by the children of Edmond Davies against Dr. Cullen and Sarah Elkins. The two suits were consolidated, and the children of Edmond Davies admitted that if Sarah Elkins established the fact that the testatrix was her sister's daughter she would be the heir of the deceased in preference to them. They made common cause with her in opposing the Will. The learned District Judge upheld the Will and on that sole ground dismissed both suits. Sarah Elkins and Mrs. D'Senha have appealed, and though the District Judge failed to record a finding as to Mrs. Elkins' relationship with the deceased, her rival claimants are apparently satisfied by the evidence she was able to produce as to her paternity and legitimacy. They have neither appealed against the dismissal of their suit nor entered appearance as respondents in this appeal by Mrs. Elkins and Mrs. D'Senha in their suit. The Davies family may be left out of further consideration as they were given up by the learned Advocate for the appellant at that hearing. The grounds taken in appeal are as follow:—

(1) That the Court below has erred in law in holding that the bequest is not vague and that it is not void for uncertainty.

(2) That the Court below has erred in law in applying section 125 of the Succession Act to the terms of the bequest in the present case.

It was made clear in the course of the arguments that the plaintiffs-appellants only dispute so much of the Will of their niece as purports to dispose of her absolute estate, and that they do not contest the bequest made of the estate of J. J. Smith in which the testatrix had only a life interest. The main ground upon which this appeal is founded is that the property in dispute is not left to any ascertained beneficiary, but is practically at the absolute disposal of the trustee, and the bequest is, therefore, void for uncertainty. The particular words which we have to consider are these:—

"He of his own judgment (may) give as a donation or apply or invest the balance

(1) 21 Ind. Cas. 599; 9 N. L. R. 152.
(2) 15 C. P. L. R. 101.

to or for any person or persons, for his, her or their use or benefit, or to or for any charitable or religious institution or object, as he may think proper."

It was urged on behalf of the respondent that these words are controlled by the words "he knowing my wishes and those of my mother the late Mrs. Ambridge." We are unable, however, to construe those words as evidence of any concealed communications as to the disposal of the estate. Neither in the pleadings nor in the witness box has any statement been made by or on behalf of Dr. Cullen to the effect that the testatrix left any verbal directions with him for the disposal of her estate. It may be that he knew that both Mrs. Ambridge and her daughter the testatrix did not wish the property to go to the plaintiffs as heirs, and that he was, therefore, entrusted to dispose of it in any other way that he deemed fit. The reference made to the wishes of her mother in conjunction with her own leads us to the conclusion that the testatrix did not mean to convey that she had given any oral directions to the respondent for the disposal of her estate. He was declared to know what she and her mother felt on the subject generally, and was, therefore, a fit person to carry out the trusts which the testatrix sought to create by her Will. We think that if any private instructions had been given to Dr. Cullen, amounting to a testamentary disposition of the property supplementary of the written Will, he would have said so in the pleadings. We, therefore, hold that the words—"he knowing my wishes and those of my mother Mrs. Ambridge"—do not control the words of disposal disputed by the appellant, even it we admitted, which we do not, that section 68 of the Indian Succession Act, 1865, offers no barrier to the admission of evidence, had it been given, to prove what the testatrix orally confided to Dr. Cullen.

It is claimed for the respondent that the bequest is one made to charity generally, and, as such, is valid; while the interpretation put on the language on behalf of the appellants is this, that the bequest is not limited to charitable purposes only, but is one to any person or persons to whom the trustee may be pleased to give the money realized by the sale of the estate. The general doctrine governing the construction of Wills has been well laid down in a leading work on the subject in these words:—

"In the construction of Wills the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the Will, and the whole carefully weighed together; but if, after every endeavour, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. * * *

"To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal." [See Jarman on Wills, 5th Edition, Volume I, pages 326 and 327.]

In the case before us there is no uncertainty in the subject of the devise. The subject is the whole estate of the testatrix, excepting a balance of Rs. 4,000 left for disposal under the Will of her second husband, J. J. Smith. This estate is to be converted into money so far as it is not already in that form, and is thereafter to be held and disposed of by the trustee according to the directions contained in the Will by which he is appointed trustee.

It is contended that there is uncertainty as to the object, and that is the question upon which our decision is invited.

It cannot be disputed that the language used favours the contention of the appellants. The bequest is made "to or for any person or persons, for his, her or their use or beneft, *or* to or for any charitable or religious

institution or object," and it is uged that charity and religion are given as an alternative to something which is not under the category of either. On the other hand it is argued for the respondent that the alternative given is between charity to individuals and charity to institutions. The trustee may, at his discretion, apply the money to help a poor man or a poverty-stricken family, or he may subscribe to an orphanage or a church. But it is further contended on behalf of the appellants that even if this construction be admitted the bequest is void for uncertainty. It seems expedient to consider this alternative argument before deciding whether the devise was intended to cover objects outside the category of charity.

The English case-law on the subject is voluminous, and we can only deal with the general trend of it in this judgment. Dispositions made to charitable purposes are strongly favoured in point of construction, and have been upheld even where the bequest would, upon the ordinary principles which govern the construction of testamentary dispositions, be void for uncertainty. The purpose being charity, the Crown as *parens patriæ*, or the Court of Chancery, will execute it *cy-pres*: Thus bequests (*a*) to the poor in general; (*b*) to charitable uses generally; (*c*) for the advancement of religion expressed in the most vague and indefinite terms, (*d*) to such charitable uses as the testator's executor shall appoint; (*e*) in favour of a charitable object which has no existence, or which is void in law, or has become impossible, have been maintained and executed in accordance with the doctrine of *cy-pres*: (*a*) *Attorney-General* v. *Mathews* (3), *Attorney-General* v. *Peacock* (4); (*b*) *Clifford* v. *Francis* (5); *Attorney-General* v. *Herrick* (6); (*c*) *Powerscourt* v. *Powerscourt* (7); (*d*) *White* v. *White* (8); (*e*) *Attorney-General* v. *City of London* (9); *Attorney-General* v. *Whorwood* (10); *Attorney-General* v. *Guise* (11). Indeed in *In re White*; *White* v. *White* (12) it was laid down that "a charitable bequest never fails for uncertainty." This means that if a general intention can be found to give to charity, the gift does not fail because the testator has not indicated the particular charity he wishes to benefit, or because the means he indicates for ascertaining the particular charity are inadequate. The general test at the present day in England seems to be whether the scope and terms of the Will, or that part of it which relates to charitable dispositions, indicates an intention to benefit charities, or a class of charities generally treating particular named objects of gift as mere instruments for carrying out such general intention. In all such cases the general purpose of charity will be executed according to the doctrine of *cy-pres*.

So far the case-law of England is plain and consistent: but difficulties arise as soon as we come to examine the cases which define what is and what is not a charitable purpose. 'Charity' has been defined to be a general *public* use. In order to ascertain what are charitable purposes recourse is usually had to the preamble of the Statute 43 Eliz. c. 4, which preamble has been reproduced in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), though the latter enactment otherwise repeals the former. The preamble of 43 Eliz. c. 4 enumerated as charities the relief of the aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea banks and highways; education and preferment of orphans; relief, stock or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes. But it has been held that the word 'charity' is by no means limited to the exact forms of it enumerated in the Statute of Elizabeth: *Income Tax Commissioners* v. *Pemsel* (13). Numerous instances will be found in Jarman on

(3) (1677) 2 Lev. 167; 83 E. R. 501.
(4) (1675) Rep. Tem. Finch. 245; 23 E. R. 135.
(5) (1679) 1 Freeman 330; 22 E. R. 1235.
(6) (1772) Amb. 712; 27 E. R. 461.
(7) (1824) 1 Moll. 616; Beat. 572.
(8) (1778) 1 Bro. C. C. 12; 28 E. R. 955.
(9) (1790) 3 Bro. C. C. 171; 29 E. R. 472.
(10) (1750) 1 Ves. Sen. 534; 27 E. R. 1188.
(11) (1692) 2 Vern 266; 23 E. R. 772.
(12) (1893) 2 Ch. 41; 62 L. J. Ch. 342; 2 R. 380; 68 L. T. 187; 41 W. R. 683.
(13) (1891) A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J. P. 805.

Wills, 5th Edition, Volume I, page 167, and in the cases there cited. In the case last above cited 'charity' in the legal sense (wherein it has a far wider meaning than the word conveys in its popular use) was said to comprise four principal divisions, namely.—

(1) trusts for the relief of poverty;

(2) trusts for the advancement of education;

(3) trusts for the advancement of religion; and

(4) trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Nevertheless it is impossible to reconcile all the case-law in respect of bequests to charitable uses or to evolve therefrom any satisfactory definition of 'charity'. On the one hand a gift for private charity has been held to be too confined to be a charity in the legal sense, and, therefore, void: *Ommanney* v. *Butcher* (14); on the other hand bequests for purposes of benevolence, or liberality, or general or public utility, or philanthropy, or for public purposes, in cases to which the preamble to 43 Eliz c. 4 would not expressly have applied, are declared to be too wide to be charitable: *James* v. *Allen* (15); *In re Jarman, Leavers* v. *Clayton* (16); *Morice* v. *Bishop of Durham* (17); *Kendall* v. *Granger* (18); *Langham* v. *Peterson* (19); *In re Macduff, Macduff* v. *Macduff* (20); *Vezey* v. *Jamson* (21); and *Blair* v. *Duncan* (22). We need not pursue the subject any further. It will be found fully discussed in Jarman on Wills, already referred to, and in the Law of Wills by Theobald, 7th (1938) Edition. The decisions of the English Courts appear to have been mainly controlled by the statutory provisions governing charitable bequests, and cannot, therefore, be a complete or accurate guide in this country where those Statutes have no force, except so far as their provisions have been incorporated in British Indian enactments or, in the absence of enactment, been followed by the Indian Courts. In the Indian Succession Act, 1865, by which this case is governed, a great deal of English Law is incorporated, and in section 105 thereof we have a provision controlling bequests "to religious or charitable uses"; but neither in that Act, nor in the General Clauses Act, 1897, nor in any special enactment, are we able to find any definition of a charitable use or of a religious use. The Indian case-law is meagre, but, as far as it goes, it is largely based on analogies drawn from the English case-law. In *Gangabai* v. *Thavar Mulla* (23) it was held that in the Will of a Khoja Muhammadan, written in the English language and form, a gift of a fund" to be disposed in charity as my executor shall think right," is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects by analogy to 43 Eliz. c. 4. But where the Will is in the native language, and the word '*dharm*' is used, the word was declared to be too vague and uncertain for the gift to be carried into effect by the Court, including as it does many objects not comprehended in the word 'charity' as understood in English Law. In a note which appears at page 76 of this ruling, reference is made to a decision of the same Court in 1859 in which the word *dharm* was interpreted as including a great number of objects which come within the meaning of the English word 'benevolent', as contradistinguished from 'charitable' in the sense in which the latter has been construed by English Courts since 43 Eliz. c. 4. The well-known case of *Morice* v. *Bishop of Durham* (17) was referred to as an authority for the proposition that a bequest to "charitable and benevolent purposes" is too vague an indication of the testator's intention for a valid gift to charity, and must

(14) (1823) Turn. & R. 260; 37 E. R. 1098; 24 R. R. 42.

(15) (1817) 3 Mer. 17; 36 E. R. 7; 17 R. R. 4.

(16) (1878) 8 Ch. D. 584; 47 L. J. Ch. 675; 39 L. T. 89; 26 W. R. 907.

(17) (1804) 9 Ves. Jun. 399; 32 E. R. 656; 7 R. R. 232.

(18) (1842) 5 Beav. 300; 11 L. J. Ch. 405; 6 Jur. 919; 49 E. R. 593; 59 R. R. 507.

(19) (1903) 87 L. T. 744; 67 J. P. 75; 19 T.L.R. 157.

(20) (1896) 2 Ch. 451; 65 L. J. Ch. 700; 74 L. T. 706; 45 W. R. 154.

(21) (1822) 1 Sim. & St. 69; 57 E. R. 27; 90 R. R. 878.

(22) (1902) A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 158.

(23) 1 B. H C. R. 71 at p. 76.

be held void. In *Jamnabai* v. *Khimji Vullubdass* (24) bequests (*a*) for the continuance of an existing *sadavarat*, (*b*) for the establishment and maintenance of a second *sadavarat*, and (*c*) for the building of a well and cistern for public use were all held valid as charitable trusts. In *Morarji Cullianji* v. *Nenbai* (25) Starling, J., felt bound, by the modern tendency towards upholding as much as possible where charity is concerned [following *Hoare* v. *Osborne* (26)], to hold that a bequest in favour of *dharm* and *sadavarat* was valid as to *sadavarat* (the distribution of alms) but invalid as to *dharm*: and, upon an entirely arbitrary conclusion, he sustained the bequest to the extent of one-half. This decision seems to be irreconcileable with the *ratio decidendi* in *Morice* v. *Bishop of Durham* (17) above quoted. In *Devshankar Naranbhai* v. *Motiram Jageshwar* (27), where most of the earlier Bombay decisions were reviewed, it was held that a bequest in favour of *dharmada* is void for uncertainty. In *Runchordas Vandravandas* v. *Parvatibai* (28) the English ruling last above cited was approved by their Lordships of the Privy Council, who ruled that a devise to *dharm* is void because the objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control. In *Trikumdas Damodhar* v. *Haridas* (29) a bequest by a testatrix of the residue of her estate for use by six named executors "in such manner as they may unanimously think proper for purposes of public usefulness or for purposes of 'charity'" was held to be bad for uncertainty. In *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (30) devises (1) to feed the poor and needy, (2) to make contributions towards the worship of the testator's ancestral goddess, (3) for annual *shrads* of the testator, his father, mother, and grandfather, and (4) for the performance of ceremonies and the feeding of Brahmins, were found to be valid testamentary bequests; and it was doubted, and not decided, whether bequests to learned men for holding *tolls* for learning at the time of the Doorgah Poojah, and for reading the Mahabharat and Pooran and for prayer to God, were valid. In *Parbati Bibee* v. *Ram Barun Upadhya* (31) a bequest of a residuary estate "to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper" was held valid by Henderson, J., who construed the devise as one made wholly to charity and, therefore, outside the purview of the *dictum* in *Morice* v. *Bishop of Durham* (17). In *Rajendra Lal Agarwalla* v. *Raj Coomari Debi* (32), Harington, J., held a direction to spend income in feeding poor indigent Hindus to be a valid charitable bequest under Hindu Law. In *Administrator-General of Bengal* v. *Hughes* (33) the English Law was closely followed, but no question of uncertainty was raised. The repair of certain graves was held not to be a charity. In *In the matter of Hormusji Framji Warden* (34) the Court held the *cy-pres* doctrine to be applicable in India. In *Gurdit Singh* v. *Sher Singh* (35) it was decided that a bequest for distribution of money on *dharmath* was void for uncertainty.

From a consideration of all thes eauthorities it seems clear that if we can construe the devise in this case to be a bequest to "charity," as that word is understood in English Law, then the disposition will be valid, and be governed by the Indian Trusts Act, 1882. But if it is a devise in the alternative for purposes which are not charitable, though benevolent or philanthropic, then the bequest is void under the principles laid down in *Morice* v. *Bishop of Duruam* (17) and the Indian cases relating to *dharm*. We have seen that in law charity

(24) 14 B. 1; 7 Ind. Dec. (N. S.) 459.
(25) 17 B. 351; 9 Ind. Dec. (N. S.) 228.
(26) (1866) 1 Eq. 585; 35 L. J. Ch. 345; 12 Jur. (N. S.) 243; 14 L. T. 9; 14 W. R. 383.
(27) 18 B. 136; 9 Ind. Dec. (N. S.) 599.
(28) 26 I. A. 71; 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 7 Sar. P. C. J 543; 12 Ind. Dec. (N. S.) 485 (P. C.)
(29) 31 B. 583; 9 Bom. L. R. 560.
(30) 4 C. 443; 1 C. L. R. 566; 2 Ind. Dec. (N. S.) 282.
(31) 31 C. 895; 8 C. W. N. 653.
(32) 34 C. 5; 11 C. W. N. 65.
(33) 21 Ind. Cas. 183; 40 C. 192.
(34) 32 B. 214; 9 Bom. L. R. 1203.
(35) 14 Ind. Cas. 247; 78 P. R. 1912; 63 P. W. R. 1912; 106 P. L. R. 1912.

has been defined to be a general public use, and that a devise for private charity has been held to be void, or at any rate not to be a charitable bequest in law. We have also seen that both in England and in India the Court will only recognize the validity of trusts which it can either itself execute or can control when in process of being executed by trustees: *Morice* v. *Bishop of Durham* (17); *Runchordas Vandravandoss* v. *Parvatibai* (28). That principle is now regarded as well established in England: *Nash* v. *Morley* (36). In a case already cited, *Ommanney* v. *Butcher* (14), the testatrix declared as to certain money that she wished it to be given in private charity. Sir T. Plumer, M. R., held that the words did not create a trust which could be carried into effect. Assisting individuals in distress was private charity, but such a purpose could not be executed by the Court or the Crown. So a gift to found a private museum, *Thomson* v. *Shakespear* (37), or in aid of a subscription library, *Carne* v. *Long* (38), or of a mechanics institute, *In re Dutton, Exparte Peak* (39), or for the benefit of an orphan school kept by an individual substantially at his own expense, *Clark* v. *Taylor* (40), has been held not to be charitable. In *Vezey* v. *Jamson* (21) a testator gave the residue of his estate to his executors, upon trust to apply and dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting appoint, and as the laws of the land would admit of; and, in default, upon trust to pay and apply the same in or towards such charitable or public purposes as the laws of the land would admit of; *or to any person or persons, and in such shares, manner, and form as his* (the testator's) *executors, or the survivor of them*, or the executors or administrators of such survivor, *should in their or his discretion, will and pleasure think fit*, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir J. Leach, V. C., observed that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly on trust, and they could not, therefore, hold it for their own benefit; the purposes of the trust being so general and undefined, they must fail altogether and the next-of-kin become entitled. We have underlined (italicised) certain passages in our statement of the above case which seem to us to offer a close resemblance to the first part of the disputed devise in this case. In *Kendall* v. *Granger* (18), where the trustees were directed to dispose of the residue for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion might suggest, irresponsible to any person or persons whatsoever, Lord Langdale, M. R., decided that the gift was void for uncertainty. He said that to make the bequest valid it must be *obligatory* on the trustees to apply the *whole* of it in charity. In *Ellis* v. *Selby* (41) a bequest for "charitable *or* other purposes" and in *Williams* v. *Kershaw* (42) a devise for "benevolent, charitable, and religious purposes" were held invalid. Generally, where a discretion is left to trustees, which would empower them to apply the whole of the gift *either* to charitable or other *indefinite* purposes, the whole gift is void, as it does not appear that the chief object was charity; and, on the other hand, the other object is void for uncertainty: Theobald's Law of Wills, 7th Edition, page 369, and cases there cited.

In the present case a discretion is left to the trustee in the first instance, as he may think proper, to give the whole of the property forthwith to any individual he may select. There are absolutely no words of control over this power. It is not required

(36) (1842) 5 Beav. 177; 11 L. J. Ch. 336; 6 Jur. 520; 49 E. R. 545; 59 R. R. 456.

(37) (1859) Johns. 612; 70 E. R. 564; 123 R. R. 265.

(38) (1860) 29 L. J. Ch. 503; 2 De. G. F. & J. 75; 6 Jur. (N. S.) 639; 8 W. R. 570; 2 L. T. 552; 45 E. R. 550.

(39) (1878) 4 Ex. D. 54; 48 L. J. Ex. 350.

(40) (1853) 1 Drew. 642; 1 W. R. 476; 21 L. T. (o. s.) 287; 61 E. R. 596; 94 R. R. 786.

(41) (1835) 7 Sim. 352; 4 L. J. Ch. 69; 58 E. R. 872; 40 R. R. 160.

(42) (1835) 5 Cl. & Fin. 111; 7 E. R. 346; 47 R. R. 49.

that the person shall be indigent or deserving of the gift, or that the donation should be an act of charity in either the legal or the popular sense of that word, and we are not justified in reading into the Will words that are not there. In *Dolan* v. *Macdermot* (43), where the trust was to lay out "in such charities and *other public* purposes," it was held that the words, "*other public* purposes," meant purposes *ejusdem generis, i.e.*, charitable, and that they were used to include purposes which, though charitable, under 43 Eliz. c 4 might not be considered so in popular parlance. We think that the rule of *ejusdem generis* cannot be applied here, because the primary bequest is to a person or persons, and only as an alternative succeeding such beneficiaries are charitable purposes mentioned. But suppose we took the unusual course of applying that rule backwards, so as to construe the donation or investment in favour of a person or persons to be a form of the charitable purposes subsequently denoted in general terms, it would carry the devise no higher than one to private charity or public charity, and such a combination would make the bequest void for uncertainty. In *Pocock* v. *Attorney-General* (44) the bequest was to charitable institutions, and was, therefore, of a general public use and rightly held to be valid. The case is not in point here. In *In re Sutton*; *Stone* v. *Attorney-General* (45), where the bequest was for "charitable and deserving objects," in *Wilkinson* v. *Lindgren* (46), where it was to certain specified charitable institutions "or to any other religious institution or purpose" as the trustees might think proper, and in *In re Douglas*; *Obert* v. *Barrow* (47), where the gift was for "charities, societies, and institutions to be selected by A," the rule of *ejusdem generis* was applied, and the words "charitable" and "charities" were held to govern the whole sentence. But we are unable by any straining of language to bring the present case into the category of a bequest made wholly for charity in the legal sense of that term. It will further be observed that the words used are not "charitable *and* religious," but "charitable *or* religious." It is a nice question at the present day, chiefly owing to the decision of the House of Lords in *Grimond* v. *Grimond* (48), whether gifts for religious institutions or religious purposes generally are good charitable gifts: See Theobald's Law of Wills, 7th Edition, page 356 *et seq.*, where the subject will be found fully discussed.

For all these reasons we are of opinion that the contention on behalf of the appellants is sound, and that this appeal must prevail. It is accordingly affirmed and, the decree of the lower Court being reversed, the plaintiffs will be given a decree declaring that the provisions of the Will empowering the trustee to dispose of the estate of the testatrix to any person or persons or to any charitable or religious institution or object are void for uncertainty and of no effect. But the rest of the Will holds good, and the estate is liable for the payment of all funeral and testamentary expenses and the legacy to the eight children of J. J. Smith, the second husband of the testatrix. We are also of opinion that the estate of the testatrix should bear the whole costs of this litigation in both Courts, and the decree will direct accordingly. We allow Pleader's fees in both Courts taxed *ad valorem* of the property in dispute.

*Appeal allowed.*

(43) (1867) 5 Eq. 60.

(44) (1876) 3 Ch. D. 342; 46 L. J. Ch. 795; 25 W. R 277; 35 L. T. 575.

(45) (1885) 28 Ch. D. 464; 54 L. J. Ch. 613; 33 W. R. 5.9.

(46) (1870) 5 Ch. 570; 39 L. J. Ch. 722; 23 L. T. 375; 18 W. R. 961.

(47) (1887) 35 Ch D. 472; 56 L. J. Ch. 913; 56 L. T. 786; 35 W. R. 740.

(48) (1905) A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477: 21 T. L. R. 323.

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## CALCUTTA HIGH COURT.

APPEAL No. 74 OF 1915.

SUIT No. 744 OF 1913.

December 11, 1916.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

HARIBANGSA SHIBDAS RAKSHIT—DEFENDANT—APPELLANT

*versus*

NALINI MOHAN SHAHA—PLAINTIFF—RESPONDENT.

*Contract Act (IX of 1872), s. 211 - Principal and agent—Agent for sale of goods—Delivery order received from broker—Payment to broker, whether discharges agent*

A delivery order for certain goods belonging to the plaintiffs' firm was handed over to the defend-

ants, for the purpose of enabling them to sell the goods at a commission, by a broker who, in the defendants' presence, endorsed the name of the plaintiffs' firm on the order. The defendants sold the goods and paid the price to the broker:

*Held*, that in the absence of a custom of the trade warranting the defendants to pay the price of the goods to the broker, or of proof that the plaintiffs had expressly or impliedly authorised the broker to receive payment, the defendants were not discharged from their liability to the plaintiffs for the price of the goods. [p. 801, col. 1.]

Appeal against the judgment of Mr. Justice Greaves, dated the 28th July 1915, in Suit No. 744 of 1913.

Mr. *S. R. Das* (with him Mr. *K. P. Basu*), for the Appellant.

Mr. *S. C. Bose* (with him Mr. *Sarkar*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendants from the judgment of Greaves, J., whereby he gave judgment for the plaintiffs for Rs. 4,750 and costs.

The cases made by the plaintiffs and the defendants in the pleadings are fully set out in the learned Judge's judgment, and I need not refer to them in detail.

The case made at the trial for the plaintiffs was based upon the evidence of Bhuban Mohan Saha, who stated that he looked after the plaintiffs' business.

He alleged that the plaintiffs bought from Gillanders Arbuthnot & Co. 251 bags of Java Sugar, and that a delivery order for the same, signed by Gillanders Arbuthnot & Co., was brought to him by the broker of the plaintiff firm, *viz.*, one M. L. Roy. The delivery order was as follows:—

DOCK DELIVERY ORDER,
*Calcutta*, 25*th April* 1913.

No. 479

To

The Superintendent,
Kidderpore Docks.

| India one anna. |
|---|

Please deliver to Baboo Lalit M. Nalini M. Shah, 251 bags Java Sugar Arqi: 17 Mark K. P.

Ex: S. S. Burma.
(Two hundred fifty one bags.)

| Kidderpore Docks. No. 27 Berth. Date |
|---|

Gillanders Arbuthnot & Co.

According to his story, on the 30th May 1913, he accompanied by M. L. Roy went to the defendants' *guddee* and handed the delivery order to S. N. Rakshit, the defendants' manager, and arranged with S. N. Rakshit to take delivery of the sugar and sell the same at a commission; the plaintiffs were to bear the costs and charges relating to the sugar, and after the sale the proceeds were either to be brought to the plaintiffs or intimation that the money was standing with the defendants to the plaintiffs' credit was to be sent to the plaintiffs. In cross-examination he stated that at the time he made over the delivery order, he told Surendra Nath Rakshit that Makhan Lal Roy would accompany the representative of the defendant firm to take delivery of the sugar from the docks, and that he (Makhan Lal Roy) would sign the dock delivery order after inspecting the bags. He stated that Makhan Lal Roy had authority to sign the firm's name and get delivery. I should also add that he stated in cross-examination that the transaction in suit was the first transaction that his firm had had with the defendants. He also stated that at most of his visits, I think in all his visits, to the defendants' *guddee*, with one exception, he saw Surendra.

The defendants' case on the other hand was that B. M. Shaha did not bring the delivery order to the defendants but that on the 2nd June M. L. Roy and Khitish came to Surendra Nath and stated they had lot of sugar which they wished him to sell on commission, and that the defendants agreed to this: that on the following day, the 3rd June, Khitish brought to the defendants the delivery order, that at the time the delivery order was brought, it bore the endorsement which now appears upon it. (In passing I may say that I think the learned Judge has in error fixed the first interview on the 3rd instead of the 2nd and the 2nd interview on the 4th instead of the 3rd: it is, however, a matter which makes no material difference.)

It is common ground that the proceeds of the sale were not paid to the plaintiffs in accordance with the agreement alleged by the plaintiffs; and that the plaintiffs have not in fact received the proceeds.

It is necessary, therefore, in the first instance to arrive at a conclusion as to which of

these two stories relating to the inception of the transaction, is true in fact.

The learned Judge has said as follows:—

"Turning once more to the issues in this case, with regard to issue No. 1, that is to say: 'Did the plaintiff enter into any agreement with the defendant firm on the 30th of May as alleged in paragraph 3 of the plaint?' I feel some difficulty in deciding between the evidence called on behalf of the plaintiff and the evidence called on behalf of the defendant in this case, that is to say, as to whether the plaintiff's representative Bhuban Mohan Shaha, as he alleged, came on the 30th May to the defendant's *guddee*, or whether the story of the defendant is true that Bhuban Mohan Shaha never went there and that the whole business was transacted by Makhan Lal Roy and Khitish Chandra Pal. I do not think myself that it is really necessary to decide for the purpose of this case, which story in fact is true, but as the issue has been raised, I am bound to decide it, and so with some doubt I accept the story of the plaintiffs having regard to the corroboration afforded it by Khitish Chandra Pal that he had gone and entered into an agreement with the defendant firm on the 30th of May."

I am most unwilling to interfere with a finding of fact by the learned Judge who tried the case, and who has had the opportunity of seeing and hearing the witnesses; but in this case the learned Judge has expressed a doubt as to the correctness of his finding and has put on record the difficulty he has felt in coming to a decision. Although some weight must be given to the learned Judge's finding, even when it is given with doubt, as in this case, such a finding cannot be of such importance as a definite and decisive finding of fact, and it throws upon this Court the necessity of closely investigating the evidence and arriving at a conclusion for ourselves, if possible, on this question of fact.

After such investigation I have come to the conclusion that the learned Judge's finding of fact, that the plaintiffs' story should be accepted, should not be supported. First of all, the evidence of B. M. Shaha as to this part of the case is almost entirely uncorroborated. I do not think that the admission of Khitish that he knew of the dispute between the plaintiffs and defendants is much, if any, corroboration of the plaintiffs' story; for it appears from his evidence that he did not receive any payment from the defendant firm after hearing of the trouble, and the last payment he did receive was on the 30th June; so that if this be accepted as correct, he did not hear of the trouble until the end of June, or beginning of July, and not by the 23rd June, as the learned Judge seems to think. This may have made a material difference in the learned Judge's mind.

Further, there are some features of the plaintiffs' story which seem to me improbable. I do not understand why the plaintiffs' manager, if he took the delivery order to the defendants on the 30th May and left it with them for the purpose of collecting the goods and selling them as he alleged, should not have endorsed the delivery order then and there. I think the reason alleged by the plaintiffs is not a sufficient or satisfactory one. Further, it is hard to believe the plaintiffs' manager's story as to his visits after the 30th of May, when he alleges the defendants told him they had not been able to get delivery of the goods owing to the weather, when, as a matter of fact, they had not only got delivery but had sold them. This was a fact which the plaintiffs' manager could have discovered for himself by the most casual enquiry at the docks, and which, of course the defendants must have known. Again, if it be true that the defendants expressly agreed to take the proceeds of the sale to the plaintiffs, or that information that the money was standing with the defendants to the plaintiffs' credit should be sent to the plaintiffs, I do not understand why the defendants, who are experienced in business, and against whose honesty as regards the money no accusation is made, should have failed to carry out the arrangement, and should have paid the money to Khitish Chandra Pal and to Probodh—neither of whom, as far as the defendants were aware, were known to the plaintiffs.

On the other hand, the defendants' story as to this part of the transaction is, I think, the more probable, and it has the advantage of being corroborated in material respects by the entries in their books, and though criticism has been directed to some of the entries, it has not been sufficient to convince me that the entries relating to the receiving of the delivery order were made otherwise than in the ordinary course of business. These

are some of the reasons for my coming to the conclusion that the defendants' story as to the inception of the business and the bringing of the delivery order should be accepted in preference to that of the plaintiffs.

The case, therefore, must be considered upon the assumption that M. L. Roy and Khitish had an interview with the defendants on the 2nd of June, and that on 3rd June Khitish brought the delivery order in pursuance of the arrangement made on the 2nd June, and that it then bore upon it the endorsement showing the name of the plaintiff firm by the pen of M. L. Roy.

It is clear that the goods belonged to the plaintiffs and that they have not received the money realised by the defendants by the sale of the (plaintiffs') goods. The defendants in the first instance sought to defend themselves on the ground that as the delivery order endorsed in blank had been handed to them by Khitish, from whom they had received instructions, they were entitled to pay over the proceeds to Khitish in accordance with the custom of the sugar trade, and that they had paid over the proceeds, Rs. 4,750, in three instalments, *viz.*, two of Rs. 200 and Rs. 50 to Khitish, and one of Rs. 4,500 to Probodh Ch. Roy, son of M. L. Roy, at the request of Khitish. This was the case made at the beginning of the dispute; see the defendants' letter of 3rd July 1913 and the statement of defence, and it was, in my opinion, the real case made by Surendra Nath Rakshit in his evidence, although there were variations of it at different stages of the evidence.

The learned Judge decided against the existence of any such custom, and it was not seriously urged in the appeal that the payment to Khitish by itself would amount to a discharge of the defendants.

But it was argued (1) that in effect it was M. L. Roy and Khitish who handed over the delivery order and that, as far as the defendants knew, M. L. Roy and Khitish were owners of the sugar and principals in the transaction;

(2) in the alternative, that, as far as the defendants knew, M. L. Roy was the owner and principal and Khitish was the broker acting for him;

(3) that if neither was in fact a principal, the defendants were entitled to treat them as being in the position of factors entrusted with the delivery order by the owners of the goods; and

(4) that the defendants had paid Khitish and Probodh the proceeds of the sale, and that such proceeds had reached the pocket of M. L. Roy, and consequently they were discharged.

It is to be noticed that this case was not made at the trial, and section 108 of the Contract Act, upon which the learned Counsel for the defendants relied, was not mentioned to the learned Judge, though it was urged that the defendants could raise the question whether M. L. Roy was the agent to receive payment of the moneys in respect of the 25 tons of sugar sold.

As regards the payment, I think sufficient evidence has been given to justify us in coming to the conclusion that the moneys paid by the defendants to Khitish and Probodh, at the request of Khitish, were handed by them to M. L. Roy, that is, of course only for the purposes of this case. M. L. Roy has not been called as a witness and we have not heard his explanation, if he has any. The question, therefore, remains, can the defendants escape from liability to the plaintiffs by relying on this payment to M. L. Roy through Khitish and Probodh.

As regards this matter, it must be remembered that the delivery order was made in the name of the plaintiff firm: it was endorsed in the name of the plaintiff firm, though by the pen of M. L. Roy. The account was opened in the name of the plaintiff firm in the defendants' books in accordance with instructions from M. L. Roy or Khitish, as alleged by the defendants. M. L. Roy's name does not appear in the books, in the defendants' letter of 3rd July 1913 or in the statement of defence.

The defendants had known Khitish as a broker and M. L. Roy also as a broker, they had never heard the name of the plaintiffs' firm before this transaction.

No suggestion was ever made that the defendants regarded M. L. Roy as the owner of the goods until the trial of the case, and then what happened is described by the learned Judge as follows:—

"He stated in cross-examination that it was their custom to pay the persons who

brought the delivery order signed, and that these persons received payment, and that with regard to the transaction in suit he understood it was the joint transaction of Khitish and Makhan, and that Khitish said, with reference to the transaction, that he was Makhan's underbroker, Makhan being the principal, and the witness said: 'My case is, that Makhan was the principal and Khitish the agent, and I had no concern with any one else.' I remark, with regard to this in passing, that no such case was made in the written statement, nor was it made until this suit had proceeded for sometime. I gather from Counsel for the defendants in this case that he does not rely on any such case, that is to say, that Makhan and Khitish were principals in the transaction."

Having regard to the evidence and the circumstances of this case, I cannot believe that the defendants ever regarded M. L. Roy as anything more than a broker, and Khitish as his underbroker; and I am convinced beyond all reasonable doubt that the only thing they cared about was that they had received the delivery order endorsed in blank from Khitish, and consequently they considered they were entitled to pay him and were fully discharged thereby.

The reliance on the payment to M. L. Roy was an afterthought; but in view of the evidence I think they had notice that the principals were the plaintiff firm and that M. L. Roy was broker, and if they wished to rely on the payment to M. L. Roy as a discharge, they should have proved either that the plaintiffs had given authority to M. L. Roy to receive the money or that the plaintiffs had so acted as to make the defendants believe that they had done so. This, in my opinion, they have failed to do.

I ought to mention that the learned Counsel for the appellants contended that if the plaintiffs' story as to the alleged contract was not accepted, the form of the action was wrong; but that he did not intend to take any technical objection on that ground.

The defendants had very considerable latitude in raising new points both in this Court and in the Court of First Instance, and I think that there are sufficient materials before us to enable us to come to a conclusion as to the rights of the parties upon the merits of the case, and in my judgment this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 28 OF 1916.

March 9, 1917.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BADU MIA—PLAINTIFF—APPELLANT

*versus*

*Srimati* BADRANNESSA *alias* BEHARI BANOO, MINOR, BY HER FATHER AND GUARDIAN AHMED ALI AND THE SAID AHMED ALI ALSO IN HIS OWN RIGHT—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Marriage—Divorce—*Tafviz—*Delegation of power of divorce to wife, validity of—Contract Act (IX of* 1872), *s.* 26, *applicability of.*

It is lawful for a Muhammadan husband to delegate to his wife power to divorce herself on certain conditions, *e. g.*, on the husband marrying a second wife. [p. 804, col. 2; p 805, col. 1.]

A provision in a dower-deed whereby a Muhammadan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void under section 26 of the Contract Act. [p. 804, col. 1.]

*Quære.*—Whether there would be any difference in the law according as the dower-deed was an antinuptial or post-nuptial contract.

Appeal against the following decree of Mr. Justice Newbould, dated the 4th January 1916, in Appeal from Appellate Decree No. 2869 of 1914:—

This is an appeal against a decree dismissing a suit for restitution of conjugal rights. The appellant is the husband. Shortly after his marriage he executed a *kabinnamah.* The case of the wife, which has been upheld by the decision of the lower Appellate Court, is that by the terms contained in this *kabinnamah* she had the right to divorce her husband on his marrying a second time and that she actually did divorce him by a registered deed. It was held in the case of *Maharam Ali* v. *Ayesa Khatoon* (1) by Woodroffe, J., and myself that a Muhammadan husband can lawfully delegate to his wife the power to divorce on the husband marrying a second wife. There is,

(1) 31 Ind. Cas. 562; 19 C. W. N. 1226.

therefore, nothing illegal in the terms of the *kabinnamah* in the present case, if it contains such a provision. The portions of the *kabinnamah* which are relevant on this point are paragraphs Nos 3, 9 and 10. The third paragraph provides that the husband shall not take any other wife. The ninth paragraph gives a general power of divorce; and the tenth paragraph states the circumstances under which that power of divorce can be exercised. After stating certain definite grounds such as insanity or impotence, the paragraph goes on to say: "if I break any one of the aforesaid conditions or a part of any such conditions, then you may on the strength of the authority given by me and referred to above release your body and take any other husband." It is contended that the expression "aforesaid conditions" means conditions specified in the first part of paragraph No. 10. To my mind there can be no doubt that the only reasonable interpretation that can be placed upon these words is the conditions mentioned in the previous paragraphs of the deed. It is contended that it was not the case of the wife when she executed the *talaknamah* that she was empowered to do so by anything mentioned in the tenth clause of the *kabinnamah*. The reference there is to the ninth clause. But, as I have stated, this ninth clause is one which gives the general power and it is not necessary to make any special reference to the tenth clause. It is clear from the *talaknamah* that the right to divorce is claimed under the general condition of the tenth clause read with the previous conditions of the *kabinnamah*. One of these conditions stated in the *talaknamah* is that mentioned in the third clause, namely, the taking of a second wife.

It is next urged on the authority of Sir A. Wilson's work on Anglo-Muhammadan Law, 4th Edition, at page 157, that as the wife did not exercise her right of divorce immediately she heard of the second marriage, her right to do so ceased to exist. It is evident that the passage relied on refers to a case in which the husband after marriage conferred on his wife the right to divorce him and it does not apply to the general permission to divorce given by a marriage contract. This was the view that was taken by a Division Bench of this Court in the case of *Ayatunnessa Beebee* v. *Karam Ali* (2). The fact that in the present case the *kabinnamah* was actually executed a few months after the marriage does not make that ruling inapplicable. The *kabinnamah* formed the marriage contract, though it was actually reduced to writing and executed on a subsequent date. In my opinion, therefore, the lower Appellate Court is right in holding that the suit for restitution of conjugal rights must fail on the ground that there previously had been a valid divorce by the wife. I, therefore, dismiss the appeal with costs."

Babu *Asiranjan Chatterjee*, for the Appellant.

Babu *Manmatha Nath Mookerjee*, for the Respondents.

JUDGMENT.—We are of opinion that the decree made by Mr. Justice Newbould must be affirmed. We have been invited to hold that the right conferred on the wife by the dower-deed was not properly exercised, and considerable time elapsed between her knowledge of the second marriage of her husband and the institution of this suit. This point, however, was not taken in the Court of First Instance and there has consequently been no determination of two material questions of fact, *viz.*, *first*, whether the dower-deed was an anti-nuptial or a post-nuptial contract; and *secondly*, when did the wife become aware of the second marriage of her husband. The sole question in controversy throughout has been whether valid authority to divorce was conferred upon the wife and whether she has exercised that authority in accordance with law. Upon that point, there can be no doubt that the view taken by the Subordinate Judge and confirmed by Mr. Justice Newbould is correct. The decision of this Court in the case of *Maharam Ali* v. *Ayesa Khatoon* (1) has not been challenged. That case is an authority for the proposition that a provision in a dower-deed whereby a Muhammadan husband authorises his wife to divorce herself from him in the event of his marrying a second wife, is not void under section 26 of the Contract Act; it is lawful for a Muhammadan husband to delegate to his wife power to divorce on certain con-

(2) 1 Ind. Cas. 513; 12 C. W. N. 907; 36 C. 23.

ditions and the husband marrying a second wife is such a condition. It has been argued before us, however, that as in the deed of divorce the wife relied upon the ninth clause of the dower-deed, she is not now entitled to fall back upon the tenth clause. In our opinion, there is no force in this contention. If she has authority conferred upon her under the dower-deed, it is really immaterial under which clause of the document she purports to act.

A refined argument was finally addressed to us as to the meaning and effect of the third clause which provides as follows:—"So long as you live I shall not and cannot take any other wife. If I take one, then to that wife (1, 2, 3 *talaks*) the divorce by three *talaks* would apply." It was argued that there could not be a breach of the condition not to take a second wife, as by virtue of this clause immediately upon the second marriage of the husband the second wife stood divorced. It is not necessary for us to decide whether this is the true effect of the second part of the clause or whether the second part merely emphasises the fact that the husband undertook not to take a second wife; for even if the interpretation put forward by the appellant be accepted as correct, it is clear that there could not be a divorce of the second wife till she had become a wife, and the moment she became a wife, there would be, on the part of the husband, breach of the condition not to take a second wife. We express no opinion upon the question whether such a covenant, according to the interpretation of the appellant, would be operative as against the second wife; nor do we decide the question raised before Mr. Justice Newbould, namely, whether there would be a difference in law in the relative positions of the parties according as the contract was post-nuptial or anti-nuptial.

The result is that the decree made by Mr. Justice Newbould is affirmed and this appeal dismissed with costs.

*Appeal dismissed.*

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 645 OF 1915.

February 16, 1917.

*Present*:—Mr. Justice Macleod.

CHAMPSEY DOSSA AND OTHERS—PLAINTIFFS

*versus*

GORDHANDAS KESSOWJI AND OTHERS—DEFENDANTS.

*Bombay Salt Act (II of 1890), s. 11—License to manufacture salt—Licensee taking partners to share in profits, legality of.*

Where a licensee under section 11 of the Bombay Salt Act, who is prohibited, by the terms of his license, from sub-letting the whole or a part of the privilege, admits some members of his family and others as partners in the business to share the profits, the partners, however, not having any part in the manufacture of salt, the arrangement does not infringe the provisions either of the license or of section 11 of the Act. [p. 808, col. 1.]

The admission of partners to share in the profits cannot be considered as a sub-letting or alienation of a part of the privilege, unless there has been a document directly transferring to the partners or attempting to transfer to the partners a part of the right to manufacture or vend. [p. 807, col. 2.]

Messrs. *Inverarity* and *Strangman*, for the Plaintiffs.

Messrs. *Setalvad*, *Mulla* and *Kanga*, for Defendant No. 1.

Mr. *J. H. Vakil* (with him Mr. *Bahadurji*), for Defendant No. 2.

Messrs *B. J. Wadia* and *Desai*, for Defendant No. 3.

Messrs. *Khan* and *Mirza*, for Defendant No. 4.

Messrs. *Moos* and *Billimoria*, for Defendant No. 5.

### JUDGMENT.

MACLEOD, J.—This suit was originally filed by four of the sons of Dossa Ebji against a fifth son and two other persons, praying that the defendants might be restrained by an injunction from excluding the plaintiffs from their share in the partnership in this suit, or, in the alternative, that the partnership might be dissolved from the date of the suit and the affairs thereof might be wound up under the directions of this Honourable Court.

The first plaintiff died after the suit was filed and his son has been added as the fourth defendant. The fourth plaintiff apparently had some disputes with his co-plaintiffs and his name was struck out from the record as plaintiff and added as the fifth defendant. The family to which

the parties belong was joint and undivided, and for many years they had been carrying on business in salt. I need not go further back than 1909 when there was a family agreement, a part of which referred to a certain business in salt carried on at Bhaynder in which there were two outside partners, who are the second and the third defendants to this suit. The business was carried on in the name of Kessowji Dossa and the joint family had a share of elven annas, the second defendant had a share of three annas and the third defendant two annas.

In 1911, Gordhandas, the son of Kessowji, separated from the family, and a fresh agreement was entered into by which it was arranged that out of the eleven-annas share of the joint family in the business of Kessowji Dossa, Gordhandas should have a four-annas share, and the other members who remained joint, a seven-annas share.

The business of manufacturing salt at Bhaynder was carried on under agreements with certain persons who held licenses from Government for long periods, and who are styled "Shilotries." Exhibit C is an example of one of these licenses, clause 5 of which is as follows:—

"That he, the licensee, shall not without the written permission of myself, *i e.*, (the Collector of Salt Revenue) or of my successor in office for the time being, sublet, sell, mortgage or otherwise alienate whole or in part the privilege granted by this license of manufacturing salt on the land within the aforesaid limits."

Whenever the licensee obtained permission to sublet, that was endorsed on the license in the following form:—

"The above-mentioned Shilotries have leased out the said salt works to Gordhandas Kessowji for five years from the date the 1st of June 1905 and, therefore, all the aforementioned conditions apply to him."

In the partnership agreements that I have referred to, executed in 1909 and 1911, nothing is said about the subletting or alienation of the rights which Gordhandas had obtained to manufacture salt; the only agreement is that the parties shall share in the profits of certain shops in certain proportions. It has now been argued by the first defendant's Counsel that these agreements of partnership were illegal and that, therefore, the plaintiffs cannot sue under them for a partnership account.

Under section 11 of Bombay Act II of 1890, no salt shall be manufactured and no natural salt and, except under the provisions of section 14, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of license to be granted by the Collector in this behalf. Section 47 provides a penalty for any one who, in contravention of the Act, or of any rule or order made under the Act, or of any license or permit obtained under the Act, manufactures, removes or transports salt, etc.

The only question is whether Gordhandas having admitted certain persons to share in the profits which he derived from the manufacture and sale of salt thereby sublet, sold, mortgaged or otherwise alienated whole or in part the privilege granted by the license for manufacturing salt on the land within the limits mentioned in the license.

In *Gauri Shankar* v. *Mumtaz Ali Khan* (1) the defendant had taken a lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease, not to underlet or assign the lease without the leave or license of the Magistrate and Mumtaz subsequently admitted another person as his partner to share with him the profits to be derived from the lease. It was held by the Full Bench that such partnership was not void by reason of the covenant not to underlet or assign the lease. Mr. Justice Oldfield, one of the referring Judges, was of opinion that the admission by the lessee of a partner to share the profits could not come within the meaning of the words "sub-lease" or "transfer" and Mr. Justice Pearson accepted this view in the final judgment.

It is not disputed that if Gordhandas had sublet or alienated the rights which he obtained from the Shilotries or had entered into any argeement with third parties, whereby he gave up entirely the management and control of the manufacture of salt under the license, that would have amounted to a breach of the condition.

(1) 2 A. 411; 1 Ind. Dec. (N. S.) 791.

CHAMPSEY DOSSA *v.* GORDHANDAS KESSOWJI.

In *Ismailji Yusufali* v. *Raghunath Lachiram Marwadi* (2) Yusufalli obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector. Without any such permission, however, Yusufalli sublet the salt pans to an outsider, who, as a security for the performance of the conditions of the sub-lease, deposited a sum of Rs. 1,000 with Yusufalli. On the expiration of the term, a suit was brought for the recovery of the deposit from the representative of Yusufalli, who denied the right to recover the deposit on the ground that it formed a consideration for an agreement which had been forbidden by law and was illegal. The defendant's plea prevailed and the suit was dismissed. The Court held that the real and necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease, although that was forbidden by law and by the terms of the license. The question was not discussed there whether the Court will distinguish between Acts relating to public policy and Acts passed for the protection only of the Revenue. Although under section 23 of the Indian Contract Act, the consideration or object of an agreement is unlawful, if it is of such a nature that, if permitted, it would defeat the provisions of any law, it must be noted that the Courts in India seem to recognise the distinction which has been drawn by the Courts in England between Acts the object of which is to impose conditions in order to maintain the public order or safety or the protection of the persons dealing with those on whom the conditions are imposed, and Acts in which conditions are imposed merely for administrative purposes, for example, the convenient collection of revenue: see *Brown* v. *Duncan* (3). But in the view I take of this case, it is not necessary to deal with that question.

In *Karsan Sadashiv Patil* v. *Gatlu Shivaji Patil* (4) the first defendant had obtained a license under the Abkari Act to sell country liquor. One of the conditions of the license was that the licensee should not sell, transfer to another person, or sub let his right to sell country liquor obtained under the license and he should not enter into any *kabuliyat* for the exercise of the said right, which, in the opinion of the Collector, is in the nature of a sub-lease. After obtaining the license, the defendant admitted a partner into the business, who afterwards brought a suit for an account of what was due on the partnership. A question having arisen as to whether the contract for partnership was forbidden by law and opposed to the policy and general tenor of the Act and, therefore, not enforceable in a Court of Law, it was held that the omission in the license sanctioned by Government in the year 1903 of all reference to the question of sub-letting a part of the right to vend or of admitting persons into the business only pointed to the inference that the Abkari authorities had decided not to prohibit the taking up of other persons into partnership in the profits derived from the selling of liquor under an Abkari license.

There is no doubt that in the license in that case there seems to have been no prohibition against sub-letting a part of the right to vend; and by the conditions of the license in this case, the licensee is prohibited from sub-letting the whole or a part of the privilege, but I do not think that any importance ought to be attached to that condition. The admission of partners to share in the profits cannot be considered as a sub-letting or alienation of a part of the privilege, unless there has been a document directly transferring to the partners or attempting to transfer to the partners a part of the right to manufacture or vend.

Mr. Inverarity was prepared to call evidence to prove that the licensees for the manufacture of salt have almost invariably had partners who provided capital for the undertaking and shared in the profits, and that the salt authorities were perfectly aware of this practice and had never raised any objection to it. Certainly, as far as this family is concerned, they have been dealing in salt for a very large number of years and sharing in the profits, although the license was in the name of only one of their number. But even if the authorities did not object to that, it might still be

(2) 3 Ind Cas. 779; 33 B 636; 11 Bom. L. R. 748.
(3) (1829) 10 B. & C 93; 5 Man. & Ry. 114; 8 L. J. K. B. (o. s.) 60; 109 E R. 385.
(4) 19 Ind. Cas. 442; 37 B. 329; 15 Bom. L. R. 227.

CHAMPSEY DOSSA *v.* GORDHANDAS KESSOWJI.

said that that would not prevent the admission of partners being illegal if that was the law. In so far as I conceded that that would be a correct argument, no useful purpose would be served by calling this evidence, whatever the attitude of the authorities may be. I prefer to decide the case, as far as I am concerned, on what I consider a far better ground, that the agreements of 1909 and 1911 do not infringe the conditions imposed upon Gordhandas by the various licenses which he held for the manufacture of salt. The evidence shows, apart from that, that Gordhandas was the man who actually superintended the manufacture of salt; Dayabhai and Ranchhoddas lived at Bhaynder and worked at the shop, keeping the accounts, arranging for the weighing and the selling of salt, while the other partners were in Bombay receiving the sale proceeds from Bhaynder, mostly daily, paying the customs duties and doing other business necessitated by the work of the partnership. Therefore, none of the partners except Gordhandas had any part in the manufacture of salt and, therefore, it cannot be said that the effect of those agreements was to infringe the provisions either of the licenses or of section 11 of Act II of 1890. Therefore, the first defendant is not entitled to exclude, or rather was not entitled to exclude, his partners from sharing in the profits in the business, and there must be a dissolution of the partnership and accounts taken not, I think, from the date of the suit, but from the time the partnership came to an end in September 1916 under the agreement.

Certain issues were raised by the third defendant. The first was whether the suit is not bad for misjoinder of defendants and causes of action. So far as the claim with regard to the six *padavas* is concerned, his contention was a good one and, therefore, it has been excluded from this suit. The first defendant admits that the six *padavas* belong to the plaintiffs, but he claims a lien on them until his share in some other property has been ascertained. However, I have nothing to do with that question now in this suit.

The other issue was whether this Court had jurisdiction to try the suit as regards the cause of action relating to the third defendant. The grounds for questioning the jurisdiction of the Court were that the third defendant did not sign the agreement, that he lived at Bhaynder and the business was carried on at Bhaynder. As a matter of fact, the agreement was signed in Bombay and the third defendant was present and attested it. As the agreement referred to other matters concerning the family, the outsider partners in the Bhaynder salt business did not execute it, but there is no doubt that the third defendant agreed to the terms in Bombay and that the agreement was made in Bombay and a part of the business was carried on in Bombay; and, therefore, with leave, this Court has jurisdiction to try the suit with regard to the third defendant.

On the issues Nos. 6 and 7, which were raised for the plaintiffs, and related to a certain lease obtained by Gordhandas, which was to run for five years from the 30th June 1915, it is admitted by the first defendant by his Counsel that if the partnership was a good one, the partners would be entitled to the benefits of that lease and, therefore, the profits derived under the lease must go into the partnership accounts.

There will be a reference to the Commissioner to take account for the partnership on the basis of my findings.

*Costs.*—Plaintiffs' costs will be paid out of the assets. The first defendant must pay the plaintiffs' costs of issue No. 1 and his own costs of that issue. The remainder of his costs will be paid out of the assets.

The third defendant must pay plaintiffs' costs of issue No. 5 and his own costs of that issue.

Defendants Nos. 2, 3, 4, and 5 will be paid one set of costs between them (out of the assets).

Mr. Setalvad asks for directions of the Court about one existing lease which will run up to 1920.

Mr. Inverarity replies no order can be made until the Shilotri and the Collector are communicated with.

*Order.*—I make an order for sale by the Commissioner of the interest of the defendant under the lease referred to. There is no doubt that the consent of the Shilotri and the Salt Collector will have to be obtained so that the purchaser can obtain a good title. I have no doubt that the Shilotri and the

Salt Collector will put no obstacles in the way when the circumstances are explained to them. The first defendant is the only person who is entitled under the lease. If he chooses to do nothing under the lease, then there is nothing to be done.

Parties to have liberty to bid at the sale.

*Order accordingly.*

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## PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 519 OF 1915 AND No. 99 OF 1916.

April 26, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

*Babu* GITA PROSAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

RAGHO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 20—Payment of principal by guardian for benefit of minor—Minor, liability of—Bond, suit on—Interest, when to be granted as damages—Document, construction of.*

Where a payment of money due under a mortgage bond is made by the *de facto* guardian of a minor in order to avoid the immediate bringing of a suit on the bond against the minor, the period of limitation is extended under section 20 of the Limitation Act as against the minor. [p. 810, col. 1.]

Where there is no stipulation in a bond for payment of interest after due date, interest can be allowed only up to the date of payment of the debt as damages for recurring breaches of the contract to repay for the period of six years prior to the date of suit. [p. 810, col. 1.]

*Mathura Das* v *Raja Narindar Bahadur*, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Cas. (N. S.) 25, distinguished.

*Chajmal Das* v *Birj Bhukan Lal*, 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652 (P. C.), relied upon.

Where a document is silent with regard to interest and where there is no special mention of interest at a particular rate or of a particular sum handed over to the creditor, it must be taken that the intention of the parties is, in making re-payment, to pay only the interest actually due under the written instrument. [p. 810, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Monghyr, dated the 23rd August 1915.

Mr. *Ganesh Dutta Singh*, for the Appellants.

Messrs. *Ramprasad, Shevanandan Rai* and *Gangadhar Das*, for the Respondents.

### JUDGMENT.

ROE, J.—These appeals are appeals by the plaintiff and defendant respectively in a suit brought upon the footing of a mortgage-bond dated the 27th of July 1893, the due date of payment being the 1st of *Bhadra* 1301 which corresponds to 15th September 1894. Limitation is claimed to be saved by payments made of Rs. 2,452 on the 6th August 1898 and of Rs. 800 on the 29th of May 1909. The learned Subordinate Judge has accepted the proofs given of these payments and has decreed the plaintiff's suit, but in decreeing the suit has refused to give interest at the bond rate beyond the date of re-payment and has confined the interest to six years' interest at 6 per cent. per annum, upon the ground that the bond is silent as to the interest to be paid after the date of re-payment.

On behalf of the defendant it is contended, *firstly*, that the learned Subordinate Judge was in error in accepting the payment of Rs. 800. The payment of Rs. 2,452 is not denied. And *secondly*, it is argued that if the payment of Rs. 800 was made, it was made by one Bacha Singh who was not the lawful guardian of the defendant, who was a minor at the time of the payment.

On the first point we agree with the learned Subordinate Judge that the evidence of this payment is overwhelming. There is no reason whatsoever for stigmatising the witness Deoki Nandan Singh as a perjuror. He is a respectable gentleman paying Rs. 157 income-tax and there can be no reason why he should lend himself first of all to the support of a deliberate forgery of the endorsement, and secondly to actual participation in the forgery of the letter Exhibit 7, which is an intimation to him that Rs. 800 out of the bond money has been paid. This letter is dated the 29th of May 1909, the day after the payment. We see no reason whatsoever for disagreeing with the learned Judge's finding of fact.

With regard to the position of Bacha Singh there is very little on the record. It is admitted that he was the nearest male cognate of the minor and that there were no male agnates living. It is shown that in another suit he was nominated by the Court to act as guardian of the minor and it is admitted that in all the mutation proceedings which were necessitated by the death of the minor's father Bacha Singh acted for him and it is proved that in the

Record of Rights prepared upon a Cadastral Survey, Bacha Singh was entered in the *khewat* as the guardian of the minor. He was undoubtedly the *de facto* guardian and there is nothing tangible on the record to show that he was not the lawful guardian. The payment made by him clearly avoided the immediate bringing of a suit against the minor and there is no reason to suppose that the payment was not made for the minor's benefit. We hold that the appellant was rightly made liable under the bond.

With regard to the contention that interest should have been given at the stipulated rate from the date of the bond up to the date of realisation, the decision of the Judicial Committee reported as *Mathura Das* v. *Raja Narindar Bahadur* (1) has been quoted as authority for the proposition that the bond before us intended that interest should run after the date of re-payment. We have searched the document in vain for any such indication. Not one word anywhere is said with regard to payment of interest after the due date and the case seems to us to be indistinguishable from the case of *Chajmal Das* v. *Birj Bhukan Lal* (2) decided by the Judicial Committee in the defendant's favour. We hold that there being no stipulation for payment after due date, interest can be given only up to the date of payment and following the line of decisions beginning from the case of *Golam Abas* v. *Mahomed Jaffer* (3) we must hold that the six years' rule of limitation applies and that interest can be given only as damages for recurring breaches of the contract to re-pay for the period of six years prior to the date of suit.

Mr. Pugh advances an ingenious argument that if under the Interest Act a Court is entitled to decree interest by way of damages the creditor, whenever a payment is to be made, is entitled to regard the sum which the Court would have decreed, as interest, and to take any part of the sum re-paid as such interest. We do not think that the Interest Act can be stretched to this point. Where a document is silent with regard to interest and where there is no special mention of interest at a particular rate or of a particular sum handed over to the creditor, we must take it that the intention of the parties was, in making re-payment, to pay only the interest actually due under the written instrument.

In this case the only interest due under the written instrument on the first date of payment, the 6th of August 1898, was Rs. 395-8-0 and there is nothing in the endorsement recording this re-payment to suggest that there was any intention to pay a larger sum of interest than this.

With regard to the second payment of Rs. 800 the position is more difficult, for there is a distinct statement made by the guardian when making the re-payment that the repayment was intended to be made as a payment of interest. Under the written instrument no interest was due between the 6th August 1898 and 25th September 1909; if, therefore, no interest was due, no interest could be paid, and if no interest could be paid the present suit would be barred by limitation. That it was the intention of the parties to pay this sum of Rs 800 as interest is clear, otherwise the creditor's right to sue would have lapsed and the receipt of Rs. 800 would not be of such value to the creditor as to warrant his acceptance of it as part payment of principal. We must take it, therefore, that this Rs. 800 was intended to wipe out all interest equitably due from the 6th August 1898 up to 29th of May 1909. Interest under the Interest Act will accrue from the 25th of September 1909 up to the date of realisation, the payment of Rs. 800 on the 29th of May 1909 being within six years of the institution of the suit. Interest should also run during the prosecution of the suit up to the date of realisation

The account, therefore, must be amended and a decree must be made for Rs. 1,831-12-0 due on the 29th of May 1909 *plus* interest at 6 per cent. from that date up to the date of realisation. Failing payment of that sum within three months of this Court's decree the mortgaged property will be put up for sale. The plaintiff is entitled to costs Rs. 1,831-12-0 *plus* interest to the date of suit in the lower Court. In appeal each side will bear its own costs.

*Appeal accepted in part.*

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25.

(2) 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652 (P. C.)

(3) 19 C. 23*n*; 9 Ind. Dec. (N. S.) 461.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 107 OF 1912.

October 4, 1916.

*Present*—Mr. Justice Oldfield and Mr. Justice Krishnan.

SRINIVASA RANGA ROW PANTULU AND ANOTHER, BY THE OFFICIAL ASSIGNEE, MADRAS—PETITIONERS—APPELLANTS

*versus*

RAJA KUMARA VENKATA PERUMAL RAJU BAHADUR VARU, MINOR RAJAH OF KARVETNAGAR, BY GUARDIAN MR. W. A. VARADACHARIAR—COUNTER-PETITIONER—RESPONDENT.

*Madras Court of Wards Act* (*I of* 1902), *ss.* 37, 38, 41—*Scope of s.* 41—"*Shall not be paid before other pecuniary claims*", *meaning of*—*Omission to notify under s.* 41, *effect of*—*Notification by part owner of entire claim under s.* 37, *whether can be availed of by other part owner*—*Interpretation of Statute.*

A person having pecuniary claims against an estate under the management of the Court of Wards must himself notify the same to the Collector and cannot rely upon a notification made by a person having an interest only in a part of that claim. [p. 812, col. 1.]

Section 37 of the Court of Wards Act does not recognize the notification of a claim by any person except the claimant or a person empowered by him. [p. 812, col. 1.]

The cessation of interest under section 41 continues even after the release of the estate to the ward, unless the same is subsequently revived by act of parties. [p. 815, col. 1.]

Per *Oldfield, J.*—The language of section 41 of the Court of Wards Act, when interpreted with reference to other sections of the Act, makes it perfectly clear that the tenure of the Court of Wards Act is intended to affect the estate permanently, not only directly in respect of debts actually discharged, but in certain circumstances indirectly by reducing the amount of debts still due when the Court's tenure ends. [p. 812, col. 2.]

*Depuru Kalappa Reddi* v. *Umade Rajha*, 8 Ind. Cas. 392; (1911) 1 M. W. N. 75; 8 M. L. T. 297, followed.

Section 41 has the effect of postponing unnotified debts to those notified under section 38 (1) of the Act, even after the estate has been released from the Court of Wards and handed over to the *zemindar*. [p. 813, col. 2; p. 814, col. 1.]

A construction which makes a certain provision of an Act superfluous is not legitimate when another construction explaining the insertion of the provision is easily available. [p. 813, col. 1.]

Per *Krishnan, J.*, (dissenting).—Section 41 of the Court of Wards Act cannot possibly continue to apply to an estate which has been freed from the control of the Court of Wards and to which the Act itself has ceased to apply. The question whether the disabilities once imposed on any particular creditor by the application of the section continue to have effect even after such application has ceased, depends upon the character of the disability, whether it is necessarily of a permanent character or is only of a temporary one. [p. 814, col. 2; p. 815, col. 1.]

The words "shall not be paid until after the discharge or satisfaction of the claims notified or admitted under section 38" in section 41 of the Act merely prescribe an order of priority to be followed in payment of certain debts but does not put an end to them; such an order can be availed of when the payment is made or demanded, only if it is in force at the time. It is worded in the form of an injunction not to pay until a certain thing is done and like other injunctions it can have effect only when it is in force, it has not any permanent effect. [p. 815, cols. 1 & 2.]

The term "ward", wherever it occurs in the Court of Wards Act, is not applied to a person who was once a ward, but has ceased to be so. [p. 815, col. 2.]

A joint undivided Hindu family, one member of which was an insolvent, had as one of the assets of the family a mortgage-decree for a lakh of rupees against an estate under the management of the Court of Wards. One-twenty-fourth part of the decree debt passed to another person by assignment. He notified his claim to the Collector under section 41 of the Court of Wards Act but the holder of the mortgage-decree failed to notify his claim. The estate ceased to be under the management of the Court of Wards and the mortgaged villages were subsequently sold at the instance of a money-decree-holder and there were surplus sale-proceeds. The Official Assignee on behalf of the insolvent applied for execution of the mortgage-decree and for payment of the surplus sale-proceeds in execution of the mortgage-decree:

*Held*, (*Krishnan, J.*, dissenting), that the omission to notify the mortgage-debt had not merely the effect of making the interest cease altogether, but also entirely postponed the payment of the debt until the other creditors who had notified their claims had been satisfied. [p. 813, col. 2; p. 814, col. 1.]

Appeal against the order of the District Court of North Arcot, dated the 4th December 1911, in Civil Miscellaneous Petition No 48 of 1911, in Execution Petition No. 132 of 1905, in Original Suit No. 7 of 1894.

Mr. *T. Narasimha Aiyangar*, for the Appellants.

Messrs. *L. A. Govindaraghava Aiyar* and *L. Venkataraghava Aiyar*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—This appeal relates to the execution of a decree against respondent, a minor *zemindar*. Appellant, the Official Assignee, is executing as Receiver in a partition suit of the property of a family of which the decree forms part. The question is whether section 41, Act I of 1902, debars him from executing at present and including certain interest in the amount claimed, inasmuch as the respondent's estate came under the Court of Wards in 1907, and, a notification under section 37 (1) having been duly published, this claim was not notified to

the Collector. It is not disputed that, if respondent can plead section 41, he must succeed.

Two answers to this plea have been attempted, which were not suggested in the lower Court. *Firstly*, it is alleged that Gopaul Row, 3rd defendant in the partition suit above referred to, duly notified his claim in respect of his decree and that appellant is entitled to rely on that notification. Its terms, however, are not before us and they may have covered only Gopaul Row's share. But, if they were comprehensive, it is still the case that section 37 does not recognise the notification of a claim by any person except the claimant or, of course, a person empowered by him; and it is not shown how Gopaul Row was so empowered. *Secondly*, it is urged that appellant was absolved from any obligation to notify because although he was known to the Collector to have a claim, the notice required by section 37 (2) was never sent to him. It is sufficient that, if the Collector can be presumed to have known of the claim, because (as appears from Exhibit II) it was made during a previous tenure by the Court of Wards of the same estate, he must be presumed to have complied with the law and sent notice in respect of it. The question whether he did so or not, one of fact, was not raised in the lower Court, and cannot be raised for the first time here.

Appellant, however, has relied mainly on the argument that section 41 cannot be applied to postpone or reduce the amount of respondent's liability, after the management by the Court of Wards has ceased. This is urged on the grounds that the contrary view is not supported by the language of the section, is inconsistent with the proviso to section 40, would render the ward's position, after he receives back the estate, anomalous, and is not entailed by the policy of the Act. It is further urged that *Depuru Kalappa Reddi* v *Umade Rajaha* (1) on which the lower Court relied was decided wrongly. As the present case has been argued fully, I give my reasons for concurring in that decision at length.

The language of section 41 is, as observed by the learned Judges in the case just referred to, absolute, subject to one qualification to be specified later. The proviso to section 40 merely preserves the claimant's right to have recourse to the Civil Court to enforce notified claims, which the Court of Wards has allowed or disallowed, and does not affect the unnotified claims, to which alone section 41 applies. The anomalous result alleged to follow from the application of the latter section, as entailing a permanent deprivation of interest and postponement, is, that the ward on majority would be compellable to pay notified before unnotified creditors. But it has not been shown how it would be difficult for him to do so or for Courts to enforce his obligation, though the decision as to the form of remedy available to a notified creditor, who has been prejudiced by payments to postponed creditors, may be determined with regard to the circumstances of the case, when it arises. Lastly, it is urged that the policy of the Act is to ease the estate only during the tenure by the Court of Wards, not to reduce its debts permanently. But we have been shown no legitimate reason for holding that the latter was not the object of the Legislature; and the only method of interpretation clearly permissible in the circumstances, reference to the other provisions of the Act, shows that the tenure of the Court of Wards was intended to affect the estate permanently, not only directly in respect of debts actually discharged, but in certain circumstances indirectly, by reducing the amounts of debts still due, when the Court's tenure ended.

Section 37 (1) provides for the notification of all claims, both those which are and those which are not immediately enforceable without distinction as regards the latter between those which will and those which will not mature before the ward's majority in cases in which it will terminate the Court's tenure; and the wording of section 40 and, as has been already observed, section 41 includes nothing respecting its application to the former class. So also, as regards section 42, in which moreover the reference, not only to the ward but also to his representative, justifies affirmative argument. Sections 43 and 44 relate to the determination by the Collector on behalf of the Court of Wards of possession under mortgages and leases and provide for a

(1) 8 Ind. Cas. 392; (1911) 1 M. W. N. 75; 8 M. L. T. 297.

right of suit in the Civil Courts and in the one case for discharge of the mortgage as though it were not one with possession, in the other, for revision of the terms of the lease. But it is noticeable that there is no such general provision, as the appellant's argument requires, for a revival of the original mortgage or for a return to the original rate of rent or a restoration to possession, when dispossession has taken place. Sections 43 and 44 are accordingly consistent with respondent's argument and sections 37 (1) and 42 support it affirmatively.

Section 55 is, it is argued, not directly applicable to the case of respondent; and it has accordingly been referred to only as supporting inferences regarding the meaning of other provisions. The material portion of it is clause 3, which negatives the application of sections 41, 42 to debts unpaid, when the estate is restored to the proprietor under this section. The appellant is constrained to represent this provision as actually superfluous and introduced only to meet possible doubts in the particular cases, with which the section deals. But such a construction is not legitimate, when, as here, another is easily available, by which the insertion of the clause can be explained; that is, as specifying an exception to the general rule. That an exception is intended is particularly clear from the mention in clause 2, not only of section 41, but also of section 42, the wording of which has already been referred to as inconsistent with appellant's argument. Clause 2 of section 55 affords another instance of special provision for cases covered by the section on a matter, regarding which a general provision could easily have been made, but, as already pointed out, has been omitted, the restoration to possession of encumbrancers dispossessed under section 43 and still unpaid; and here again the point is clear, since, if the termination of the Court of Wards' management involved, as appellant contends, the complete restoration of all creditors to their original rights, the clause would not have applied the same treatment to all cases, including those in which the mortgagee is paid off under section 43 (5) otherwise than in accordance with the terms of his mortgage. Reference to section 55, therefore, confirms the conclusion that, subject to one exception not material in this case, section 41 is intended to have general and permanent effect.

In conclusion, I refer shortly to the considerations, which, I understand, have impressed my learned brother. There is first the view that Chapter 5, in which section 41 occurs, deals exclusively with ascertainment and settlement of debts by the Collector, that the use of the word "Ward" in the section limits its application to the ascertainment of liabilities during the Court of Wards' tenure and that a distinction is to be drawn between the provisions for cessation of interest and for postponement, the one being of permanent, the other only of temporary effect. As regards the contents of Chapter 5, the heading, on which my learned brother relies and which runs "ascertainment and settlement of debts", is to my mind with all respect perfectly general; and the sections, particularly 37 (1) and 42, are as already shown irreconcilable with his conclusion. The word "Ward" in section 41 is appropriately used without qualification, because it is connected with claims unnotified and not admitted during the continuance of the guardianship. The distinction proposed between the two provisions in the section is not supported by anything in its wording and does not, in my opinion, follow necessarily from anything in the parties' position. It may be that, as my learned brother says, the *zemindar's* claim to postpone payment of a particular debt has no merits apart from the Act and that the object of section 41 is merely to induce creditors to come forward promptly. But, when it is conceded that the inducement has taken the form of a penal interference with the rights of those who delay, discussion of the policy of the Act and its effect in individual cases is irrelevant; and the assumption of a particular limit to such interference is, in the face of the general wording, inadmissible.

The other objection calling for notice is that, appellant's lien on the fund in Court being in no way affected by the Act, it can serve no useful purpose to put off payment to him from it, since he will be entitled to be paid from it eventually. But if, as I think, the foregoing represents the correct view of the effect of section 41 (and notice may be invited particularly to the words in it "notwithstanding any contract to the contrary"), appellant's lien is affected by the Act, and

he can be paid only after the notified creditors, to whom he is postponed, have been satisfied. It is not alleged that they have been; and in fact no argument in this form seems to have been attempted before the lower Court.

In these circumstances, I would follow *Depuru Kalappa Reddi* v. *Umade Rajaha* (1) and confirm the lower Court's decision dismissing the appeal with costs.

The result is that the appeal is dismissed with costs.

KRISHNAN, J.—The facts of this case may be briefly stated as follows:—One V. Krishnaswami Rao became an insolvent and his estate vested in the Official Assignee of Madras. He was a member of a joint Hindu family of four persons. One of the assets of the family was a mortgage decree for a lakh of rupees against the *zemindar* of Karvetnagar, in Original Suit No. 7 of 1894. The Official Assignee brought a Civil Suit No. 116 of 1897 for partition and got himself appointed as Receiver to execute the mortgage decree. But before this was done, an one-twenty-fourth share in the decree had passed to a person not a party to the partition suit or the order in it. This share finally passed to one Srinivasaraghavachari. The Court of Wards had taken charge of the Karvetnagar Estate in 1899, the then *zemindar* having been declared a Ward. That management continued up to 1905 when the estate was released as the *zemindar* died. The Official Assignee filed Execution Petition No. 132 of 1905 for executing the mortgage-decree. The minor *zemindar* who had succeeded to the estate was also declared a Ward of the Court of Wards, who assumed management again in August 1907 before the execution was carried out That management continued till January 1910, when the estate was released under the discretionary power given to do so under the first part of section 54. The usual notification was published by the Collector under section 37 (1) in February 1908 calling upon all creditors to notify their debts, and a special notice was apparently sent to the Official Assignee. For some reason not apparent, the Official Assignee failed to notify his mortgage decree debt. In December 1911 the District Court held that under section 41 of the Act the claim of the Official Assignee to execute his decree should be postponed until after discharge or satisfaction of the claims of creditors notified or admitted under section 38 and that interest should cease from August 1908, that is, at the expiry of six months from the date of notification under section 37 (1). Against this order the present appeal was filed in this Court by the Official Assignee and two others. It was once dismissed for default but, on good cause being shown, was restored.

In the meanwhile Srinivasaraghavachari above mentioned, assignee of one-twenty-fourth share in the decree, applied for execution. His application was allowed as he had properly notified his claim under section 38. In execution the mortgaged property was sold in April 1916, and purchased by one Mr. Muthia Chetty, a stranger, and we are informed that the money is in Court.

The decree in Original Suit No. 7 of 1894 having been fully executed, the prayer in the Execution Petition No. 132 of 1905 under appeal to sell the mortgaged properties can no longer be granted; but it is argued that the money in Court, the balance of sale-proceeds of the property available for the Official Assignee, if any, should be paid out.

The main argument addressed to us had reference to the meaning and applicability of section 41 of the Act. Two minor points were argued which are dealt with by my learned brother in his judgment in paragraph 2, and I entirely agree with his view. As regards section 41, the appellant contends that its application and effect cease as soon as the estate is released from the control of the Court of Wards under section 54 of the Act; the respondent maintains the contrary. The section cannot possibly continue to apply to an estate which has been freed from the control of the Court of Wards and to which the Act itself has ceased to apply. The real question for decision is, as I apprehend it, whether the disabilities imposed on any particular creditor by the application of the section once continue to have effect even after such application has ceased. This, to my mind, depends on the character of the disability imposed, that is, whether it is necessarily of a permanent character or is

only of a temporary one. As regards the cessation of interest, I am prepared to agree that the language in the section makes interest cease altogether; and, therefore, unless such interest is revived after the section ceases to apply, either by law or by act of parties, its cessation continues in effect. I have said "by act of parties", as in my view there is nothing in the section or elsewhere to prevent the *zemindar* from entering into a fresh contract to pay interest for proper consideration after he is freed from the control of the Court of Wards. There is no law which has the effect of reviving interest except section 55 (3) which, however, does not apply to the present case as the estate was not released under clause 1; and no act of parties has been referred to as having that effect. I, therefore, agree that interest was rightly disallowed to the appellants from 28th August 1908 when the six months under section 37 expired.

With all respect to my learned brother I am unable to take the same view as he does, regarding the effect of the second part of section 41. It directs that unnotified pecuniary claims against the ward or his property shall not be paid till after the discharge or satisfaction of the notified claims. To adopt the view that has found favour with my learned brother leads in certain cases to the very drastic result of extinguishment of the security and the debt of a secured creditor. I find it difficult to persuade myself that the Legislature intended to attach such a serious penalty to the mere omission to notify a debt. Of course if the result is clear on the language of the section, we must accept it, but I do not think the words of the section necessitate or justify such a construction as penal sections should be strictly construed consistently with the language used. It seems to me the words above mentioned merely prescribe an order of priority to be followed in payment of certain debts but do not put an end to them; such an order, it seems to me, can be availed of, when payment is made or demanded, only if it is in force at the time. It is worded in the form of an injunction not to pay until a certain thing is done and like other injunctions it can have effect only when it is in force; it is difficult to see how it can have any after-effects. It does not, from its nature, appear to me to have a permanent effect. The fact that at one time a particular rule of priority applied to certain debts does not carry with it the result that the same rule should always be applied unless changed. It will, therefore, follow that this rule of priority unlike the rule as to cessation of interest ceases to have effect as soon as the section ceases to apply.

The wording of the section, instead of being against this view, rather supports it, as it refers to pecuniary claims against the *ward* or his property. It is difficult to contend that the debt due by a *zemindar*, after he has entirely ceased to be a ward, can be described as a claim against a ward. I think the use of the term "*ward*" in the section is very significant and is a clue to its construction; and that it shows that the last portion of the section only applied to debts due by persons who are *wards*. A reference to the various sections where the term 'ward' is used shows that it is not applied to a person who was once a ward but has ceased to be so.

I am inclined to think that the section, while it imposes certain disqualifications on unnotified creditors for the purpose of inducing all creditors to notify their claims to the Collector in time, really prescribes a rule to be followed by the Collector when he pays the debts according to section 32, clause 2. The wording of the section seems to imply that unnotified debts will also be paid though only after the notified ones; that would indicate that the rule is connected with some method of payment and the only method provided is the one under section 32 of the Act. There is no method provided by which an unnotified creditor can compel the *zemindar* after release of his estate to pay all the notified debts so that he may claim payment of his debt in turn; thus if the latter part of section 41 is to have the effect after the estate is released, a *zemindar* can effectively prevent the unnotified creditors from realising their debts at all by simply keeping undischarged a single notified debt; this is a result that can hardly be looked upon as reasonable.

It may also be pointed out, though perhaps much stress cannot be laid on it, that the

SRINIVASA RANGA ROW *v.* RAJAH OF KARVETNAGAR.

section occurs in a chapter which deals, according to its head-note, with "ascertainment and settlement of debts" under the Act; *i. e.*, by the Collector. Section 41 would seem to come under the description "settlement of debts" and it would thus be by the Collector.

I shall now examine the arguments against the view set forth above. It is first urged that the question is covered by the authority of the case of *Depuru Kalappa Reddi* v. *Umad Rajaha* (1). That decision states that the provisions of section 41 are absolute. Though the weight of its authority is great as the learned Chief Justice was a party to it, it is difficult to understand what exactly the learned Judges meant by the statement above mentioned and why they said it, as there is no discussion of the question of the meaning of section 41 in their judgment. The District Judge had held, in the order appealed against, that the section did not apply at all to decrees which were being executed in Civil Courts and that was the view that was reversed. It is not clear whether the question of postponement of payment even after the release of the estate was really argued or considered by their Lordships. The argument based on section 55, clause 3, that the reference in it to section 41 would become superfluous in the view I have taken is not valid, as it is quite necessary to revive the agreement as to interest which is abrogated by that section, as I have pointed out above.

It is also quite true, as my learned brother has pointed out, that the tenure of an estate under the Court of Wards thus permanently affects it in many ways and that the creditors are not restored to all their original rights on the termination of that management. But with all respect, it seems to me that the question at issue cannot be decided on such considerations but must depend on the language of section 41 and its meaning.

I think it is legitimate to examine the result of a particular construction of a section to see whether it should be adopted where the meaning is not clear. If we look at the result of holding that the prohibition in section 41 continues even when the estate is in the hands of the *zemindar*, we will find that no advantage accrues to any one but merely injury is caused to secured creditors like the appellants by loss of interest. It is quite clear to my mind that section 41 cannot be construed to extinguish any security or any debt; a penal section cannot be given such an extended meaning by implication. There is no provision in the Act pointed out which affects the appellants' lien on the money in Court and it must, therefore, be paid out to them sooner or later. So far as I can see, neither the *zemindar* nor any of the other creditors who have no lien on that money can touch it. The property mortgaged having been already sold, the mere postponement of payment to appellants is thus, as I said, utterly purposeless except to harm them. I think we should be slow to pass an order which has this effect. I am entirely unable to agree that section 41 has itself the effect of destroying the lien of secured creditors when there are no words in it to that effect.

I hold that it is not open to the *zemindar* to plead, now that he and his estate have been released from the control of the Court of Wards, that the appellants' claim should be postponed till after his notified creditors have been paid. I do so, however, with hesitation as my learned brother takes a different view, but I feel we should not extend the penal character of section 41 too much by our construction. I would reverse the order of the lower Court and remand the execution petition for a fresh disposal and direct costs to abide and follow the result. But as my learned brother agrees with the order of the lower Court, his judgment must prevail.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM ORDERS No. 443 OF 1915 AND No. 507 OF 1915.

February 28, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

IN No. 443

MUNSUR ALI—APPELLANT

*versus*

ABHOYA CHARAN DAS—RESPONDENT.

IN No. 507

NIZAMAT ALI—DECREE-HOLDER—APPELLANT

*versus*

MIA JAN SIKDAR—JUDGMENT-DEBTOR—RESPONDENT.

*Limitation Act* (*IX of* 1908), *s.* 15—*Attachment of*

MUNSUR ALI *v.* ABHOYA CHARAN DAS.

*decree before judgment, whether stay of execution—Set-off of Statute-barred decree, whether allowable—Forms given in Schedule to Civil Procedure Code, whether control Code itself—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 53 (1) (b) (*ii*), *O. XXXVIII, r.* 6.

An attachment before judgment is not an injunction or order staying execution within the meaning of section 15 of the Limitation Act, no matter whether the subject-matter of the attachment is a decree or any other property. [p. 818, col. 2.]

The form of execution by setting off cross-decrees is given in the Code of Civil Procedure and no equitable considerations can add to or detract from the provisions of the Statute. Therefore, a Statute-barred decree in favour of the judgment-debtor cannot be set off against a decree sought to be executed against him. [p. 818, col, 2.]

The forms given in the Schedule to the Code of Civil Procedure cannot control the clear words of the Code itself. [p. 818, col. 2.]

IN No. 443

Appeal against the order of the District Judge, Noakhali, dated the 29th June 1915, reversing that of the Munsif, 2nd Court, Sudharam, dated the 29th August 1914.

IN No. 507

Appeal against the order of the District Judge, Chittagong, dated the 24th July 1915, reversing that of the Munsif, 2nd Court, Satkania, dated the 16th January 1915.

FACTS.—The only question involved in Appeal No. 507 was whether the execution of the decree was barred by limitation. The respondent to this appeal objected to the execution on the ground that it was time-barred. The decree in question was dated the 13th February 1909 and the application for execution was made on the 12th August 1914. The decree-holder's case was that as the decree could not be executed for its having been attached by three separate orders, he was entitled to the benefit of section 15 of the Limitation Act. The Munsif held that section 15 of the Limitation Act applied to the case and saved the decree from being time-barred; and he accordingly disallowed the objection of the judgment-debtor. On an appeal preferred by the judgment-debtor the District Judge held that as Order XXI, rule 53, clause 2, Civil Procedure Code, permits the execution of an attached decree, the attachment of the decree in question was not an injunction or order within the meaning of section 15 of the Limitation Act, and he allowed the appeal holding that the decree was barred by limitation. Against this decision of the District Judge the present appeal was preferred to the High Court.

Babu *Chandra Sekhar Sen*, for the Appellant in No. 507 of 1915.—The application for execution is not time-barred as the facts of the case show. The decree sought to be executed was already attached by three separate orders. One of the attachment orders was withdrawn on 29th June 1914, and the decree-holder applied for execution on the 12th August 1914. The attachment prevented the decree-holder from proceeding to execute the decree. So it operated as an injunction within the meaning of section 15 of the Limitation Act. It was impossible for the decree-holder to execute the decree when it was under attachment. The case reported as *Beti Maharani* v. *Collector of Etawah* (1) is not applicable to the facts and circumstances of the present case.

Babu *Khitish Chandra Sen*, for the Respondent, in No. 507 of 1915.—Section 15 of the Limitation Act does not cover a case like this. The order of attachment of the decree cannot operate as an injunction or order staying execution within the meaning of section 15 of the Act. This is now well established as the cases reported as *Shib Singh* v. *Sita Ram* (2) and *Beti Maharani* v. *Collector of Etawah* (1) show. An order of attachment of a decree does not prevent the decree-holder or judgment-debtor from executing the decree. Order XXI, rule 53 (*b*) (*ii*), allows the holder of a decree or the judgment-debtor to apply for execution of the attached decree. The words "or his judgment-debtor" in Order XXI, rule 53 (*b*) (*ii*), did not occur in the old Code and they are inserted in the new Code to give effect to the observations of Maclean, C. J., and Banerjee, J., in the case reported as *Adhar Chandra Dass* v. *Lal Mohun Das* (3). I rely upon those words. The decree-holder-appellant who was the judgment-debtor of the decree

(1) 17 A. 198; 22 I. A. 31; 6 Sar. P. C. J. 551, 8 Ind. Dec. (N. s.) 452.

(2) 13 A. 76; A. W. N. (1890) 194; 7 Ind. Dec. (N. s.) 47.

(3) 24 C. 778 at p. 782; 1 C. W. N. 676; 12 Ind. Dec. (N. s.) 1188.

in execution of which his present decree against my client was attached had a perfect right to apply for execution during the continuance of the attachment. Referred to *Hurronath Bhunjo* v. *Chunni Lall Ghose* (4), *Sarup Ganjan Singh Bhuyan* v. *Robert Waston & Co. Ltd.* (5), *Adhar Chandra Dass* v. *Lal Mohun Das* (3), Order XXI, rule 55, Civil Procedure Code.

Babu *Chandra Sekhar Sen* replied.

Babus *Basant Kumar Bose* and *Bepin Chunder Bose*, for the Appellant in No. 443 of 1915.

Babu *Dhirendra Lal Kastgir*, for the Respondent in No. 443 of 1915.

JUDGMENT.

IN No. 443 OF 1915.

FLETCHER, J.—This is an appeal from an order of the District Judge of Noakhali, reversing the order of the Munsif of the 2nd Court at Sudharam. The admitted facts are as follows:—The respondent to this appeal on the 5th of November 1908 obtained a decree absolute for Rs. 847 in a mortgage suit against the appellant. The appellant having instituted a suit against the respondent attached this decree before judgment on the 7th of April 1909. On the 30th September 1909, the appellant obtained a decree against the respondent for Rs. 851. On the 7th of September 1910, the appellant applied that both decrees should be set off one against the other but this application was on the 26th of January 1911 rejected as premature. The appellant applied on the 20th November 1913 for execution of his decree.

The learned District Judge held that the decree of the respondent was barred by limitation but it was equitable to allow the respondent to set off his Statute-barred decree against the appellant's decree. Two points were urged on the appeal before us, *first*, was the execution of the respondent's decree stayed by an injunction or order within the meaning of section 15 of the Indian Limitation Act and *secondly*, if not, is the respondent entitled to set off his Statute-barred decree against the decree of the appellant.

It is well established that an attachment before judgment is not an injunction or order within the meaning of section 15 of the Indian Limitation Act [*Beti Maharani* v. *Collector of Etawah* (1)].

It is said, however, that different considerations arise when the subject-matter of the attachment is a decree. But this is clearly not so as Order XXI, rule 53 (1) (*b*) (*ii*), clearly authorises the creditor who has attached the decree or his judgment-debtor to proceed to execute the attached decree. It is said that the forms in the Schedule to the Code of Civil Procedure support a different view. But even if that were so, the forms cannot control the clear words of the Statute itself. The respondent then argued that the fact of the attachment being before judgment made a difference but the terms of the rules of Order XXXVIII do not support the argument.

On the second point, reliance was placed on decisions of this Court where on equitable grounds a defendant in a suit has been allowed to set off a Statute-barred debt against the claim of a plaintiff. Those considerations cannot, I think, apply in execution of cross-decrees. This form of execution is given by the Code of Civil Procedure and no equitable considerations can add to or detract from the provisions of the Statute. In my opinion the order of the learned District Judge should be set aside and the order of the Munsif restored with costs both here and in the Courts below. We assess the hearing fee at Rs. 25.

RICHARDSON, J.—I agree.

IN No. 507 OF 1915.

The same points are involved in this appeal as in Miscellaneous Appeal No. 443 of 1915 which has just now been disposed of by us, except that the learned District Judge did not allow the barred decree to be set off against the decree for which execution was applied for.

The appeal fails and must be dismissed with costs. We assess the hearing fee at Rs. 25.

*Appeal No.* 443 *allowed*;
*Appeal No.* 507 *dismissed.*

(4) 4 C. 877; 3 C. L. R. 161; 4 Ind. Jur. 236; 2 Ind. Dec. (N. S.) 555.

(5) 6 C. W. N. 735.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 5 OF 1913.

May 4, 1916.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

NILMADHAB MAHAPATRA—DEFENDANT No. 2—APPELLANT

*versus*

KESHAB LAL MAHAPATRA—DEFENDANT AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Rent payable partly in money and partly in paddy—Tenant, right of, to pay price of paddy—Construction of* kabuliyat—*Speculation, whether permissible.*

Where a tenant agreed by a *kabuliyat* to pay rent partly in money and partly in paddy and on his failure to deliver the paddy, to pay a certain sum as the price thereof:

*Held*, that the *kabuliyat* gave a right to the tenant to pay rent partly in money and partly in paddy if he liked and if he did not like to deliver paddy, he could pay the rent altogether in money by paying the amount mentioned as its price; but that he was not liable, in default of delivering the paddy, to pay its market-value at the time of the default. [p. 820, col. 1.]

In such a case the right and liability of the tenant must depend upon the construction of the contract and the construction of the contract only, and a Court has no right to make any speculation as to whether the amount mentioned in the *kabuliyat* as the price of the paddy has been put in for the purpose of fixing the stamp duty and the registration fee. [p. 820, col. 1.]

Appeal against the following order of Mr. Justice N. R. Chatterjea, dated the 13th January 1913, in Appeal from Appellate Decree No. 1643 of 1910:—

"This appeal arises out of a suit for rent, and the question involved in the appeal is whether the plaintiff is entitled to get the price of the paddy rent at the market rate, or at the rate mentioned in the *kabuliyat*. The defendant agreed by the *kabuliyat* to pay Rs. 8 in cash and $29\frac{1}{2}$ maunds of paddy as rent, but there is a provision in it, that if he could not deliver the paddy, he was to pay cash at the rate of 1 maund 10 seers per rupee. Both the Courts below have held that plaintiff is entitled to get the price of the paddy at the market rate, and the defendant has appealed to this Court.

I am of opinion that the construction put upon the *kabuliyat* by the Courts below is correct. There can be no doubt upon the terms of the document that a portion of the rent is to be paid in kind, *viz.*, $29\frac{1}{2}$ maunds a year, on failure to pay the paddy at the time stated in the schedule or instalments interest at the rate of 10 seers per maund is to be paid, and the schedule of instalment expressly provides that the paddy is to be delivered in the month of *Magh* of each year.

It is true a money value is mentioned in the *kabuliyat* for the paddy and the question is whether that in any way modifies the contract to deliver the paddy. In the body of the document it is stated that on failure to deliver paddy, its price at the rate of 1 maund 10 seers per rupee is to be paid. The price of the paddy at that rate would be Rs. 23-9-2. In the schedule of instalments, however, the cash to be paid in lieu of paddy is Rs. 24. Now, what was the tenant to pay in cash on failure to deliver the paddy, Rs. 23-9-2 according to the rate mentioned in the body of the document or Rs. 24 as stated in the schedule? If the parties really agreed that a particular fixed sum was to be paid in lieu of the paddy, there would not have been this difference between the amount stated in the body of the document and the schedule. They, therefore, seem to have been stated in the *kabuliyat* only for the purpose of fixing the stamp duty and registration fee. The paddy rent provided by the *kabuliyat* is no doubt a fixed one, but having regard to the terms of the *kabuliyat* I do not think it was left to the tenant at his option either to deliver the paddy or to pay what might at a particular time be a very inadequate sum as the value of it.

The learned Pleader for the appellant relied on the case of *Afar* v. *Surja Kumar Ghose* (1) and on behalf of the respondent reliance was placed on the cases of *Baneswar Mukherji* v. *Umesh Chandra* (2), *Akbar Ali* v. *Durga Kripa Sen* (3) and *Sheik Isaf* v. *Gopal Chandra Dey* (4). Each *kabuliyat*, however, must be construed according to the particular terms contained therein, and upon the terms of the *kabuliyat* before us, I think the Courts below have arrived at a proper construction. The appeal is accordingly dismissed with costs."

Babus *Dwarka Nath Mitra* and *Ram Dayal Dey*, for the Appellant.

(1) 7 Ind. Cas. 842; 12 C. L. J. 649; 15 C. W. N. 249.
(2) 7 Ind. Cas. 875; 37 C. 626.
(3) 8 Ind. Cas. 944; 12 C. L. J. 589.
(4) 8 Ind. Cas. 896; 12 C. L. J. 593.

SETHURAMA SAHIB *v.* CHOTTA RAJA SAHIB.

Babu *Probodh Kumar Bose*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In this case the appeal is by one of the defendants, defendant No. 2, and the action was brought for rent; and the sole matter in dispute is whether the rent in respect of the paddy is payable at the price which is mentioned in the contract or whether the plaintiff is entitled to get that rent at the market rate at the time the suit was instituted.

Now, but for the fact that three learned Judges have decided this matter in a way contrary to the one in which I am going to decide it, I really should not have wished to say anything except that this appeal ought to be allowed. But out of deference to the learned Judges, I think it is necessary for me to say one or two words.

In my opinion this matter must depend upon the construction of the contract, and the construction of the contract only; we have no right to make any speculation as to whether certain passages were entered in the contract for some motive which is not apparent on the contract itself; for instance, it has been said that this power to substitute a money payment for the delivery of paddy and the mention of the Rs. 24 have been put in for the purpose of registration. There is not a word about it in the contract and, if we were to act upon an assumption of this kind, we would simply enter upon speculation. The contract, in my opinion, is too plain to need any explanation. It gives a right to the defendant to pay to the plaintiff rent partly in money and partly in paddy if he likes. On the other hand, if he does not like to deliver paddy, he can pay the rent altogether in money, and the contract provides the rate in that case. As I have said, if it were not for the fact that there has been a decision of no less than three learned Judges, I should have said that the matter is too plain for argument.

This appeal, in my opinion, should succeed and the judgment of the three Courts should be set aside and the decree will be altered in accordance with our judgment, upon the basis that the annual rental payable is Rs. 24 instead of Rs. 59.

The appellant is entitled to his costs in all the Courts.

MOOKERJEE, J.—I entirely agree.

*Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 136 OF 1915.

October 24, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

*Srimanth* SETHURAMA SAHIB POWAR, THROUGH HIS AUTHORISED AGENT G. B. BAKSHI OF TANJORE—DEFENDANT—APPELLANT

*versus*

*Srimantha* CHOTTA RAJA SAHIB MOHITOY *alias* CHIMMA SAHIB—PLAINTIFF—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1908), *ss.* 11, 48, *O. XX, r.* 18, *O. XXI, r.* 2 *and O. XXXII, r.* 7 (2)—*Partition decree, construction of—Parties minors—Agreement for common enjoyment of some items for which partition decreed—Non-certifying of agreement to Court, effect of—Absence of Court's sanction, effect of—Suit for partition of reserved items, nature of, when enforcement of agreement barred*—Res judicata.

Per *Curiam* (*Sadasiva Aiyar, J. dubitante.*)—A finding or decision given by a Court on a matter on which its opinion is not invited does not operate as *res judicata*. [p. 823, col. 1; p. 824, col. 1.]

Per *Curiam*, (*Napier, J., dubitante.*)—Order XXI, rule 2 (1), which requires certifying to Court of adjustments made out of Court of decrees 'of any kind' applies not only to money decrees, but includes complex decrees under which possession of immoveables is also awarded and, as regards execution of that portion of the decree, an uncertified adjustment cannot be recognized. [p. 823, col. 2.]

*Kelu Nair* v. *Meenakshi*, 21 Ind. Cas. 639; 25 M. L. J. 586; 14 M. L. T. 574, *Sri Kishan Lal* v. *Kashmiro*, 34 Ind. Cas. 37; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 31 M. L. J. 362; 14 A L. J. 1236 (P. C.), dissented from.

*Abdul Latiff Sahib* v. *Bathula Bibi Ammal*, 23 Ind. Cas. 530; (1914) M. W. N. 346; 15 M. L. T. 338, followed.

Per *Sadasiva Aiyar, J.*—An agreement varying the terms of a decree between parties who are minors, which is not sanctioned by the Court under Order XXXII, rule 7, Civil Procedure Code, can be avoided by each of the parties as against the other. A party who is barred by limitation from actively avoiding it as plaintiff can, however, defend a suit brought against him on that agreement by pleading the voidability of the transaction as against him. [p. 824, col. 1.]

If an agreement between the parties to reserve partition of certain properties of which partition has been decreed by Court cannot be recognized under Order XXI, rule 2, Civil Procedure Code, or Order XXXII, rule 7, or its enforcement has become barred under section 48, Civil Procedure Code, the only remedy of the parties to obtain a partition of such properties by metes and bounds is to proceed in execution of that decree and not by separate suit, provided a final decree was not passed in the first partition suit. [p. 824, col. 1.]

*Madan Mohan Mondul* v. *Baikunta Nath Mondul*, 10 C. W. N. 839; *T. C. Mukerjee* v. *Afzal Beg*, 27 Ind.

SETHURAMA SAHIB *v.* CHOTTA RAJA SAHIB.

Cas. 694; 37 A. 155; 13 A. L. J. 98, *Jogendra Nath Rai* v. *Baldeo Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, dissented form.

If a Court construes a decree as a final decree in any contested execution proceeding between the parties, that construction will operate as *res judicata*. [p. 824, col. 2; p. 825, col. 1.]

The cause of action for partition is one and the same and once it has merged into a preliminary decree and into a final decree which effects partition by metes and bounds and awards possession of particular shares to the parties, the plaintiff cannot have a second suit for partition as if the tenancy-in-common gave rise every day (even after the final decree) to a new cause of action. [p. 824, col. 2.]

So long as a preliminary partition decree has not been completed by a final decree, the Court is bound, on the application of either party to proceed with the suit to pass a final decree and such an application is not an application in execution. [p. 825, col. 1.]

Per *Napier, J.*—A suit for partition of reserved items should be treated as one for recovery of possession of the share from which the plaintiff has been ousted, by a partition by metes and bounds, and the Appellate Court should treat all necessary amendments as having been made. [p. 825, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in Original Suit No. 24 of 1913.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General), for the Respondent.

JUDGMENT.

SAD. SIVA AIYAR, J.—The defendant is the appellant. The suit was brought for partition of a few of the properties left undivided between the plaintiff and the defendant, though a decree for partition of the plaint properties and several other properties had been passed so long ago as on 7th March 1896 (see decree Exhibit C), and for partition of one property (item No. 4) not included in the former suit. The plaintiff and the defendant were two of the parties to the suit (Original Suit No. 36 of 1895) in which that decree (Exhibit C) was passed, they having been "plaintiff" and "second defendant" respectively in that suit. The third defendant in that suit was the Secretary of State for India represented by the Collector of Tanjore, who was in possession of some of the moveables belonging to Sakharam Sahib (connected with the Tanjore Royal Family) whose properties were in dispute in that suit.

The lower Court has dismissed the suit as regards items Nos. 4 and 5 of the plaint A Schedule and has passed a preliminary decree for partition of the other items Nos. 1, 2, 3, 6, 7, 8 and 9 in Schedule A. This appeal by the defendant ought, therefore, to have been confined to those items, but I find it includes (probably by mistake) all the nine items.

Forty-two grounds have been mentioned in the appeal memorandum, but many of the grounds are either too vague to require notice or are mere repetitions in other words of other grounds and most of them were not argued separately. I shall mention only the contentions pressed before us by Mr. Ananthakrishna Aiyar for the appellant and give my conclusions shortly upon each of them after setting out a few more necessary facts.

As I said, the *razinama* decree (Exhibit C) was passed on the 7th March 1896. Both the plaintiff and the defendant were then minors represented by their respective guardians. The relevant portions of that decree are: "This Court doth order and decree that plaintiff do recover from defendants Nos. 1 and 2 one moiety with reference to good and bad soil of the immoveable properties described in Schedule A of the plaint, except the house item No. 8 that has been given to first defendant and that the second defendant" (present defendant) "do take the other moiety...that plaintiff do further get from second defendant mesne profits from this date to date of delivery in respect of the moiety in Schedule A aforementioned." On the 11th October 1897, the plaintiff's guardian granted a receipt to the defendant's agent and it is marked Exhibit III in this case. That receipt acknowledges that the plaintiff's claim as established under the decree (Exhibit C) had been satisfied by granting possession and otherwise to the plaintiff's guardian of his share in all the properties mentioned in that decree (Exhibit C), except one of the nine properties now in dispute and except the moveables in the Collector's hands. (Item No. 4 of the present suit was, as I said before, not included in Original Suit No. 36 of 1895. Paragraph 10 of the plaint in the present suit says: "In regard to the properties annexed to the Schedule A hereto, it was found that a division by metes and bounds was not then convenient," (that is at the time of Exhibit III in

October 1897). "It was, therefore, agreed that the properties should be enjoyed in common by plaintiff and defendant without dividing them by metes and bounds, that the income thereof should be divided by the plaintiff and the defendant in equal shares and that the properties themselves should be divided by metes and bounds between the plaintiff and the defendant whenever the parties should desire to have such division effected." The 15th paragraph of the plaint is as follows: "Plaintiff finds it inconvenient to have the properties described in Schedule A in an undivided condition and is desirous of having them divided by metes and bounds. Plaintiff, therefore, sent a notice through his Vakil to the defendant on the 29th December 1910 calling upon him to consent to a fair division of the properties described in Schedule A by metes and bounds. The defendant has not replied to the same." The present suit was brought on 14th December 1912, the plaintiff and the defendant both having then attained majority. One other fact might be mentioned, namely, that between 1898 and 1903 four petitions for execution of the decree Exhibit C were filed on behalf of the plaintiff (see Exhibits IV, VI, VII and VIII) and one on behalf of the defendant (Exhibit V) but the prayer in these execution petitions related, so far as I could see, to the moveable properties belonging to the late Sakharam Sahib which were in the custody of the Tanjore Collector (the third defendant in the suit) and afterwards of the Tanjore Palace Receiver: These have been since divided amicably between the parties.

In the year 1899, Original Suit No. 68 of 1899 was filed by the present defendant against the present plaintiff for the recovery of a sum of money due on a bond executed by the plaintiff's next friend to the defendant's agent in connection with the settlement of some other suit brought by a third person against both of them. Exhibit 42 is the judgment in that case. One of the defences raised in that suit was that the bond was not enforceable till the plaintiff (then first defendant) had been put in possession of his share in all the properties. The 8th and the 10th issues in that suit were as follows:—"8. Whether plaintiff's agent Veeraraghava Aiyangar granted time to Kasoba Sahib" (present plaintiff's and then 1st defendant's guardian) "for paying up the amount of the bond till he should get possession of the 1st defendant's share of all the properties (moveable and immoveable) of Sakharam Sahib?" "10. Whether the first defendant has been put into possession of his share in all the moveable and immoveable properties of Sakharam Sahib, and if not, whether the suit is premature?"

The Court found that time was so granted and that that suit was premature, as the plaintiff had not been put into possession of his share of all properties mentioned in Exhibit C. The plaintiff in that suit (defendant in this suit) seems to have set up during the course of the trial of that suit, that even if his agent had agreed to give time for payment of the bond till the present plaintiff (then first defendant) was put in possession, there was an agreement about October 1897 by which the properties were to be enjoyed in common and hence, the present plaintiff must be deemed to have been put in possession of his half share and accordingly that that suit of defendant was not premature. The learned Subordinate Judge in his judgment (Exhibit 42) says: "Besides, the alleged agreement was not put forward by plaintiff at the time of the settlement of the issues nor any reference made to the agreement in the plaint." The Judge, therefore, found against the agreement, though no issue was directly raised about it and though it does not appear that the guardian of the present plaintiff (then first defendant) denied that agreement. The defendant now contends that by reason of the finding in Exhibit 42 against that agreement, the question whether there was such an agreement in October 1897 between the plaintiff's guardian and the defendant's guardian to hold these plaint properties in common is *res judicata* against the present plaintiff, who has set up that same agreement in paragraph 10 of the present plaint.

I think the above are the only facts which are necessary to be set out for the decision of this appeal. On these facts, several technical objections to the suit were advanced on behalf of the defendant (appellant). As regards the facts themselves they are fully

established by the oral and documentary evidence in the case notwithstanding that the truth of one of these facts, namely, the agreement between the plaintiff's guardian and the defendant's guardian to hold the plaint properties (except item No. 4) in common, was found against in the suit of 1899 (Exhibit 42).

I shall first deal with the question whether the finding in Exhibit 42 as to the truth of the agreement is a *res judicata* in this suit. It would be so (see section 11 of the Civil Procedure Code) if the fact of this agreement was directly and substantially in issue in the former suit, if, according to explanation 3, the matter was alleged by one party and either denied or admitted expressly or impliedly by the other and if it was heard and finally decided in that suit. Having considered the judgment (Exhibit 42) carefully, I agree with the lower Court that there is nothing to show that this agreement which was put forward by the present defendant (plaintiff in the older suit of 1899) during the course of the examination of witnesses in that case was ever denied by the present plaintiff (then first defendant). The Subordinate Judge who decided that suit seems of his own accord to have thought that the agreement, if true, might be fatal to the defence in that suit, namely, that that suit was premature and as that agreement was put forward at a late stage of the litigation, he pronounced an opinion in his judgment against the truth thereof. There is nothing to show that the present plaintiff's guardian or his Vakil considered the truth of the agreement as fatal to the defence in that suit and invited the opinion of the Court on the truth or falsehood of that agreement. I would, therefore, hold, though after some hesitation, that the opinion expressed in that judgment (Exhibit 42) about the truth of the agreement is not *res judicata* in this suit.

Even if I am wrong in the above opinion and even if that agreement is wholly left out of consideration as not available to the plaintiff, I think the plaintiff is entitled to succeed in this suit in the view I take of the real nature of this litigation. Before mentioning that view, I shall just say a few words on the other technical objections raised in the case as they were elaborately argued, though a decision on these objections also is unnecessary in my opinion. These questions can only arise if the decree of 1896 (Exhibit C) is treated as a final decree for partition.

Assuming that it is such a final decree, can the agreement to hold certain properties in common, whereas the decree contemplates division by metes and bounds and the award of a definite half share to the plaintiff, can that agreement be allowed to vary the decree? In *Kelu Nair* v. *Meenakshi* (1), Spencer, J., and myself held that Order XXI, rule 2, of the Code of Civil Procedure does not apply to the relief of possession of immoveables given by a decree. We relied on *Sankaran Nambiar* v. *Kanara Kurup* (2), which was decided on the language of section 258 of the old Civil Procedure Code. We thought that the slight change in the language introduced by Order XXI, rule 2, of the new Code, though it set at rest the difference of opinion whether mortgage decrees are decrees for money (and whether payments made in satisfaction of mortgage decrees should be certified), did not affect the decision in *Sankaran Nambiar* v. *Kanara Kurup* (2) which related to a decree for possession of immoveables. But I find in a more recent case decided by the learned Chief Justice and Ayling, J., in *Abdul Latiff Sahib* v. *Bathula Bibi Ammal* (3), that it has been held that as the first sentence in Order XXI, rule 2, clause 1, refers to "a decree of any kind", the words "the decree" in the second sentence of that rule meant "a decree of any kind under which money is payable", including a complex decree under which possession of immoveables is also awarded and that as regards execution of that portion also of the decree which relates to the possession of immoveables, an uncertified adjustment cannot be recognised. (The headnote to the report in Madras Weekly Notes is very misleading). There is a still more recent case (Civil Miscellaneous Second Appeal No. 11 of 1915) (Oldfield and Krishnan, JJ.) which, however, follows *Kelu Nair* v. *Meenakshi* (1). After full consideration, I recede from the opinion expressed by me in *Kelu Nair* v. *Meenakshi* (1) and adopt that found in the judgment in *Abdul Latiff Sahib* v.

(1) 21 Ind. Cas. 639; 25 M. L. J. 586; 14 M. L. T. 574.

(2) 22 M. 182; 8 M. L. J. 175; 8 Ind. Dec. (N. S.) 129.

(3) 23 Ind. Cas. 530; (1914) M. W. N. 346; 15 M. L. T. 338.

*Bathula Bibi Ammal* (3). I am not even sure that "the decree" in the second sentence should be one under some part at least of which money should be payable. However, this does not help the defendant in this case as clause 3 of Order XXI, rule 2, prevents only the Court executing the decree from recognising the adjustment and not any other Court. The Court which decided the present suit is not executing the decree in the suit of 1896 and hence it seems to me that the agreement can be recognised by it if the question of its truth is not *res judicata*.

The next objection is that as that agreement varies the terms of the decree in the suit of 1896, it is invalid under Order XXXII, rule 7, of the Code of Civil Procedure corresponding to section 462 of the old Code, as not having been sanctioned by the Court. Order XXXII, rule 7, clause 2, of the Code of Civil Procedure makes such an agreement voidable against all the parties other than the minor. Each of the parties to the suit (who were both minors at the time of the agreement which took place at the end of 1897) could, therefore, avoid it as against the other. Now, I take it the defendant wishes to avoid it while the plaintiff does not wish to avoid it. It was not denied that more than three years had elapsed since the defendant attained majority when this suit was instituted. But the Privy Council has held in *Sri Kishan Lal* v. *Kashmiro* (4) that though a defendant might be barred from instituting a suit to avoid a transaction voidable against him, he could defend a suit brought against him by pleading the voidability of that transaction as against him. I am, therefore, of opinion that Exhibit C can be avoided by the defendant in defence to this suit. If the agreement has thus become avoided and if the decree of 1896 was a final decree for partition, I think the only remedy for the plaintiff to obtain a partition by metes and bounds was to proceed in execution of that decree, and not by a separate suit. No doubt it has been held in *Madan Mohan Mondul* v. *Baikunta Nath Mondul* (5) and *T. C. Mukerji* v. *Afzal Beg* (6) that even if a decree for partition was not executed and was allowed to be barred, a second suit for partition could be brought so long as the relationship of tenants-in-common continued between the parties. It was also held in *Jogendra Nath Rai* v. *Baldeo Das* (7) that where, by mistake, the Court decreed the final partition of only a portion of the property belonging to the parties in common, though the suit was for partition of all the properties held in common, a subsequent suit for the portion left undivided might be brought. I, however, respectfully dissent from those decisions and hold that the cause of action for partition is one and the same and once it has merged into a preliminary decree and into a final decree which effected partition by metes and bounds and awarded possession of particular shares to the parties, the plaintiff cannot have a second suit for partition as if the tenancy-in-common gave rise every day (even after the final decree) to a new cause of action. If the decree of 1896 was a final decree, I am clear that execution of that decree is barred by the twelve years' period of limitation under section 48 of the Code of Civil Procedure. If, however, there is a new cause of action on the agreement of 1897, assuming it to be valid, it is clear on the facts that the possession of the defendant after 1899 continued to be that of a tenant-in-common with the plaintiff. There was no assertion of adverse possession as against the plaintiff and, on the other hand, out of the common profits the defendant seems to have spent moneys on a purpose common to the plaintiff and the defendant, namely, the maintenance of a cow, calf and elephant dedicated to the idol in the famous Kamatchiamman temple at Tanjore in accordance with the agreement of 1897.

I shall now state briefly the true legal view which, I think, ought to be taken of this suit. I think that the decree of 1896 was only a preliminary decree so far as the partition of the plaint properties (except of course item No. 4) is concerned. I do not think that the execution petitions of 1898 and 1903 already referred to can change the character and construction of a decree. If such a construction had been made by the Court in an order passed on a contested execu-

(4) 34 Ind. Cas. 37; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 31 M. L. J. 362; 14 A. L. J. 1236 (P. C.).

(5) 10 C. W. N. 839.

(6) 27 Ind. Cas. 694; 37 A. 155; 13 A. L. J. 98.

(7) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

tion proceeding that construction may, no doubt, be *res judicata* between the parties. But so far as the decree for partition of immoveables is concerned, no such construction seems to have been placed by the Court in any order passed on any execution petition. [See also the judgments of Oldfield, J., and myself reported as *Srinivasa Madali* v. *Ramasamy Mudali* (8).] So long as a preliminary partition decree has not been completed by a final decree, the Court is bound, on the application of any parties, to proceed with the suit to pass a final decree and such an application is not an application in execution. See the same case of *Srinivasa Mudali* v. *Ramasamy Mudali* (8). I think this suit might be treated as such an application to pass a final decree and the decree passed in this suit appointing a Commissioner to divide the properties Nos. 1, 2, 3, 6 to 9 and other appurtenant as orders passed in the suit of 1895 (in furtherance of the preliminary decree), that is, to obtain the necessary report, etc., from the Commissioner in view to prepare the final decree to be passed in that suit. Viewed in this manner, the lower Court's decision is right. The appeal will, therefore, be dismissed. The memorandum of objections was not pressed as regards item No. 4. As regards item No. 5, the lower Court has given good grounds for its view that its partition has been already effected by metes and bounds between the parties and it is not necessary to pass a decree for its fresh division. The memorandum of objections is, therefore, also dismissed. Costs on both sides of this appeal to come out of the estate.

NAPIER, J.—My learned brother has mentioned at sufficient length the material facts on which this appeal is founded and I will not recapitulate them.

A number of contentions were raised before us on behalf of the appellant, some of which I do not think it necessary to express any opinion on. The point of *res judicata* was pressed by Mr. Ananthakrishna Aiyar, but I agree with my learned brother that the existence of the agreement relied on was not a point substantially in issue in the previous case. On the facts, I am satisfied that the *razinama* decree was executed by the plaintiff and defendant taking joint possession of the house in question. This is, to my mind, established by Exhibit G series. It, therefore, becomes immaterial whether the subsequent agreement relied on was void as not having been sanctioned by the Court, or whether it is voidable only as contended by the learned Advocate-General; nor do I think it necessary to express any opinion on the very difficult question of the construction of Order XXI, rule 2, Civil Procedure Code. I have little doubt that rules 1 and 2 were intended by the Legislature to apply to what are known as money-decrees. But on the language used, it seems difficult to hold that the word "decree" in rule 2, clause (1), can apply only to money-decrees or can be read as meaning a "decree to the extent of any money payable under it." In the view I take of the facts the suit will not be barred under section 48, Civil Procedure Code, by reason of more than twelve years having elapsed since the date of the original decree, *i. e.*, 7th March 1896, as in my mind a fresh cause of action has arisen from the ouster in 1909. I cannot accept the contention that the cessation of occupation by the agent for the plaintiff and defendant in 1899 and the subsequent failure to pay any portion of the proceeds of the rent of the house from that date amounts to a clear and unambiguous assertion of a right to sole ownership by the defendant, in view of the fact that there was an original and continuing liability of the plaintiff to pay his share of the expenses of upkeep of the animals for whose maintenance the rent was, in fact, applied, although the agreement under which it was done might have been void. I would, therefore, treat this suit as one for recovery of possession of the half share from which the plaintiff has been ousted, by a partition by metes and bounds, treating all necessary amendments in the plaint as made. In this view I would dismiss the appeal with costs to come out of the estate.

With regard to the memorandum of objections, I see no reason to think that the house was not properly divided originally

(8) 30 Ind. Cas. 380; (1915) M. W. N. 725 at p. 726; 2 L. W. 693; 18 M. L. T. 145.

and in that view the memorandum of objections fails and should be dismissed with costs to come out of the estate.

*Appeal and Memo. of objections dismissed.*

V.R.P.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1736 OF 1914

November 23, 1916.

*Present*:—Mr. Justice Oldfield and Mr. Justice Phillips.

MANJESHWARA KRISHNAYA—DEFENDANT No. 3 - APPELLANT

*versus*

VASUDEVA MALLYA AND OTHERS—PLAINTIFFS NOS. 1 TO 5, DEFENDANT No. 1 AND HIS LEGAL REPRESENTATIVE—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Res judicata as between co-defendants—Finding on issue not in active controversy between defendants* inter se, *effect of—Vendor and purchaser—Mortgage by vendee, declaration of validity of, in action by vendor against vendee and his mortgagee—Transfer pending suit*—Lis pendens—*Transfer of Property Act (IV of 1882), s. 52.*

*M.* sold certain properties to 1st defendant, who mortgaged them to plaintiff's father after purchase. *M.* brought a suit against 1st defendant and plaintiff for a declaration that both the said sale and mortgage were colourable transactions. The Court held that they were both valid. During the pendency of that litigation 1st defendant sold the property to 2nd defendant, who, in turn, transferred it to 3rd defendant. In a suit by the plaintiff to enforce the mortgage security:

*Held*, per Curiam, that the previous decree in favour of *M.*, wherein the validity of the mortgage was admitted by both 1st defendant and the plaintiff's predecessor and which was not in active controversy between them, did not operate as *res judicata* in the present suit. [p. 827, col. 2; p. 829, col. 1.]

*Held*, by *Phillips, J.* (whose opinion prevailed under section 98, Civil Procedure Code), *Oldfield, J., dissenting*, that under section 52 of the Transfer of Property Act, the transfer to 2nd defendant could not affect the plaintiff's right to a valid mortgage over the property, a right which he obtained as the result of the suit during which the property was transferred. [p. 830, col. 1.]

Per *Oldfield, J.*—The wording of section 52 of the Transfer of Property Act no doubt is general and is not restricted explicitly to the protection of those parties only who have been in active controversy with the transferor. But it cannot be read as a general prohibition against the subsequent agitation of every question, which arose in the litigation, between whomsoever it was decided. That reading would refuse full effect to the words "the rights of any other party," for the right protected cannot be treated as existing, like an obligation running with the property, independently of the party in whose favour it was decreed. [p. 828, col. 1.]

The doctrine of *lis pendens* operates only in favour of a plaintiff and cannot be invoked by a defendant. [p. 828, col. 2.]

Per *Phillips, J.*—There is no authority for the proposition that the scope of the doctrine of *lis pendens* must be limited to cases in which the doctrine of *res judicata* would apply to the transferor. [p. 829, col. 2.]

Second appeal against the decree of the District Court of South Canara in Appeal Suit No. 45 of 1913, preferred against that of the Subordinate Judge, South Canara, in Original Suit No. 60 of 1911 (Original Suit No. 63 of 1906 on the file of the District Court of South Canara).

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *V. V. Sreenivasa Aiyangar*, for the Respondent.

This second appeal coming on for hearing on the 13th November 1916, and having stood over till this day for consideration, the Court delivered the following

JUDGMENT.

OLDFIELD, J.- Plaintiffs sue to recover on a mortgage on the suit property, admittedly executed by 1st defendant in favour of their predecessor-in-interest. Third defendant, the appellant, is a transferee of the property from 2nd defendant, who is a transferee from 1st defendant in virtue of transactions to be detailed later. Third defendant's contention is that the mortgage is invalid, because it was entirely without consideration. The lower Appellate Court decided against this on the ground that 3rd defendant was concluded by the decision in Second Appeal No. 323 of 1902; it modified the decree of the Subordinate Judge only on another point, regarding which there is no dispute before us.

For the understanding of the effect of the decree in Second Appeal No. 323 of 1902 the necessary facts are that 1st defendant bought the property from one Manjunatha, leaving rupees one thousand and five hundred of the consideration outstanding, rupees one thousand on a promissory note and rupees five hundred, which had not been paid, when it should have been, at registration. This rupees one thousand five hundred

and another sum of rupees five hundred, which does not affect the present argument, were raised by 1st defendant by the suit hypothecation of the property to plaintiffs' predecessor; 2nd defendant, holding a decree against Manjunatha, attached the debt due to him by 1st defendant and, proceeding against the latter, obtained a decree and bought in the property, thus becoming the mortgagee of plaintiffs' predecessor. Manjunatha, apparently apprehensive of competition between his right to a charge for unpaid purchase money and the mortgage, brought Original Suit No. 114 of 1898 to have the mortgage and also the previous sale to 1st defendant declared invalid on the grounds that they were colourable and without consideration. The High Court in Second Appeal No. 323 of 1902 held that the sale was valid and that the mortgage was valid subject to Manjunatha's claim to his unpaid purchase money, the principal of which it found to be rupees one thousand, the amount above referred to as due on a promissory note. This judgment is the basis of the lower Appellate Court's decision against 2nd defendant and 3rd defendant. The parties to it were Manjunatha as plaintiff and 1st defendant, his wife and plaintiffs' predecessor as defendants. In the second appeal, the last mentioned was appellant and the legal representatives of Manjunatha, 1st defendant and his wife were respondents. Throughout the proceedings plaintiffs' predecessor and 1st defendant upheld the validity of the mortgage

Contrary to 1st defendant's previous pleading his successors, 2nd and 3rd defendants, have contended in the present suit that the mortgage was without consideration and is not binding on them or the property in the latter's hands. And accordingly the case has been argued first on the ground that they are estopped by 1st defendant's conduct in Second Appeal No. 323 of 1902. That can be dismissed shortly, because no such plea of estoppel was advanced, put in issue or considered in the lower Courts. Next it is said that the decree in the second appeal is *res judicata* between plaintiffs and 3rd defendant; and to this two answers have been given. It is argued firstly that, although the decree declared the validity of the mortgage, subject only to Manjunatha's prior right to rupees one thousand, the judgment, which modified the decision in first appeal by adding to it a reference to that right, statedly made that reference only as between Manjunatha and plaintiffs' predecessor, thus leaving the question of the validity of the mortgage and the amount recoverable on it open as between the latter and 1st defendant. This restriction of the effect of the decision regarding the rupees one thousand is intelligible, because (as the records show) the original judgment had recognised Manjunatha's object as not so much to have the mortgage "set aside as to have it rendered of no effect, so far as it affected his property; it was not his interest whether 1st defendant owed any money or not to 3rd defendant;" and the main ground of second appeal against the decisions declaring the mortgage invalid was that Manjunatha had no right to ask for that relief. But, whatever the reason for it, the making of the restriction in the judgment cannot assist 3rd defendant, because it was not mentioned in the decree, to which 1st defendant submitted and which must be looked to, rather than the judgment, as determining the parties' rights. The second argument relied on, however, affords a clear reason for holding that the decree in Second Appeal No. 323 of 1902 is not *res judicata*. Plaintiffs' predecessor and 1st defendant were co-defendants and were so far from being in active contest that their pleas as to the validity of the mortgage and Manjunatha's right to dispute it were substantially the same; and in these circumstances there is no *res judicata* between them. *Ramchandra Narayan* v. *Narayan Mahadev* (1), *Venkayya* v. *Narasamma* (2).

It is, therefore, necessary to consider the third ground of decision proposed by plaintiffs, that adopted by the lower Appellate Court and based on the principal of *lis pendens*. The difficulty in the way of its application is not due to any doubt as to the contentious character of Second Appeal No. 323 of 1902 or the fact that the transfer to 2nd defendant was made during the litigation. It is that the principle, as contended for, involves that the decision relied on shall be binding on the transferee, not

(1) 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. s.) 142.

(2) 11 M. 204; 4 Ind. Dec. (N. s.) 142.

only as it would have been on the transferor, but also to the extent to which there was an adjudication on the rights of any other party, whether that adjudication affected those of the transferor or not; in short that in the present case, although there was no binding decision between 1st defendant and plaintiff's predecessor as to the invalidity of the mortgage, 3rd defendant is to be affected by one between Manjunatha and each of them separately.

To test this contention with reference to section 52 of the Transfer of Property Act the wording no doubt is general and is not restricted explicitly to the protection of those parties only, who have been in active controversy with the transferor. But it cannot, in my opinion, be read, as plaintiffs claim, as a general prohibition against the subsequent agitation of every question, which arose in the litigation, between whomsoever it was decided. That reading would refuse full effect to the words "the rights of any other party". For it would involve the fallacy of treating the right protected as existing, like an obligation running with the property, independently of the party in whose favour it was decreed; and, so much conceded, it would, as is pointed out in the first case to be referred to, be hard to permit other parties to the litigation to profit by its recognition, though (as in the present case) they had obtained no binding adjudication regarding it, and at the same time to refuse permission to strangers to do so.

Authority supports this view; and, though it is mostly English, it does not appear inapplicable in this country owing to the English procedure of registration of *lis pendens* or on other grounds. *Bellamy* v. *Sabine* (3) contains a general statement of the doctrine, which has often been approved by Indian Courts. It is also directly in point, because it dealt with the competition between one of two co-defendants and the other's transferee, the former claiming unpaid purchase money and the latter under a mortgage made during the litigation. The decision was in favour of the transferee, the matter being put most clearly in the judgment of Turner, L. J., "Laying out of consideration the cases (which are rare), in which decrees can be made between co-defendants," (and also presumably those in which there is an adjudication between them after active contest) "upon what ground is the case of a co-defendant to stand in a different position from that of a stranger? and, if the doctrine of *lis pendens* is to be carried so far as to affect a purchaser with notice in favour of a stranger, I hardly know what title would be safe, independently of the late Acts requiring registration." In the next case, *Tyler* v. *Thomas* (4), the doctrine was applied; but the decisive factor in favour of its application was that, though there was no adjudication between the co-defendants concerned, an issue was raised between them and reserved for subsequent trial, *Bellamy* v. *Sabine* (3) being distinguished on that ground. In *Bull* v. *Hutchens* (5) it was held that "a *lis pendens* is merely notice of some claim, made in respect of the property which is the subject of the suit, but that it does not, of itself, create an incumbrance, apart from the equity on which the litigation is founded." Only one Indian case need be mentioned. In *Shivlal Bhagvan* v. *Shambhuprasad* (6) a Full Bench decision, the Court, though it based its conclusion on another ground, referred to *Bellamy* v. *Sabine* (3), apparently with approval, as deciding that the doctrine of *lis pendens* operated only in favour of a plaintiff and could not be invoked by defendants.

Plaintiff's construction of the section failing on its merits and with reference to authority, I would allow the second appeal, set aside the lower Appellate Court's decision and remand the case for disposal on the other points raised in the appeal memorandum before it.

PHILLIPS, J.—The properties mortgaged to the father of plaintiffs Nos. 1 and 2 by 1st defendant had been sold to 1st defendant by one Manjunatha Bhandari, who brought a suit in 1898 (Original Suit No. 114 of 1898, Sub-Court, Mangalore) for a declara-

(3) (1857) 1 De. G. & J. 566; 26 L. J. Ch. 797; 3 Jur. (N. S.) 943; 6 W. R. 1; 44 E. R. 842; 118 R. R. 228.

(4) (1858) 25 Beav. 47; 53 E. R. 553; 119 R. R. 325.

(5) (1863) 32 Beav. 615; 8 L. T. 716; 9 Jur. (N. S.) 954; 11 W. R. 866; 55 E. R. 242; 2 N. R. 306; 138 R. R. 885.

(6) 29 B. 435; 7 Bom. L. R. 585.

tion that the sale-deed to 1st defendant and the hypothecation-deed executed by him to the father of plaintiffs Nos. 1 and 2 (3rd defendant in that suit) were invalid. In Second Appeal No. 323 of 1902 it was held that the sale-deed and mortgage were both valid. During the pendency of the litigation 2nd defendant purchased the property from 1st defendant and 3rd defendant is 2nd defendant's transferee, and it has been held by the lower Appellate Court that the doctrine of *lis pendens* is applicable and that, therefore, 3rd defendant cannot now question the validity of the mortgage to 1st and 2nd plaintiffs' father.

As between Manjunatha Bhandari and plaintiffs the validity of the mortgage is undoubtedly *res judicata*, and also as between Manjunatha Bhandari and 1st defendant. But it is contended now that as 1st defendant and plaintiffs' father were co-defendants in the suit of 1898 the validity of the mortgage is not *res judicata* as between them, for no question of *res judicata* can arise between co-defendants when there was no matter actively in contest between them, the decision of which was necessary for the determination of the suit. This would appear to be the case, and I am not prepared to say that the prior decision in Second Appeal No. 323 of 1902 would operate as *res judicata* between 1st defendant and plaintiffs, although the former might be estopped from questioning the validity of a mortgage, the validity of which he had himself set up in that litigation. It is then contended for respondents that even though the doctrine of *res judicata* may not apply to 3rd defendant, he is precluded from disputing the validity of the mortgage by reason of section 52 of the Transfer of Property Act, under which during the active prosecution of a contentious suit the property concerned cannot be transferred by any party to the suit so as to affect the rights of any other party thereto under any decree made therein.

This contention, if upheld, would in this case possibly have the effect of disabling a purchaser even more effectively than his transferor to whom the doctrine of *res judicata* would apply, but cannot be rejected on this ground alone. Section 52 of the Transfer of Property Act embodies the English doctrine of *lis pendens* as applicable in Courts in India, and the principle on which that doctrine rests is that no alienation by either party to a pending litigation is to be allowed to prejudice the interests of the parties thereto. In the words of the Lord Chancellor in *Bellamy v. Sabine* (3), "The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." We have not been referred to any cases in which the question now in issue has been specifically decided, and consequently, I think that the provisions of section 52 must be relied upon for the answer. The decree in Second Appeal No. 323 of 1902 held that the mortgage to plaintiffs' father was valid, subject to a claim for unpaid purchase money, and that decree was binding on 1st defendant who was a party to it. No doubt it is remarked in the judgment that the decree of the lower Courts will be modified as between the plaintiff and 3rd defendant (plaintiffs' father), but that remark appears to be due to the fact that 3rd defendant alone appealed to this Court, and 1st defendant was *ex parte* and it is clear from the decree itself that the mortgage was held to be valid and not merely as between plaintiff and 3rd defendant. The effect of the decree, therefore, was to establish the right of plaintiffs' father to a valid mortgage was on the suit property, and under section 52 no transfer effected during the suit can affect that right. First defendant as a party is bound by that decree and does not now seek to impeach its validity. To allow 3rd defendant in this suit to contend and possibly to prove that that right does not exist would certainly affect plaintiffs' right, established by the decree, and although the declaration as to the right might not be conclusive as between 1st defendant and plaintiffs as *res judicata*, yet it is a declaration binding on 1st defendant until he seeks to impeach it. He does not impeach it now, and consequently its impeachment by his alienee does seriously affect plaintiffs' rights and, therefore, in my opinion cannot be allowed. I can find no authority for the proposition that the scope of the doctrine of *lis pendens* must be limited to cases in which the doctrine of *res judicata* would apply to the transferor, and if the Legislature had meant to enunciate that

proposition, it could have done so in terms instead of enacting section 52 in its present form. According to the language of section 52, the transfer to 2nd defendant cannot affect plaintiffs' right to a valid mortgage over the property, a right which he obtained as the result of the suit during which the property was transferred. The transfer to 2nd defendant must, therefore, be deemed to have been made subject to that right and 3rd defendant cannot now impeach the validity of the mortgage.

In this view it is unnecessary to discuss the question of estoppel. The question was not raised in the lower Courts and cannot be raised for the first time in second appeal, although it is quite possible that, if 1st defendant had in this suit impeached the validity of plaintiff's mortgage, the plea of estoppel would have been raised and proved successfully.

BY THE COURT.—The appeal is dismissed with costs.

*Appeal dismissed.*

V.R P.

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MADRAS HIGH COURT.
SECOND CIVIL APPEAL NO. 695 OF 1913.
February 16, 1917.
*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.
NATHAMUNI MUDALI AND OTHERS—DEFENDANTS NOS. 2 TO 6—APPELLANTS
*versus*
PARTHASARADI MUDALI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 7 TO 12—RESPONDENTS.

*Hindu Law*—Sudras—*Illegitimate son, rights of*—*Share, claim for, after partition between father and legitimate sons, maintainability of.*

An illegitimate son of a *Sudra* can, under Hindu Law, take a share equal to that of a legitimate son at his father's choice, and, after his father's death, can demand of the legitimate sons a share equal to half that of a legitimate son. [p. 831, col. 2]

Where, however, a partition has already been effected between the father and his legitimate sons, in which nothing is reserved for the illegitimate son, the latter cannot claim his share. [p. 832, col. 1.]

*Ram Saran Garain* v. *Tek Chand Garain*, 28 C. 194, followed.

An illegitimate son does not take a share in his father's estate at birth. [p. 832, col. 2.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 45 of 1912, preferred against that of the District Munsif, Poonamallee, in Original Suit No. 247 of 1911.

FACTS of the case appear from the judgment.

Mr. *T. V. Muthukrishna Aiyar* (with him Mr. *A. Sivarama Menon*), for the Appellant.—(1) The general rule of Hindu Law is that an illegitimate son can get a share in the family property at his father's choice. It is nowhere laid down that he can bring a suit to compel a partition to get a share. Mayne says that the right is a strange right and has not been raised anywhere hitherto. *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (1) and *Soundarayam* v. *Arunachalam Chetty* (2), *Karuppanan Chetti* v. *Bulokam Chetti* (3).

(2) Again in this case there was a previous suit for partition in which the present plaintiff was allotted no share, and when the family became divided there was nothing on which his right could operate. This point was laid down in a series of cases. *Krishnayyan* v. *Muttusami* (4), *Ranoji* v. *Kandoji* (5), *Parvathi* v. *Thirumalai* (6), *Sadu* v. *Baiza* (7), *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (1), *Karuppa Goundan* v. *Kumarasami Goundan* (8) and *Visvanathaswamy Naicker* v. *Kamu Ammal* (9).

There are also recent cases of *Mandaram Nammaiya Chetty* v. *Mandaram Thiruvengadathan Chetty* (10) and *Meenakshi* v. *Muniandi Panikkan* (11).

(3) The text of Mitakshara is clear and explicit that an illegitimate son takes a share only at his father's choice, and there is no ground for extending the rule beyond it. That is the law laid down for very many years and if his right to partition is now recognized, it will be ignoring it altogether and the doctrine

(1) 18 C. 151; 17 I. A. 128; 5 Ssr. P. C. J. 596; 9 Ind. Dec. (N. S.) 101 (P. C.).
(2) 33 Ind. Cas. 858; 2 L. W. 1247 and 1266; 29 M. L. J. 793 and 816; 18 M. L. T. 552 and 568; (1916) M. W. N. 31; 39 M. 136 and 159.
(3) 23 M. 16; 8 Ind. Dec. (N. S) 405.
(4) 7 M. 407; 8 Ind. Jur. 427; 2 Ind. Dec. (N. S.) 867.
(5) 8 M. 557; 3 Ind. Dec. (N. S.) 382.
(6) 10 M. 334; 3 Ind Dec. (N. S.) 986.
(7) 4 B. 37; 2 Ind. Dec. (N. S.) 535.
(8) 25 M. 429.
(9) 21 Ind. Cas. 724; 24 M. L. J. 271 at p. 282.
(10) 18 Ind. Cas. 601; 13 M. L. T. 88; 24 M. L. J. 223.
(11) 25 Ind. Cas. 957; 38 M. 1144; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353.

of *stare decisis* should be applied to such cases.

Mr. *V. S. Govindachariar*, (with him Messrs. *V. S. Kallabhiram Aiyangar* and *T. M. Vedantachariar*), for the Respondents.—(1) In the former suit the father's written statement was to the effect that the illegitimate son must be given a share; that amounts to a choice by the father.

[NAPIER, J.—But there the allegation was that all of them were legitimate and there could be no question of choice in that case; besides the father had in that case no right to raise that question.]

The statement expresses a desire that he should get a share and the text of Mitakshara should be understood in that light. An illegitimate son has got a right to a share by birth but what that share is, is left to his father's choice. *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (1).

Mr. *T. V. Muthukrishna Aiyar*, in reply.—The general principle of Hindu Law is that none but the members of a co-parcenary are entitled to a share on partition. The illegitimate son is recognized nowhere as a co-parcener, and his right is an exceptional right under the Hindu Law. The ordinary rules of inheritance and co-parcenary do not apply to him.

JUDGMENT.

NAPIER, J.—This is an appeal from a decision of the District Judge of Chingleput on appeal from the decision of the District Munsif of Poonamallee, in a suit brought by an illegitimate son against the legitimate sons of his father, making the father also a defendant, claiming a share of the family property on partition. The lower Appellate Court has given him a decree on the footing that the father tacitly consented to his having a share and that, therefore, he is entitled to a half share with his legitimate brothers. The legitimate sons appeal to this Court relying on the fact, which has not been disputed before us, that a prior suit had been instituted by one of the legitimate sons to which the present claimant was not made a party, and in which the plaintiff sought for partition against his father, that in that suit the father pleaded that he had other legitimate sons of whom the present plaintiff was one, and that, therefore, they were necessary parties to the suit. It appears that that suit was compromised and partition made, in which the claimant was given no share.

Mr. Muthukrishnier on their behalf now contends that whatever are the rights of an illegitimate son against his father and whatever they are against his father's legitimate sons after his father's death, once there has been a partition there remained no right to him to claim a share against the sons. We have been taken through a long series of authorities beginning with *Krishnayyan* v. *Muttusami* (4), which have decided the true position of the illegitimate son of a *sudra* by a permanently kept concubine under Hindu Law. The broad result of these cases is that an illegitimate son can, under the text in the Mitakshara, take a share equal to that of a legitimate son at his father's choice, and after his father's death can demand of the legitimate sons a share equal to half that of a legitimate son. This power of the father and right of the illegitimate son is treated by the eminent Judges who have considered these cases as being an exception to the strict rule of Hindu Law, under which no person other than a co-parcener is entitled to a share. It is explained in some of the cases as being really only a sort of capitalised maintenance and that this is the true view of it, whether the share is given by the father at his choice or whether under the latter text, it is claimed against the legitimate sons after the father's death. We do not think it necessary to discuss the principle behind this right. It is sufficient for us that it is definitely and clearly laid down in the Mitakshara and has beeen fully recognized by eminent Judges like the late Mr. Justice Muthuswami Aiyar. We take it, therefore, that where a father and his sons are in possession of a family property and there are no other co-parceners of the same degree with the father, then, as to that joint family property, the right to a full share or possibly less can be given by the father. And it seems to us to follow from this that where the father and his sons have separated, there is no longer

the material on which this claim can operate, and that, therefore, the sons' share of the property after partition cannot be made liable to this claim. For this latter proposition, there is direct authority of the High Court of Calcutta in a case reported as *Ram Saran Garain* v. *Tek Chand Garain* (12) and we can only say that judging the matter in the light of what we regard as the true inferences to be drawn from the decisions of this Court, we entirely agree with the view taken by the High Court, Calcutta.

For the respondent, three points have been taken. *First* of all, it has been urged that the written statement of the father in the previous suit amounts to a choice within the meaning of the text in the Mitakshara. We have allowed this statement to be filed in this Court and marked as Exhibit B and have examined it carefully. It is in fact an allegation that the sons are *legitimate* and that they are, therefore, necessary parties to the suit; and does not purport to make any choice, because the conditions for a choice were not before the father; secondly, it could not operate as a choice because the father had no right to raise any question in that suit other than the question whether there were other persons entitled to be made parties. That suit, as we have pointed out, ended in a compromise in which the illegitimate sons were ignored. We cannot, therefore, treat anything in the written statement in that suit as indicating a choice by the father. The *next* point taken is that the language of the text of the Mitakshara must be read as meaning that wherever the father wishes that his sons, whether legitimate or illegitimate, should be given a share, they shall be entitled to that share. Bearing in mind that this right to a share is admittedly an exception to the principles of Hindu Law, we do not feel at liberty to do anything more than construe this text strictly and we have the authority of Judges of this Court for saying that that is the proper manner in which to approach the text. We must, therefore, confine it to the exact conditions which are stated in the text itself, and, in that view, it is impossible to say that a consent of the father given in circumstances where the choice does not arise and where he has no power to dissent can come within the language of the text. The *last* point taken is that an illegitimate son has a right under Hindu Law to a share, which right arises to him at birth, and that the father's choice is only limited to this, namely, that the father can say whether he shall take a whole share or something less. It is conceded by the respondent that this view has never even been considered as possible by any of the Benches of this Court that have had this matter under careful scrutiny since the time of *Krishnayyan* v. *Muttusami* (4). The sole basis for this argument is the decision of the Privy Council in the case reported as *Jogindro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (1), in which the Privy Council held that where the property was in the hands of a legitimate and an illegitimate son and the legitimate son died the illegitimate son could take the legitimate son's share by survivorship, the estate being impartible. This decision has been considered in two cases, *Karuppa Goundan* v. *Kumarasami Goundan* (8) and *Visvanathaswamy Naicker* v. *Kamu Ammal* (9), and it cannot be denied that this Court has found some difficulty in ascertaining the principle on which that decision was founded. It must of course be loyally followed wherever that position has to be dealt with. But this Court has steadily refused to extend its application beyond that position or to deduce from it propositions which are at variance with the decisions of this Court. We are asked to say that that decision can only be founded on the proposition that an illegitimate son takes his share at birth. Not only do their Lordships not say that, but they definitely negative that proposition, the language being "it cannot be said that at his birth he acquired any right to share in the estate in the same way as a legitimate son would do." So that whatever be the principle which their Lordships apply for the purpose of their decision in that case, it was not the principle of the illegitimate son being a co-parcener at birth.

It follows, therefore, that so far from assisting the respondent in his argument, this

(12) 28 C. 194.

dictum is a direct authority against him. The respondent wished to invite our attention to the text of the Mitakshara and found some arguments on the position in which this text is found. Both my learned brother and myself feel that we are not at liberty to re-open this question. It has, as I have said, been exhaustively considered by eminent Hindu Judges of this Court for 40 years and we do not feel in the slightest degree entitled and, I may say speaking for myself, competent to review their decisions. We must, therefore, accept the law as laid down in those cases and, as it necessarily follows from those decisions and from the view which we take, following the case of *Ram Saran Garain* v. *Tek Chand Garain* (12), that the claim must fail, this appeal will be allowed, and the decree of the District Judge will be reversed and that of the District Munsif restored with costs throughout.

The memorandum of objections is dismissed with costs..

AYLING, J.—I agree.

*Appeal allowed.*

V.R.P.

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CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 86 OF 1916.

March 6, 1917.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BASIRUDDI CHOWDHURI—DEFENDANT—APPELLANT

*versus*

AFSARANNESSA BIBI—PLAINTIFF—RESPONDENT.

*Landlord and tenant*—Barga kabuliyat, *construction of—Tenant, whether bound to pay stipulated sum as value of crops or their market-value—Evidence Act (I of 1872), s. 92—Construction of document—Motive of parties, how far relevant.*

A Court cannot ignore the plain terms of a contract merely because they appear to be unreasonable. If the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or otherwise. [p. 836, col. 1.]

In construing a contract a Court is not permitted to speculate about the possible intention and motive of the parties, it is concerned only with their intention as expressed by the words they have deliberately used. [p. 836, col. 1.]

Where a *barga kabuliyat* (which was headed "value of the crops mentioned in the *barga kabuliyat* is Rs. 25") provided that a half share of the crops raised on the land shall be made over to the landlord and the tenant shall cultivate, sow and weed and do other things for cultivating and if he does not cultivate, the landlord's share of the crops will be determined by reference to the crops raised on the neighbouring fields and if the tenant fails to deliver the said crops to the landlord, he shall pay Rs. 25 per annum to the landlord on account of, the value of the crops and if he does not do so the landlord shall be entitled to realise the same by instituting a suit in Court:

*Held*, (1) that under the terms of the *kabuliyat*, the tenant, if he neglected to deliver to his landlord crops according to the terms of the instrument, became liable to pay Rs. 25 per annum on account of the value thereof and not their market-value; [p. 835, col. 2.]

(2) that under section 92 of the Evidence Act, no oral evidence was admissible to show that the clause about the payment of Rs. 25 was inserted solely for the purposes of registration of the document, as it was not so stated on the face of the instrument itself. [p. 835, col. 2.]

Appeal against the following judgment of Mr. Justice Newbould, dated the 27th March 1916, in Appeal from Appellate Decree No. 3530 of 1913:—

"In this appeal the only question to be decided is whether the defendant-appellant is liable to pay the plaintiff a cash rent of Rs. 25 yearly or to give her the value of half the crops grown on the land for the years for which rent is claimed.

The defendant executed a *barga kabuliyat* in favour of the plaintiff, dated 28th *Magh* 1298 (February 1892). This *kabuliyat* is headed "value of the crops mentioned in the *barga kabuliyat* is Rs. 25." It contains the ordinary conditions of a *barga kabuliyat* that the executant will cultivate the lands and make over half the crops raised on the lands to his lessor. It also contains the following stipulation which has been translated in the paper-book as follows: "If I neglect to deliver crops, etc., I shall pay you Rs. 25 per annum on account of the value of the crops; if I fail to deliver the same you will be competent to realise the same by instituting suit in Court, any objection to the same taken by me shall not be entertained." This is a free translation of this part of the *kabuliyat*. The following is a mere literal translation, "If I fail" (*i.e.*, to cultivate and give the crops) "I shall give (*dib*) you Rs. 25 a year on account

of the value of the crops; if I do not give (*na dib*) you will be competent to realise the same by instituting a suit." The same Bengali verb has been expressed by the translator by the English verb pay and deliver and it has been argued that the words *na dib* mean "if I do not pay Rs. 25." It is contended on behalf of the respondent that there is a clear covenant in the deed to pay Rs. 25 if the crops are not delivered and that the lessor's only remedy for a breach of the contract is to sue for this amount. The Munsif who tried the suit accepted this plea and relying on the decision of the Court in the case of *Afar* v. *Surja Kumar Ghose* (1) granted the plaintiff a decree at the rate of Rs. 25 yearly; on an appeal by the plaintiff the lower Appellate Court held that the construction put on the terms of the *kabuliyat* by the Munsif was erroneous and allowed the appeal and remanded the case to the Munsif for a fresh decision after ascertainment of the quantity and price of the crop grown on the disputed land during the year in suit.

I agree with the learned Subordinate Judge in thinking that the decision in the case *Afar* v. *Surja Kumar Ghose* (1) is not applicable to the facts of the present case. There the amount of paddy to be paid was fixed. In the present case as the tenancy is *barga* the amount is variable. In that case it was not disputed that upon a true construction of the case the plaintiffs were entitled, upon failure of the defendants to deliver the paddy, to realise only the amount stated in the lease as its value. What was decided as a point of law in that case was that when the rights and liabilities of the parties were explicitly set out in the lease, oral evidence was not admissible to prove an agreement substantially varying the terms of the instrument. Here the whole question is, how is the *kabuliyat* to be construed. On such a question decided cases are of little assistance as the words of documents usually vary on material points. In the present case all the reported cases to which my attention has been drawn can have no application, as they all refer to the payment of a fixed amount of rent in kind and not to a *barga* tenancy in which the rent is a share of the actual crop. These cases are *Sohobut Ali* v. *Abdool Ali* (2), *Ananda Chandra Roy* v. *Makram Ali* (3), *Sheik Isaf* v. *Gopal Chandra Dey* (4), *Afar* v. *Surja Kumar Ghose* (1), already referred to, and *Baneswar Mukherji* v. *Umesh Chandra* (5).

It appears to me that on a proper construction of the *kabuliyat* the landlord has not given up his right to sue for the value of half the crop in the case of non-delivery by the tenant. The description of the *kabuliyat* as a *barga kabuliyat* is inconsistent with a tenancy which gave the tenant the option of paying a final money rent. The heading of the *kabuliyat* supports the view taken by the learned Subordinate Judge that "Rs. 25 must have been mentioned for the purposes of registration." Also if the *kabuliyat* is correctly translated, this sum appears to be payable on failure to cultivate the land as well as for failure to deliver the crops and it seems to me more reasonable that this sum should have been paid to provide for the former default than the latter. Also the clause relating to the landlord's right to institute a suit can be read to mean that he can sue for the value of the crops as well as that he can sue for the fixed amount of compensation. On a proper construction of the lease there is nothing in it to deprive the landlord of the right, which the landlord of a *barga* tenant ordinarily has, to sue for the value of the landlord's share of the crop.

I, therefore, dismiss this appeal with costs."

Babu *Abinash Chandra Guha*, for the Appellant.—There is absolutely nothing in the *kabuliyat* to show that the sum of Rs. 25 mentioned therein was inserted for the purposes of registration. And under section 92 of the Indian Evidence Act oral evidence is not admissible to show that that sum was inserted in the *kabuliyat* for any such purpose. Cites *Afar* v. *Surja Kumar Ghose* (1). Distinguishes *Baneswar Mukherji's* case (5) on the grounds that in that case there was no alternative covenant for the payment of a fixed sum in cash in lieu of the crops and

(1) 7 Ind. Cas. 842; 15 C. W. N. 249; 12 C. L. J. 649.

(2) 3 C. W. N. 151.
(3) 3 Ind. Cas. 204; 10 C. L. J. 144.
(4) 8 Ind. Cas. 896; 12 C. L. J. 593
(5) 7 Ind. Cas. 875; 37 C. 626.

that the effect of section 92 of the Indian Evidence Act is not considered there.

Babu *Prakas Chandra Mazoomdar* for the Respondent.—The *kabuliyat* is a *barga kabuliyat* and in the first portion of it there is a clear stipulation for the delivery of half share of all crops grown on the land, the value of which must necessarily vary from year to year. Having regard to this stipulation the last clause, which provides that in case the tenant fails to deliver this share or neglects to cultivate the land he shall pay Rs. 25 for the value thereof must be construed to mean that the landlord respondent has an option in the matter and he may either sue for the sum fixed or for the actual value of the crops in his share. Otherwise the two stipulations would be inconsistent and no prudent man can be expected to limit his right under the first stipulation in the way provided by the second. The amount of Rs. 25 should be taken as the estimated value of a year's profit at the time when the document was executed and inserted for purposes of registration, as was held in the cases of *Sohobut Ali* v. *Abdool Ali* (2), *Ananda Chandra Roy* v. *Makram Ali* (3), *Sheik Isaf* v. *Gopal Chandra Dey* (4), *Baneswar Mukherji* v. *Umesh Chandra* (5). The insertion of the figure cannot limit the right of the landlord to that amount only, as was held in the aforesaid cases.

This construction of the *kabuliyat* does not depend upon extraneous oral evidence which may come within the provisions of section 92, Evidence Act. Hence the decision of Newbould, J., is quite right.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a decision of Mr. Justice Newbould in a suit for arrears of rent. The terms of the contract of tenancy are embodied in a document dated the 10th February 1892, and called a *barga kabuliyat*; the value of the crops mentioned therein is stated to be Rs. 25 at the commencement of the instrument. The tenant undertook to cultivate the land and raise crops thereon, and covenanted as follows: "The crops that will be raised at any time on the said land shall be taken to your house, and after making over to you to your entire satisfaction half share thereof, as proprietor's share, I shall take the remaining half share. I shall cultivate, sow and weed and do other things. If I do not cultivate, the amount of crops in your share will be determined by a reference to the crops raised on neighbouring fields. I shall deliver to you the crops. If I neglect to deliver the said crops, I shall pay you Rs. 25 per annum on account of the value of the crops. If I fail to deliver the same you will be competent to realise the same by instituting suit in Court; any objection to the same taken by me shall not be entertained." The landlord has instituted this suit for recovery of the value of the crops for the Bengali year 1318, and seeks a decree according to the market price. The Court of First Instance held that the landlord was entitled to a decree at the rate of Rs. 25 per year as the value of the crops according to the terms of the contract. The Subordinate Judge took a contrary view, held that the plaintiff was entitled to the value of the crops according to the market rate, and remanded the case for a fresh investigation. On appeal to this Court the decree of the Subordinate Judge has been affirmed by Mr. Justice Newbould.

We are of opinion that upon a plain reading of the terms of the contract the tenant, if he neglects to deliver to his landlord, crops according to the terms of the instrument, becomes bound to pay Rs. 25 per annum on account of the value thereof. But on behalf of the plaintiff the argument has been advanced that this clause was inserted solely for purposes of registration of the document. This is, however, not so stated on the face of the instrument itself, and it has been pointed out repeatedly [*Afar* v. *Surja Kumar Ghose* (1), *Nilmadhab Mahapatra* v. *Keshab Lal Mahapatra* (6) decided by Sanderson, C. J. and Mookerjee, J., on the 4th May 1916], that oral evidence is not admissible under section 92 of the Indian Evidence Act to vary the terms of the contract contained in the document. The landlord has pressed upon the Court the consideration that if the construction put by the tenant be accepted the contract becomes obviously unreasonable. He argues that the value of the crops

(6) 40 Ind. Cas. 819 26 C. L. J. 94.

will vary from year to year according to their quality and quantity and that it is inconceivable that a reasonably prudent man would have accepted a contract of this character which entitles the landlord to a fixed sum of Rs. 25 only regardless of the quantity and quality of the crops actually raised in a particular year. It is well settled, however, that we cannot ignore the plain terms of the contract because they appear to us to be unreasonable; as Cockburn, C. J., observed in *Stadhard* v. *Lee* (7), if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not. In the present case, however, there may have been good reasons why the parties should have entered into a contract of this nature; they may well have been anxious to avoid elaborate and expensive investigations as to the quality and quantity of crops raised in a particular year and the market-value thereof. But we are really not permitted to speculate about the possible intention and motive of the parties, we are concerned only with their intention as expressed by the words they have deliberately used, and it would be most dangerous to conjecture or guess at what might have been the intention of a man of average prudence. There can, in our opinion, be no doubt as to the meaning of this contract; when that has been ascertained, the landlord and the tenants are equally bound thereby.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the decree of the Court of First Instance restored with costs in all the Courts.

*Appeal allowed.*

(7) (1863) 3 B. & S. 364; 32 L. J. Q. B. 75; 7 L. T. 850; 9 Jur. (N. S.) 908; 122 E. R. 138; 11 W. R. 361; 129 R. R. 357.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2015 OF 1914.

February 13, 1917.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

KALI KANTA DAS AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

MOHESH CHANDRA KANTA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Construction of document—Kabuliyat—Agreement to deliver half produce or pay fixed sum—Landlord's right to insist upon half produce.*

A *barga kabuliyat* executed by the tenant-defendant provided that the tenant shall deliver every year at the house of the plaintiff at the proper time a moiety share, after measurement, of whatever crops are grown on the land and if the tenant does not deliver the same, then the landlord will be competent to realise a sum of Rs. 40 on account of value thereof by filing a law suit; and it further provided that if through default of the tenant in properly carrying on the cultivation, good crops are not grown, then the tenant shall deliver without objection such quantity of crops as would be in proportion to the output of the neighbouring lands:

*Held*, that the landlord was entitled to recover the value of half the crops raised on the land and was not bound to accept the sum of Rs. 40 as its equivalent. [p. 837, col. 2.]

Appeal against the decree of the Subordinate Judge, Faridpur, dated the 7th April 1194, modifying that of the Munsif, Madaripur, dated the 27th September 1913.

FACTS of the case appear from the judgment.

Babu *Dwarkanath Chuckerberty* (with him Babus *Rajendra Chandra Guha* and *Troilokhya Nath Ghose*), for the Appellants, contended that upon a proper construction of the *kabuliyat* the plaintiff was entitled to the present market price of the crops. The *kabuliyat* being a *barga kabuliyat*, it should be held that the parties intended that the plaintiff should get half of the produce or its market-value.

Babu *Hemendra Kumar Das*, for the Respondents.—The plaintiff could not go behind the clear terms of the contract. The Court could not proceed upon speculation. The fact that the *kabuliyat* was a *barga kabuliyat* did not make any difference at all. There was nothing to prevent the parties from agreeing that a fixed sum should be recovered by the plaintiff in case of failure of the defendants

to deliver the crops. See *Afar* v. *Surja Kumar Ghose* (1), *Atul Chundra Dutt* v. *Eson Ali* (2), *Sasi Bhusan Dey* v. *Umakanto Dey* (3) and *Nilmadhab Mahapatra* v. *Keshab Lal Mahapatra* (4) decided by Sir Lancelot Sanderson, C. J., and Mookerjee, J., on 4th May 1916.

Babu *Dwarkanath Chukerberty*, in reply.—None of the reported cases is a case of a *barga kabuliyat* and in all of them the rent was a fixed quantity of paddy. This being a *barga* case the amount is variable.

JUDGMENT.—The question raised in this appeal is whether the plaintiff is entitled to recover the value of half the crops of the land in suit or only a money rent of Rs. 40 yearly from the defendant under a *barga kabuliyat*. The *kabuliyat* provides that the defendant shall, carrying on cultivation, deliver evey year "at the house of the plaintiff at the proper time a moiety share after measurement of whatever crops are grown" on the land; and that if the defendant does not deliver the same, then the plaintiff will be "competent to realise a sum of Rs. 40 on account of value thereof by filing law suits." It further provides: "If through default of carrying on the tillage and cultivation ourselves or of maintenance and preservation thereof good crops are not grown, we shall deliver without objection such quantity of crops as would be in proportion to the output of the neighbouring lands. And if you so desire you shall be competent to wrest away the entire or portions of the land (from us) and let out the same to others." We think that the contract was to pay half the crops grown on the land, and not a sum of Rs. 40 a year. We have been referred to a number of cases, but none of them had to deal with a *barga* contract. In the cases cited before us, the quantity of paddy was fixed and a certain sum was agreed upon to be paid on default of payment of the produce rent, and it was held in some of the cases that upon the failure of the defendant to deliver the paddy, the landlord was entitled to realise only the amount stated in the lease as its price. Here the land was cultivated under a *barga* contract and the quantity of crops deliverable would vary in different years according to the crops raised. Morever, the *kabuliyat* provides for payment of "such quantity of crops as would be in proportion to the output of the neighbouring lands," if good crops are not grown owing to the failure of the defendant in properly carrying on the cultivation. We may point out that the defendant, while denying the *kabuliyat*, pleaded that, in respect of lands cultivated under the *barga* system in the neighbourhood, the practice was to pay only a third share of jute and other fibre crops and a moiety share of other crops only. That shows how the *barga* system was understood by the defendants themselves.

There is no doubt that there was a stipulation that the plaintiff would be competent to realise Rs. 40 in case of non-payment of half the crops. But the subsequent clause provides for the payment of paddy in proportion to the produce of neighbouring lands if good crops are not grown owing to the failure of the defendants in properly carrying on the cultivation, and the construction that the parties intended the payment of a fixed sum of money is not consistent with the above clause or the other provisions of the document mentioned above. The question is one of construction of the document; and having regard to the nature of the *barga* contract and all the terms of the document, we are of opinion that the plaintiff is entitled to recover the value of half the crops raised on the land. A similar view was taken in an unreported case, *Basiruddi Chowdhuri* v. *Afsarannessa Bibi* decided on 27th March 1916 by one of the members of this Bench.

The result is that the decree of the lower Appellate Court is set aside and the case sent back to that Court in order that the value of half the crops may be determined and a decree passed accordingly. Costs of this appeal will abide the result.

*Appeal allowed; Case remanded.*

(1) 7 Ind. Cas. 842; 12 C L. J. 649; 15 C.W. N. 249.
(2) 13 Ind. Cas. 423.
(3) 25 Ind. Cas. 171; 20 C. L. J. 153; 19 C. W. N. 1143.
(4) 40 Ind. Cas. 819; 26 C. L. J. 94.

MUHAMMAD EHIA *v.* GANGA DAYAL OJHA.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1362 AND 1363 OF 1916.

April 30, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

In No. 1362 of 1916

MUHAMMAD EHIA—APPELLANT

*versus*

GANGA DAYAL OJHA AND OTHERS—RESPONDENTS.

In No. 1363 of 1916

*Lala* VAKIL CHAND AND OTHERS—APPELLANTS

*versus*

NEPAL OJHA AND OTHERS—RESPONDENTS.

*Evidence Act (I of* 1872), *s.* 13—*Judgment not* inter *parties recognizing right in dispute, admissibility of.*

Judgments not between parties to the suit pronounced by a Court of competent jurisdiction, containing a declaration that the right in dispute has been asserted and recognized in a Court of Law, are admissible in evidence under the provisions of section 13 of the Evidence Act [p. 838, col. 2; p. 839, col. 1.]

*Raja Ranjit Sinha Bahadur* v. *Basunta Kumar Ghose*, 12 C. W. N. 739 at p. 743; 9 C. L. J. 597, relied upon.

Appeals from the decision of the District Judge, Shahabad.

Messrs. *Kulwant Sahai* and *Seveswardyal*, for the Appellant.

Messrs. *Purnenda Nath Sinha* and *Ram Persad*, for the Respondents.

JUDGMENT.

ATKINSON, J.—These second appeals come before us from a decision of Mr. Rowland, sitting as District Judge of Shahabad, reversing the decision of the Munsif of Buxar, granting a decree in favour of the plaintiffs in these two appeals. The second appeals are Nos. 1362 and 1363 of 1916.

It appears that the villages of Kazipura and Dubouli adjoin. Dubouli and Narayanpur originally constituted one *mahal* and Kazipura another; and the main question for decision in this litigation is, what is the boundary existing between these two estates. A map has been produced and shown to us by the appellant. According to that map the appellant's contention is, that the northern boundary, as indicated upon the map, is the true boundary of *Mauza* Kazipura. For the respondents it is alleged that the southern boundary demarcated is the true boundary of Kazipura; and that, therefore the lands in suit falling outside the southern boundary form part of the holdings belonging to the respondents; and that they do not form part of the holdings claimed by the appellants. The appellants seek to recover in the case of Second Appeal No. 1362 of 1916 the plot marked upon the map Nos. 361, which appears to be a continuation of plot No. 34, which admittedly falls within *Mauza* Kazipura, and in Second Appeal No. 1363 of 1916 the plaintiff on behalf of himself and the other members of the joint family seeks to recover plots Nos. 357 to 360 and these plots apparently form the continuation of plots No. 3 which is admittedly within *Mauza* Kazipura. The plaintiffs say that they have been dispossessed by the defendants wrongfully from these plots; that these plot in dispute form part of their original holdings in *Mauza* Kazipura, and that they are not within the boundary nor do they form part of the village known as Dunouli.

The issue in this case was a simple one for decision. In support of the plaintiff's case certain judgments were referred to, which were the result of the litigation which had taken place between certain tenants on the one hand, and some proprietors upon the other, or between the tenants and tenants on these estates relative to what was the boundary of these two villages. These judgments supported the view that the northern boundary was the true boundary of *Mauza* Kazipura. These judgments were sought to be relied upon by the plaintiffs in support of their contention that the boundary they alleged was the true boundary of the village of Kazipura; and that these plots in suit fell within that boundary and consequently were a part of their property.

The learned Judge held, as I gather from his decision, that these judgments were not admissible in evidence and were not binding upon the defendants inasmuch as the defendants were not parties to the previous proceedings in which these judgments had been pronounced. We think that the learned Judge was wrong in so ruling; because, in our opinion, these judgments were admissible in evidence under the provisions of section 13 of the Evidence Act, inasmuch as they were pronounced by a Court of competent jurisdiction and contained a declaration that the same right as is now in dispute had been

asserted and recognized in a Court of Law, and that, therefore, as between the plaintiffs in these suits and the defendants, they were evidence under the provisions of section 13. Authority for this proposition is contained in the ruling cited as *Raja Ranjit Sinha Bahadur* v. *Basunta Kumar Ghose* (1). Their Lordships of the Calcutta High Court in that case clearly recognised and laid down the law on facts very similar to the facts of the present appeals. Therefore in that view of the case it appears to us that the lower Appellate Court was wrong in point of law in excluding these judgments from its consideration as part of the evidence proper for the Court to consider.

Another matter which also leads us to the conclusion that the judgment of the lower Appellate Court was unsatisfactory, is that the learned Munsif very carefully considered the documents of title which had been produced by the defendants and given in evidence for the purpose of showing that the southern boundary demarcated on the map was not the true boundary of *Mauza* Kazipura. The learned Munsif in a very exhaustive and careful judgment showed, that these documents of title, relied upon by the defendants, did not refer to the lands in dispute. The learned Judge on appeal in a very summary and unsatisfactory way disregarded the careful finding arrived at by the learned Munsif, without giving any intelligent reason for doing so. He simply says: "I do not agree with the lower Court that the documents relied upon by the defendants do not refer to the lands to which they are said to refer". Well the learned Judge should have expressly found whether the deeds in question did or did not refer to the lands in suit; to find that they merely did not refer is ambiguous, uncertain and unsatisfactory and not such a judgment as the law required that an Appellate Court should pronounce after due consideration of the whole evidence. It is true that the learned Judge says in his judgment that he can find no evidence on the record sufficient to enable him to hold that the entry in the Record of Rights has been rebutted. The Record of Rights does record the southern boundary indicated upon the map as the true boundary between these two estates; but the learned Judge has arrived at that finding disregarding the evidence of the judgments which I have already referred to. If he had carefully considered these judgments and weighed them, he might have found that there was sufficient evidence before him to enable him to hold that the Record of Rights was not conclusive and binding between the parties. Therefore we consider that the judgment of the lower Appellate Court is so unsatisfactory that in the interests of all parties it is desirable that these appeals should be allowed, that the decree of the lower Appellate Court should be set aside and that we should remand the case for re-hearing by the District Judge. The appellants who have appeared before us have succeeded. Consequently they will be entitled to their costs of these appeals. The respondents Nos. 6 and 7 in Second Appeal No. 1362 of 1916 and Nos. 16 and 17 in Second Appeal No. 1363 of 1916 appear. As against them the learned Judge in the lower Appellate Court has dismissed the action; and it is very hard to know why they came here at all. But inasmuch as it may be possible on this remand that they will be found to be liable jointly with the other defendants, we direct that their costs of these appeals will abide the result.

CHAPMAN, J.—I agree.

*Appeals allowed*; *Cases remanded.*

(1) 12 C. W. N. 739 at p. 743; 9 C. L. J. 597.

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## CALCUTTA HIGH COURT.

CIVIL RULE *Nisi* No. 858 OF 1916.

February 26, 1917.

*Present*:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

JAGANNATH MONDUL AND OTHERS—JUDGMENT DEBTORS—PETITIONERS

*versus*

JALADHAR MONDAL—DECREE-HOLDER—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 47, O. XLVII, r. 1—Application falling within s. 47 purporting to be under O. XLVII, r. 1—Form of application—Appeal.*

On an application purporting to be made by the decree-holder certifying satisfaction of the decretal amount and asking for the dismissal of the execution case, the Munsif dismissed the case. Thereafter the decree-holder put in two other petitions questioning the genuineness of the application certifying satis-

faction of the decree, and asking that the order passed thereon should be cancelled and the execution case allowed to proceed. The Munsif on an enquiry dismissed both the petitions on the finding that the decretal money had really been paid:

*Held*, that although the words "Order XLVII, rule 1" were to be found in the decree-holder's petitions and in the order sheet, yet having regard to their substance they must be treated as applications under section 47, Civil Procedure Code, so that an appeal did lie to the District Judge from the Munsif's order of dismissal. [p. 841, col. 1.]

Rule against the order of the District Judge, Khulna, in Miscellaneous Appeal No. 41 of 1916.

FACTS of the case appear from the judgment.

Babu *Manmatha Nath Mukherjee* (with him Babu *Lal Mohan Ghose*), for the Petitioners.—The appeal to the District Judge was directed against the order of the Munsif on an application which was one for review under Order XLVII, rule 1, Civil Procedure Code. I submit that no appeal lay against an order dismissing an application for review. Refers to Order XLVII, rule 7, Civil Procedure Code. The District Judge was wrong in allowing the appeal holding that the order appealed against was an order on an application made in execution of the decree under section 47, Civil Procedure Code. The order appealed against was in fact an order of dismissal on an application under Order XLVII, rule 1.

Then on the merits also the opposite party has no case. The judgment of reversal passed by the District Judge is based on surmises, theories and probabilities of the case. It does not proceed on the evidence on the record, evidence which has been thoroughly discussed by the learned Munsif who disposed of the application on a due consideration of all the evidence on the record. On the merits also there has been a gross miscarriage of justice, so I can ask your Lordships to interfere in revision under section 115, Civil Procedure Code.

Babu *Mohendra Nath Roy* (with him Babu *Banku Behary Mullick Chowdhury*), for the Opposite Party.—The question raised on behalf of the petitioner is rather a question of form than one of substance. The application appealed against was rightly treated by the learned Judge as an application in execution of a decree within the meaning of section 47, Civil Procedure Code. The application was obviously not one under Order XLVII, rule 1. There is no substance in this objection on the technical point.

Then on the merits, the learned District Judge was quite competent to alter the findings arrived at by the First Court and he was quite right in doing so. This is not a fit case for your Lordships' interference in revision.

## JUDGMENT.

WALMSLEY, J.—The opposite party obtained a rent decree against the petitioners, and applied for execution by sale of the holding. The holding was advertised for sale on July 19, 1915. On July 16, 1915, however, a petition was filed purporting to be made by the decree-holder, certifying that he had received payment in full and asking for the execution case to be dismissed. On July 19, 1915, the learned Munsif dismissed the case on full satisfaction. On July 24, 1915, the decree-holder put in a petition saying that he had not received the money, that the certificate was a forgery, and asking for sanction to be granted under section 195, Criminal Procedure Code, or a prosecution ordered under section 476, Criminal Procedure Code. Again on August 6, 1915, the decree-holder put in two petitions asking that the order passed on July 19 should be cancelled and that the execution case should be allowed to proceed. On these petitions the Court held an enquiry into the circumstances, and on February 19, 1916, both petitions were dismissed, on the finding that the money had really been paid. The decree-holder appealed, and the learned District Judge reversed the finding of the Munsif and ordered execution to proceed.

The judgment-debtors obtained this Rule calling on the decree-holder to show cause why the order of the District Judge should not be set aside.

On behalf of the petitioners it is urged that the applications of August 6, 1915, must have been made under Order XLVII and that no appeal lay against an order rejecting them. It is also said that the only remedies open to the decree-holder were an application for review of judgment, and an appeal against the order

dismissing the application for execution on full satisfaction.

The decree-holder did not take the latter alternative, and I cannot understand how it would have been possible for him to appeal against an order which *prima facie* was made with his full consent, with no material on the record by which he could challenge its correctness. It seems to me clear that it was his duty to ask the Court of First Instance for an enquiry about the genuineness of the petition filed on July 15, and that is the step he took. No doubt the words "Order XLVII, rule 1" are to be found in his application and in the order sheet, but that is of no moment: We have to look at the substance of his applications. Now he did not allege that the Munsif had made a mistake, he did not offer new and important evidence to be considered with the other materials on which the order was passed, but he went to the root of the matter, and attacked the petition of satisfaction which formed the sole basis of the order. I fail to see how an application of this nature can be regarded as an application for a review of judgment. It is one which would have taken the form of a suit but for the provisions of section 47 of the Civil Procedure Code, and I regard it as an application under that section. It follows that an appeal did lie to the District Judge.

The learned Vakil has conceded, very properly, that having regard to the findings of fact recorded by the learned Judge he cannot press the petition on the merits.

The Rule, therefore, is discharged with costs, five gold *mohurs*.

BEACHCROFT, J.—I agree.

*Rule discharged.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1035 OF 1914.

January 17, 1917.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Spencer.

NOCHULIYIL EAZHUVAN THEETHI'S SON THEETHALAN—DEFENDANT No. 7 —APPELLANT

*versus*

THE ERALPOD RAJAH *styled* ELAYA RAJA AVERGAL OF PATINHARA KOVILAGOM IN CALICUT (DECEASED) AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 6—RESPONDENTS.

*Landlord and tenant—Mortgagee of lease-hold interest, liability of, for rent to lessor—Privity of estate—Privity of contract—Sub-lessees, rights and liabilities of—Transfer of Property Act (IV of* 1882), *ss.* 57, 65 (d) *and* 108 (j).

A mortgagee with possession of a lease-hold interest is not liable to the lessor for rent on the English doctrine of privity of estate. [p. 842, col. 1.]

It was not the intention of the Legislature by enacting section 108 of the Transfer of Property Act to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. Mere possession, in the absence of privity of estate, will not make the mortgagee liable to the lessor. [p. 844, col. 1.]

*Monica Kitheria Saldanha* v. *Subraya Hebbara*, 30 M. 410; 17 M. L. J 258; 2 M. L. T 363; *Kannye Loll Sett* v. *Nistoriny Dossee*, 10 C. 443; 5 Ind. Dec. (N. s.) 298, distinguished.

Per *Wallis, C. J.*—Privity of estate is a technical term of English Law and, under that law, no such privity arises unless the whole of the lessee's interest is assigned over. Where a subsidiary interest is carved out of the lessee's interest, no fresh privity arises. For instance, there is no privity of estate between a lessor and a sub-lessee. In India under section 57 of the Transfer of Property Act a mortgage of a lease-hold interest is not an out and out transfer of the mortgagor's interest, and, therefore, on the English doctrine no privity of estate can arise. [p. 842, col. 1.]

One effect of section 108 of the Transfer of Property Act is that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between himself and the assignee. The liabilities of the transferee arise in India, as in England, on and by reason of the transfer, and do not depend on the question whether the transferee has obtained possession. [p. 842, col. 2.]

Per *Spencer, J.*—Section 65 (*d*) of the Transfer of Property Act deals only with the rights and liabilities of the mortgagor and the mortgagee as between themselves. The rights and liabilities as between the mortgagor and his lessor are regulated by section 108 (*j*). [p. 844, col. 2.]

Privity of contract is personal privity and extends only to the person of the lessor and the person of the lessee, and the mere creation of a mortgage by the

latter does not create a personal privity between the lessor and the mortgagee. [p. 844, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat, in Appeal Suit No. 211 of 1913, preferred against that of the District Munsif, Alatur, in Original Suit No. 43 of 1912.

Mr. *K. R. Subramania Sastri*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyangar* and *T. R. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The question raised in this appeal is whether mortgagees with possession from lessees are liable to the lessor for rent. The Subordinate Judge has held that they are liable on the ground that privity of estate exists between them. In this I think he is clearly wrong. Privity of estate is a technical term of English Law, and it is clear that under that law no such privity arises unless the whole of the lessee's interest is assigned over. Where a subsidiary interest is carved out of the lessee's interest, no fresh privity arises. For instance, there is no privity of estate between a lessor and a sub-lessee. Where the lessee mortgages his whole lease-hold interest, privity arises in English Law, because there the mortgage is by conveyance with a right to a reconveyance, and, therefore, the whole interest of the lessee is assigned to his mortgagee; but, as this is not considered a desirable state of things, conveyancers prevent such privity of estate from arising by making the mortgage by way of sub-lease of something less than the whole interest of the lessee. In India a mortgage such as this is not an out and out transfer of the mortgagor's interest (section 58, Transfer of Property Act) and, therefore, on the English doctrine, no privity of estate can arise.

We have, however, to consider the provisions of the Transfer of Property Act as to leases which should be followed in India in preference to English decisions, even where it does not in terms apply, as to agricultural leases. Section 108 (*j*) provides: "The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property .....The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." One effect of this provision is, that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between them. It is also to be noted that the liabilities of the transferee arise, as in England, on and by reason of the transfer, and do not depend on the question whether the transferee has obtained possession. *Monica Kitheria Saldanha* v *Subraya Hebbara* (1), *Randipurazil Kunhisow* v. *Alukandiyil Parkum Mulloli Chathu* (2). If the transfer is absolute, it has been held that the transferee becomes liable to the lessor, *Kunhanujan* v. *Anjelu* (3), as in that case, privity of estate arises under the English decisions. The section, however, says nothing about privity of estate, and the question really is, what is the intention of the Legislature as regards transfers by the lessee by way of mortgage in the Indian form or by sub-lease, in which cases there would clearly according to the English decisions be no privity of estate on which the liability could be rested. The case of *Kunhanujan* v. *Anjelu* (3) does not afford much assistance, for that was a case of an assignment or absolute transfer of the lease, and all that was held was that there was nothing in the section to prevent the transferee being liable on the doctrine of privity of estate as in England. It is quite another thing to hold that in the case of a mortgage or sub-lease by the lessee the transferee becomes liable directly to the lessor, as such liability cannot be based on any recognized doctrine of privity of estate. The decision in *Kannye Loll Sett* v. *Nistoriny Dossee* (4) appears to have proceeded on the footing that the mortgage in that case amounted to an assignment or transfer of the lease-hold interest in which case privity of estate would arise, and is of no assistance in the present case, where the transfer by mortgage did not amount to an assignment or out and out transfer. This is clearly pointed out by Farran, C. J., in *Timmappa*

(1) 30 M. 410; 17 M. L. J. 258; 2 M. L. T. 363.
(2) 17 Ind. Cas. 933; 38 M. 86; 23 M. L. J. 695.
(3) 17 M. 296; 6 Ind. Dec. (N. S.) 205.
(4) 10 C. 443; 5 Ind. Dec. (N. S.) 298.

*Kuppaya* v. *Rama Venkanna Naik* (5), where, however, as has been pointed out in *Vithal Narayan* v. *Shriram Savant* (6), the word contract both in the head-note and the judgment is a slip, what was meant being not privity of contract but privity of estate. "A sub-lease differs from the assignment of a lease in that it creates no privity of contract (read, estate) between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter. The English authorities show conclusively that a landlord putting an end by a proper notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter. This is undoubted law". Later on the learned Judge observes: "An assignee of a lease is of course in a different position, for he is brought by his assignment into direct relations with the landlord" that is to say, in the language of the English Law, that privity of estate arises between them. It appears clear that the learned Chief Justice did not consider that, in India, sub-lessees could be sued for rent by the lessor under section 108 (*j*) of the Transfer of Property Act or for any other reason. To so hold, would be a very serious innovation. We cannot hold that in India the mortgagee in possession is to be directly liable to the lessor for rent without applying the same doctrine to the sub-lessee. Both are governed by the same section 108 (*j*) of the Transfer of Property Act, and, if actual possession of the land is to make the one liable for rent, it must also be the case with the other. It was no doubt held in *Vithal Narayan* v. *Shriram Savant* (6) that a mortgagee of a lease-hold interest if in possession is liable for rent to the mortgagor; and one reason given is that the distinction between legal and equitable estates does not exist in India. As already pointed out, it is owing to that distinction that in England a legal mortgagee of lease is held liable for rent to the lessor where the mortgage is an assignment creating privity of estate, but an equitable mortgagee is not so liable; and to avoid this untoward consequence, it is usual to create a legal mortgage by way not of an assignment having this effect, but by way of sub-lease of something less than the lessee's interest so that no privity of estate and no liability on the part of the mortgagee arises. This is the invariable practice as stated in the standard works of Coote, Fisher and Robbins. The decision in *Kannye Loll Sett* v. *Nistorini Dossee* (4) proceeded, as already pointed out, on the view that the mortgage was an out and out assignment of the lease, which it is not in the present case or ordinarily in India. The judgment of Lord Mansfield in *Eaton* v. *Jaques* (7) which was also referred to is, if anything, an authority the other way. What Lord Mansfield held was, that the mortgagee of a lease-hold interest, even when the mortgage was by way of assignment of the whole term, was not liable for rent by virtue of privity of estate, unless he obtained possession as well, a point on which he was overruled by ten Judges in *Williams* v. *Bosanquet* (8). Both cases, however, proceed upon the view that the mortgagee is not liable at all to the lessor unless the mortgage be by way of assignment of the term. "All this", Lord Mansfield observed, "arises from a mere slip in the attorney, in making the conveyance; for if he had made it an underlease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee". It is thus clear that what Lord Mansfield was arguing against was the mortgagee being held liable unless there were both privity of estate and possession, and that his judgment is no authority for the position that possession in the absence of privity of estate will make the mortgagee liable. See also *Cox* v. *Bishop* (9) and *Ananda Chandra Roy* v. *Syed Abdulla Hossein* (10). I am, therefore, of opinion with great respect that the authorities referred to in *Vithal Narayan* v. *Shriram Savant* (6) do not support the decision. No such liability is imposed by English Law on sub-lessees or on mort-

(5) 21 B. 311 at p. 313; 11 Ind. Dec. (N. S.) 210.
(6) 29 B 391; 7 Bom. L. R. 313.
(7) (1780) 2 Dougl. 455; 99 E. R. 290.
(8) (1819) 1 Brod. & B. 238; 129 E. R. 714; 3 Moore 500; 21 R. R. 585.
(9) (1857) 8 De G. M. & G. 815; 26 L. J. Ch. 389; 3 Jur. (N. S.) 499; 5 W. R. 437; 44 E. R. 604; 114 R. R. 351.
(10) 20 Ind. Cas. 679; 41 C. 148.

gagees from lessees either, except as pointed out by Lord Mansfield owing to the mere slip of an attorney, and if it is to be imposed in India, it must be by virtue of section 108 (*j*) of the Transfer of Property Act and not by virtue of possession. The latter part of the section shows that sub-leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of lessee against his sub-lessee or mortgagee. There appears to be no sufficient reason for supposing that it was the intention of the Legislature by this section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. I read the judgment of Farran, C. J., in *Timmappa Kuppaya* v. *Rama Venkanna Naik* (5) as holding that it had no such effect as regards sub-lessees, and can see no reason for applying a different rule to mortgagees from the lessee. To hold otherwise would, it need hardly be pointed out, introduce all sorts of complications as to apportionment, notice to quit, etc. For these reasons I think the lower Courts were wrong and would modify the decree by dismissing the suit as against the appellant and defendants Nos. 8 and 9 with costs throughout.

SPENCER, J.—I concur. The only case in which a mortgagee of a lease-hold interest in India becomes after entering into possession liable to pay the rent, appears to be where his possession is attributable to his having obtained a decree for foreclosure, the reason being that in such a case the lessee parts with the whole of his interest, and the entire interests both of the lessee and of the mortgagee become by operation of law merged in the person of the latter, *vide Macnaghten* v. *Bheekaree Singh* (11) and *Ananda Chandra Roy* v. *Syed Abdulla Hossein* (10).

Here the defendants Nos. 7 to 9, who are mere transferees of a *kanom* interest, are clearly possessed of something less than the *anubhavam* interest under the lease in favour of 1 to 6 defendants' predecessors. Consequently, the agreement in Exhibits III, IV and VII between the lessees and the mortgagees and their assignees *inter se*, that the mortgagees should pay the *michavaram* or rent, will not affect the right of the lessor to look to his lessees for the recovery of his rent, and to them alone. Even if the mortgage document were silent as to the rent, section 65 (*d*), Transfer of Property Act, provides that the mortgagor shall pay the rent reserved by the lease so long as the mortgagee is out of possession of the mortgaged property, which may be read as implying that the mortgagee should pay it if he gets into possession. But this section deals only with the rights and liabilities of the mortgagor and the mortgagee as between themselves. The rights and liabilities as between the mortgagor and his lessor are regulated by section 108 (*j*).

The Subordinate Judge who heard the first appeal observed that there was not only privity of estate but privity of contract also. He has given no reasons for his opinion, but simply states that plaintiff can enforce the provision in his favour in Exhibit VII though he was not a party to it. Privity of contract is personal privity and extends only to the person of the lessor and to the person of the lessee [*vide Walker's* case (12)].

It has not been suggested that there is any foundation in the records of this case for a personal privity existing between the lessor and the mortgagees.

The appellant is entitled to succeed in his appeal with costs throughout.

*Appeal allowed.*

(11) 2 C. L. R. 323.

(12) (1587) 3 Co. Rep. 22*a* at p. 23*a*; Moor. 351; 76 E. R. 676.

PIRAN BIBI *v.* JITENDRA MOHAN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 19 OF 1915.

March 19, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Smither.

PIRAN BIBI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

JITENDRA MOHAN MOOKERJEE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O XXI, r. 2, O. XXXIV—Mortgage—Payment of amount awarded by preliminary decree out of Court, whether can be recognized without certification—Scheme for payment under decree for foreclosure, sale or redemption.*

On an application made for a decree absolute in a suit to enforce a mortgage security by way of sale, the Court cannot take cognizance of the payment to the mortgagee out of Court of the amount awarded by the preliminary decree, which has not been certified to the Court under the provisions of Order XXI, rule 2, Civil Procedure Code. [p. 846, col. 1.]

The procedure under the provisions of Order XXXIV, Civil Procedure Code, is essentially different from the procedure in a mortgage suit under the terms of the repealed sections of the Transfer of Property Act and the method of payment to the mortgagee as authorised by the Transfer of Property Act has been abolished. [p. 845, col. 2; p. 846, col. 2.]

The scheme stated under the terms of Order XXXIV, Civil Procedure Code, for the payment of mortgage money under a decree for foreclosure, sale or redemption noted. [p. 846, col. 1.]

**Appeal against the decree of the District Judge, Murshidabad, dated the 18th May 1914, reversing that of the Munsif, Barhampore, dated the 22nd September 1913.**

FACTS of the case appear from the judgment.

Babu *Anilendra Nath Roy Chowdhury*, for the Appellants.—There is no bar in the Civil Procedure Code of 1908 which prevented the Court, to which the application for decree absolute was made, from taking cognizance of the plea of payment raised by the defendant-appellant. Under Order XXI, rule 2 of Act V of 1908, it is only the executing Court which cannot recognize the fact of payment. But in this case the Court to which the application for decree absolute was made was not an executing Court. Having regard to the provisions of Order XXXIV, rule 5, Civil Procedure Code, the Court ought to have taken cognizance of the fact of payment. Moreover, under section 151 of the Civil Procedure Code, at least for the ends of justice, the Court should have taken into consideration the plea of payment made out of Court. It would be a great hardship to the mortgagor judgment-debtors if they be not allowed to raise any such plea.

Babus *Jogesh Chandra Roy* and *Khetra Mohan Ghose* for Babu *Kali Das Sircar*, for the Respondents, not called upon in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants against a judgment of the learned District Judge of Murshidabad, dated the 18th May 1914, reversing the decision of the Munsif at Barhampore. The appeal is preferred in the main against a decree absolute made in a suit to enforce a mortgage security by way of sale. The defendants are now in the shoes of the mortgagors who were their predecessors-in-title. The plaintiffs are the sons of the original mortgagee. The suit was brought by the plaintiffs to enforce the mortgage and, on the 10th August 1908, a preliminary decree for Rs. 130 was made by the First Court. An application was then made on the 8th April 1911 for a decree absolute and the decree was made absolute *ex parte* on the 6th May 1911. Subsequently, that *ex parte* decree was set aside and the case was brought on for re-hearing. The case set up by the defendants who are now the mortgagors was that more than three years ago they had paid the whole of the amount awarded by the preliminary decree out of Court to the plaintiffs. The learned Judge of the lower Appellate Court held that, as the payment had not been certified to the Court, under the provisions of Order XXI, rule 2, the Court could not recognize it. Against that the present appeal has been brought.

Under the terms of Order XXXIV, Code of Civil Procedure, the scheme stated generally is that, in a suit to enforce a mortgage, the money payable to the mortgagee under a decree for foreclosure or sale or redemption should, in the first instance, be paid into Court and the method of payment to the mortgagee as is authorised by the Transfer of Property Act has been abolished. In a suit for sale, as appears from Order XXXIV, rule 5, when on the day fixed the defendant pays the amount into Court,

the Court shall pass a decree as mentioned in that rule; but when such payment is not made into Court on or before the day fixed, the Court shall, on an application made by the plaintiff, pass a decree that the mortgaged property or a sufficient part thereof be sold. Therefore, in passing the final decree, the Court has no discretion except to follow the statutory form of the decree when no payment has been made into Court as mentioned in Order XXXIV, rule 5, and the only other matter that there can be is that the Court may hold that the suit has been adjusted under Order XXI, rule 2, Code of Civil Procedure. It is said that any other Court not being an executing Court can recognize an uncertified payment made out of Court. I am not prepared to agree with that. It seems to me that the whole of the provisions of the law providing a certification either by the decree-holder or by the judgment-debtor within the period within which the certification is to be made would be rendered nugatory, if a defendant in a suit years after ,when the evidence would neither be fresh nor perhaps available, is allowed to come forward and say that he has satisfied this preliminary decree out of Court three years ago by paying the money to the plaintiff. It seems to me that it will be opposed both to the terms of the Civil Procedure Code and also to the provisions of the Indian Limitation Act. The view that the learned Judge of the lower Appellate Court took was, I think, correct. I am not prepared to disagree with the reasons that have been given and are to be found in a judgment of my own in another case. That was a case under the Transfer of Property Act and the procedure under the provisions of Order XXXIV is essentially different from the procedure in a mortgage suit under the terms of the repealed sections of the Transfer of Property Act. I think the learned District Judge was clearly right in the conclusion he arrived at, that the Court could not recognize this payment which is said to have been made out of Court. The appeal, therefore, in my opinion, fails and must be dismissed with costs.

SMITHER, J.—I agree.

*Appeal dismissed.*

## MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 160 OF 1916.

February 22, 1917.

*Present*:—Mr. Justice Oldfield and Mr. Justice Bakewell.

SUBBA PILLAI—PETITIONER—APPELLANT

*versus*

RANGASAMI *alias* THIRUMALASAMY MUDALI AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 107 (2), 146, O. XXII, rr. 10, 11, O. XLIII, r. 1 (l)—Devolution of interest pending suit—Application under O. XXII, r. 10, after decree, maintainability of—Appeal, right of, by person acquiring interest who was no party to decree appealed against—Merits of appeal—Court, duty of—Mortgage—Title of mortgagor decreed against in suit wherein mortgagee not impleaded—Appeal, right of, by mortgagee who purchased in Court auction.*

Order XXII, rule 10, Civil Procedure Code, does not apply to cases wherein the new party alleging acquisition of an interest takes action after the decree and before the appeal against it is begun. The discretion of the Court to allow or refuse the substitution of a new party under the rule should be exercised only in connection with pending proceedings in which the material considerations of immediate convenience are within its knowledge. The new party cannot apply, under the rule, to be impleaded only for the purpose of preferring an appeal against a concluded decree. [p. 847, col. 1.]

The appeal can, however, be entertained under section 146, Civil Procedure Code, if the merits are in favour of the appellant, so that substantial justice may not be defeated. [p. 847, col. 2.]

Where the title of a mortgagor to the mortgaged property is negatived by a decree in a suit to which the mortgagee is not a party and the mortgagee, who purchases the property in execution of a decree for enforcement of the security, is resisted in taking possession and driven to instituting a fresh suit to establish his mortgage, he can be permitted to appeal against the decree as representing the mortgagor or his representatives against whom the decree was passed. [p. 847, col. 2.]

The High Court can, to meet substantial justice, treat an appeal presented to it as a revision petition where technical objections as to adequacy of Court-fees etc., prevent its entertaining the appeal. [p. 847, col. 2.]

Appeal against the order of the District Court, Trichinopoly, in O. P. No. 58 of 1916.

Mr. *T. R. Venkatarama Sastri*, for the Appellant

Mr. *N. Rajagopalachariar*, for the Respondents.

JUDGMENT.—The question raised in this appeal is of some difficulty. But the answer is not of much importance because it is clear on which side justice lies, and our powers will enable us to secure it.

Appellant purchased certain property at a sale held in execution of his own decree on a mortgage. But, when he attempted to

take possession, he was obstructed by the present respondents Nos. 3, 4 and 5 and was referred to a suit under Order XXI, rule 103, of the Code of Civil Procedure. That suit he has brought. But respondents Nos. 3, 4 and 5 are also defendants in Original Suit No. 27 of 1914. It was brought only by the present 1st and 2nd respondents, alleged by plaintiff to be the successors-in-title of his mortgagor, and was dismissed whilst appellant's possession proceedings were pending. Against this dismissal he presented an appeal and with it an application purporting to be under section 107 (2) and Order XXII, rules 10, 11 of the Code of Civil Procedure, asking for the addition of his name as a plaintiff in Original Suit No. 27 of 1914 and for permission to appeal against the decree therein. The lower Court dismissed the appeal, because it also passed an order against appellant on the petition. He now appeals against that order.

The appeal is opposed, first, on the ground that the lower Court's order cannot be regarded as passed under Order XXII, rule 10, and, therefore, is not appealable under Order XLIII, rule 1 (*l*). This is supported by the wording of the former rule "during the pendency of the suit" and "suit", which must for the present purpose be read with reference to rule 11 as "during the pendency of the appeal" and "appeal," the inference being that the procedure is inapplicable to cases of devolution, in which the new party takes action after the decree and before the appeal was begun. This view was expressed *obiter* in *Collector of Muzaffarnagar* v. *Husaini Begam* (1), and the differences between the relevant provisions of this and the former Codes are not sufficient to deprive that and other cases to be referred to of authority. The fact that the wording of Order XXII, rule 10, excludes its application to cases such as the present, may be explained on the ground that the investiture of the Court with discretion to allow or refuse the substitution of a new party is necessary only in connection with pending proceedings in which the material considerations of immediate convenience are within its knowledge. We hold that Order XXII, rule 10, and Order XLIII, rule 1 (L), are inapplicable.

The question is next whether the appeal is altogether incompetent and, if it is so, whether we can interfere on appellant's behalf, if the merits of his case would justify our doing so. As the order against him was not passed under Order XXII, rule 10, it was not one which he was bound to ask for under that provision; and, if he was entitled to prosecute the appeal at all, he could do so only by presenting it, stating the character in which he did so, and submitting his right to do so to adjudication at the hearing. This right to carry on the proceedings, if he could establish his position, was entailed by section 146; and Order XXII, rule 10, of the Code of Civil Procedure being inapplicable, no method by which he could do so, other than that specified, has been suggested.

The objection then relied on is, however, that appellant, not having appealed against the dismissal of his substantive appeal, cannot have it displaced in these proceedings. But to this there are two answers. His mistake as to his remedy was not pointed out by the lower Court or respondents before it; and the foregoing expression of our opinion would probably enable him to apply successfully for a review of the dismissal. Or more directly (and this is the course we take) we can adopt the principle of the decisions in *Indo Mati* v. *Gaya Prasad* (2) and *Motiram* v. *Kundan Lal* (3) and treat the order rejecting the application as one finally determining appellant's rights and as including the dismissal of the appeal, which it entailed. The absence of any formal prayer for the grant of relief against the dismissal and of a properly stamped appeal memorandum have been relied on; but the circumstances would, in our opinion, justify the use of our powers of revision and it would be futile to insist on payment of additional duty, refund of which would be obligatory on our order of remand being passed. We, therefore, consider, next, whether such an order would be justified on the merits.

It is not denied that appellant was the purchaser at Court sale of the property, which is in dispute in Original Suit No. 27 of 1914 on the file of the Subordinate Judge of Trichinopoly, against the decree in which he desires to appeal. His right to it is con-

(1) 18 A. 86; A. W. N. (1895) 232; 8 Ind Dec. (N. S.) 763.

(2) 19 A. 142; A. W. N. (1897) 7; 9 Ind. Dec. (N. S.) 93.

(3) 22 A. 380; A. W. N. (1900) 125; 9 Ind. Dec. (N. S.) 1288.

tested in two distinct ways. *Firstly*, as 3rd, 4th and 5th respondents' counter-statement in the lower Court shows, they deny that the mortgage sued on by appellant, his decree or his purchase is valid against them. *Secondly*, they deny that his mortgagor or 1st and 2nd respondents' legal representatives had any right in the mortgaged property. The latter contention was adjudicated on in Original Suit No. 27. The former is in issue for the first time in the suit lately filed by appellant, Original Suit No. 28 of 1916; and he must, no doubt, secure its rejection, if he is to be allowed to represent respondents Nos. 1 and 2. As to his prospects of doing so, no assumption is at present permissible. It is clear only that his doing so would entail his right to appeal as respondents Nos. 1 and 2 could have done, and that, apart from the possibility of the decision against them becoming *res judicata* against him, the question whether he can establish his right must be considered.

Taking this view, we set aside the lower Court's orders dismissing appellant's petition and appeal and remand them for re-admission and disposal in the light of the foregoing. The lower Court will pass a formal order of dismissal on the petition, since its presentation was unnecessary. It will admit the appeal and, if respondents Nos. 2, 3 and 4 desire it to do so, will consider whether appellant has a right to present it, either itself enquiring into his right or, as may be more convenient, postponing its decision regarding it, until the result of Original Suit No. 28 of 1916 is known. Costs to date will be costs in the case.

*Appeal allowed; Case sent back.*

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 123 OF 1915-16 OF RAE BARELI DISTRICT.

August 7, 1916.

*Present*:—Mr. Holms, S. M.

MUHAMMAD YAKUB KHAN—DEFENDANT—APPELLANT

*versus*

DURGA PRASAD—PLAINTIFF—RESPONDENT.

*Oudh Rent Act (XXII of 1886), ss. 126, 108 (8)—Joint estate—Each co-sharer realising rent from each tenant according to his share—Ejectment—Notice.*

The mere fact that each of the co-sharers in an estate, which is joint within the meaning of section 126 (1) of the Oudh Rent Act, collects from each tenant his quota of rent according to his share does not authorise any of the co-sharers alone to eject a tenant by notice, unless a custom is established to that effect.

Appeal from the decree of the Commissioner, Lucknow, dated the 8th January 1916, upholding the order of the Assistant Collector, Rae Bareli, dated the 31st May 1915.

The Hon'ble Mirza *Sami Ullah Beg*, for the Appellant.

Babu *Gaya Prasad*, for the Respondent.

JUDGMENT.—Tis is not a very easy case. The estate is a joint one under section 125 (1) of the Oudh Rent Act, and section 126 (2) is not applicable. The defendant, Muhammad Yakub, has a two-annas share, his brother has another two-annas share, one *Musammat* Azizunnissa has four annas, and the Court of Wards has eight annas. It is admitted that each of the co-sharers collects from each tenant his quota of the rent according to his share. No local custom is established, although we find that in one particular case the Court of Wards sued for the resumption of half of a rent-free holding and Muhammad Yakub and the remaining co-sharers sued for resumption of the other half. The Court deciding that suit very wisely treated the two suits together and assessed rent on the rent-free holding, declaring that each of the plaintiffs was entitled to half the rent. This does not help very much, save that it shows that Muhammad Yakub in that particular case did not set up a claim to act on behalf of the sixteen-annas co-sharers as he does in the present case. The unreported decision of the Board on Petition No. 5 of 1905-06, *Gajraj Singh* v. *Maharaj Udai Partab Narain Singh* relates to rather a different set of circumstances. In that case also the co-shares collected their quota of rent from each tenant, but the Maharaja as *lambardar* granted leases to and ejected tenants. The other unreported case, Petition No. 112 of 1914-15, referred to by the respondent does not help, because there was a village custom proved in that case. On the whole I am not satisfied that the lower Courts took a wrong view of the law and I dismiss the appeal with costs.

***Appeal dismissed.***

NAND KISHWAR SAHAI *v.* KEDAR NATH.

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 242 OF 1916.

May 22, 1917.

*Present*:—Mr. Justice Chapman and Mr. Justice Atkinson.

*Babu* NAND KISHWAR SAHAI—APPELLANT

*versus*

KEDAR NATH—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1903), *O. XXI*, *r.* 90, —*Irregularity in sale proclamation—Two valuations —Substantial injury—Proof.*

It is essential for a judgment-debtor in order to succeed on an application under Order XXI, rule 90, of the Civil Procedure Code to show that the inadequacy of the prices stated in the sale proclamation was caused in consequence of the irregularity alleged. [p. 850, col. 2.]

A sale proclamation stating two separate valuations, the decree-holder's valuation and the judgment-debtor's valuation, is not irregular. [p, 850, col. 2.]

**Appeal from a decision of the Subordinate Judge, Gaya.**

Mr. *Seveswardyal*, for the Appellant.

Rai *Gurusaran Pershad*, for the Respondent.

JUDGMENT.

ATKINSON, J.—The plaintiff in this suit was a creditor of the defendant. He obtained a decree for Rs. 5,000 against the defendant on the 2nd July 1915. On the 27th September 1915 the plaintiff applied for leave to issue execution on foot of the decree which he had already obtained. The defendant was possessed of two denominations of property lot No. 1. being a 5-annas 4-pies share of *Mouza* Kurmawan and lot No. 2 being a 2-annas 8-pies share of *Mouza* Hasanpur. The decree-holder valued lot No. 1 at Rs. 2,000 and lot No. 2 at Rs. 500. Matters proceeded, and sometime prior to January 1916, the sale proclamation had issued. On the 21st January 1916 the judgment-debtor filed a petition alleging that the valuation stated in the sale proclamation was erroneous; that it was far too low, and the property was of greater value. The judgment-debtor suggested that the value of lot No. 1 was Rs. 40,000 and the value of lot No. 2 was Rs. 3,000. In that petition no suggestion was made by the defendant directly or indirectly that the sale proclamation which had been issued had not been properly served; and, as far as I can trace, no attempt was made at any time to suggest any defect in the service of the sale proclamation, prior to the application that was made under Order XXI, rule 90, to set aside the sale that took place on the 18th July 1916. The learned Subordinate Judge disposed of the defendant's application with regard to the question of valuation, and directed that the value of the property specified by the decree-holder and by the judgment-debtor should be set forth in the proclamation, and this was done and by consent of the parties no fresh sale proclamation was issued. On the 15th May 1916 the judgment-debtor prayed for two weeks' time, waiving, as he stated in his petition, "any objection as to irregularity and inadequacy of price," and asking that the sale might not take place until the 31st May 1916. Accordingly that application was granted, and the date of sale was fixed for the 31st May 1916. On this date the defendant in his petition again recognised the validity of the sale proclamation; and raised no objection as to service and waived all objection as to any irregularity that might exist as to the manner in which the valuation was stated in the proclamation. The defendant further applied on the 1st June under Order XXI, rule 83, for further time to enable him to pay off the decretal sum that was due to the plaintiff. This application was also granted; and time was given up to the 26th June 1916. On the 26th June 1916 a further application for time was made by the judgment-debtor asking that the sale might again be postponed and the defendant might be granted time to enable him to pay off the decretal sum. This application the learned Judge also granted, and the sale was finally postponed to the 18th July 1916. On that date the judgment-debtor-defendant was unable to find or raise the money to pay off the plaintiff's decree, and accordingly the sale took place, and the plaintiff-decree-holder became the purchaser at the sum of Rs. 5,000 for lot No. 1 and Rs. 980 for lot No. 2. Each application for adjournment was

granted and in consideration of the adjournment being granted, the defendant averred that he would raise no objection as to any irregularity in connection with the issue of a fresh sale proclamation after the valuation had been revised, in the manner which I have stated, in March 1916. It would be quite impossible to hold that the defendant had not completely waived and abandoned his right to have a fresh sale proclamation issued. His conduct was only inconsistent with his waiving the necessity of a fresh sale proclamation after the 11th of March 1916. Therefore, so far as that matter is relied upon as an irregularity for impeaching the sale that was effected it is utterly without substance or foundation. The only other irregularity which is suggested is, that the notice of the proclamation was not duly served. This point, as I have already stated, was not taken at any time prior to the application which was made before the learned Judge to set aside the sale on the 16th August 1916; and it appears to us from the evidence and the admission contained in the judgment-debtor's first petition that the proclamation was duly served in the ordinary way prescribed by the rules; and in respect of that contention the defendant has no ground for objection. The present application was made on the 16th August 1916 to set aside the sale on the ground of material irregularity which caused the defendant-judgment-debtor substantial injury; and the two grounds alleged to support his application are, *firstly*, the material irregularity in setting forth the valuation of the property, and *secondly*, the non-service of the notice of the proclamation. The learned Judge considered the matter very carefully and he came to the conclusion that the defendant had no ground for complaint whatsoever; that he was shown every consideration; that he had waived expressly the necessity of any fresh sale proclamation being issued in March, and that in point of fact notice had been duly served. In the view that the learned Subordinate Judge took and the decision at which he arrived, I think he was perfectly correct. We are satisfied that the sale proclamation was duly served and that no irregularity can be relied upon in respect of the non-issue of a fresh sale proclamation. It is stated that it was wrong in effect to have stated two separate valuations in the proclamation, the decree-holder's valuation and the judgment-debtor's valuation. I do not think that it was wrong. Mr. Krishna Sahai relies upon it as an irregularity, having regard to the recent decision of this Court in the Full Bench case reported as *Raghunath Singh* v. *Hazari Sahu* (1), but at the time that the learned Judge did enter the two valuations in the proclamation it appears that it was thought to be the practice recognised for some time in this province and occasionally acted upon by some and not by others. Therefore, I do not think that there was any irregularity at all; but in this respect apart from that, assuming that there was an irregularity, in my opinion the judgment-debtor has completely waived this point as a valid ground of objection. It is essential for the judgment-debtor, in order to succeed in an application under Order XXI, to show that the inadequacy of the prices stated in the sale proclamation was caused in consequence of the irregularity. There is not a scintilla of evidence on the record to suggest that the failure to issue a fresh sale proclamation in any way caused an inadequacy of bidding at the sale, or that the judgment-debtor was prejudiced in any way whatsoever by any material irregularity in the publishing and conduct of the sale. In my opinion there was no irregularity and this application must, therefore, be dismissed with costs, measured at three gold *mohurs*.

CHAPMAN, J.—I agree.

*Appeal dismissed.*

(1) 37 Ind. Cas. 872; 2 P. L. J. 130; 1 P. L. W. 111 (1917) Pat. 105.

MADRAS HIGH COURT.

ORIGINAL SUIT APPEAL No. 22 OF 1916.

March 29, 1917.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Oldfield.

BANGHY ABDUL RAZACK SAHIB, GENERAL MERCHANT CARRYING ON BUSINESS UNDER THE NAME OF MESSRS. KHAN SAHIB BANGHY ABDUL KHADER SAHIB & Co.—PLAINTIFF—APPELLANT

*versus*

KHANDI RAO AND ANOTHER, MERCHANTS CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF MESSRS. W. K. A. RAM & Co.—DEFENDANTS—RESPONDENTS.

*Contract, construction of—Contract for supply of goods by agent of enemy firm—Declaration of hostilities before arrival of vessel—Commercial Intercourse with Enemies Ordinance (VI of 1914)—Capture of vessel and condemnation by Prize Court—Subsequent release, effect of—Breach of contract—Damages, liability for—Contract Act (IX of 1872), s. 56 and illus.* (d).

Defendants, agents of a German firm, contracted on 25th August 1914 to deliver to plaintiff at Madura certain casks of dye in 3 instalments of 2 casks each 'to be delivered on arrival of the steamers, one lot of two casks to be delivered each time at Rs. 501-4-0 for each cask.' The defendants were not to be responsible if the steamers did not come to Madras or Tuticorin, the port for Madura, where the goods were to be consigned. One of the steamers, *Barenfels*, left Hamburg and Antwerp before the outbreak of war but before it could arrive, war had broken out and the Commercial Intercourse with Enemies Ordinance was in force. The *Barenfels* and her cargo were captured in October 1914 and condemned by the Prize Court. She was, however, subsequently released and allowed to proceed on her voyage to Colombo. The defendants were precluded from taking delivery of the goods, unless they deposited a sum amounting to twice the invoice value of the goods. In an action for damages for breach of contract against the defendants:

*Held*, that the defendants were not liable inasmuch as;

(1) on the true construction of the contract the defendants were not liable to deliver the goods even if the steamer did arrive when there were no such goods in it; [p. 852, col. 1.]

*Hale* v. *Rawson*, (1858) 27 L. J. C. P. 189; 4 C. B. (N. S.) 85; 4 Jur. (N. S.) 363; 6 W. R. 339; 31 L. T. (O. S.) 59; 114 R. R. 632; 140 E. R. 1013, distinguished.

(2) the capture of the ship was one of the possibilities contemplated under the clause in the contract relating to the non-arrival of steamers which relieved the defendants from the obligation to supply the goods on the said contingency [p. 852, cols. 1 & 2.]

(3) the condemnation of the goods related back and divested the owners of the goods as from the date of seizure and the effect of the proclamation was to render the further performance of the contract illegal; [p. 852, col. 1.]

(4) the subsequent release of the vessel and her cargo did not impose on the defendants any obligation to purchase the goods at a greatly enhanced price from the Prize authorities and make them over to the plaintiff. [p. 852, col. 2.]

Appeal from the judgment of Mr. Justice Bakewell in the exercise of the Original Civil Jurisdiction of the High Court, in Civil Suit No. 229 of 1915.

Messrs. *Grant* and *Greatorex*, for the Appellant.

Messrs. *Short*, *Bewes & Co.*, for the Respondents.

JUDGMENT.—This is a suit for breach of contract entered into between the plaintiffs who are merchants at Ambur and the defendants who were importers of German dyes to Madras and Tuticorin, entered into on the 25th August 1914 after the outbreak of the war, by which the defendants undertook to deliver certain casks of dye from the lot to arrive per *SS. Steinturn* and certain other casks from what is described as the "Bombay lot" meaning the lot imported by the defendants at Bombay. The contract went on to stipulate for three deliveries of two casks, each of the weight and description mentioned, "to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the above-mentioned rate, *i.e.*, Rs. 501-4-0 for each cask. We are not responsible for the supply of goods if steamers do not come to Madras or Madura."

The evidence shows that the defendants had arranged for consignments by successive steamers, and having regard to this we have no doubt that what the defendants understood to deliver was two casks of the required description arriving in the ordinary course in successive steamers consigned to the defendants at Madras or Tuticorin, the port for Madura. In the case of Tuticorin, the ship either touched at Tuticorin or landed the goods at Colombo for transhipment. One of the steamers, *Barenfels*, had left Hamburg and Antwerp before the outbreak of war and, according to the evidence, should have arrived in Madras about the 17th August in the ordinary course. On the date of the contract she was overdue, and the defendant says he did not know what had happened to her. She did arrive ultimately in May 1916, and the first contention of the learned Advocate-General was, that under the

contract on the arrival of the *Barenfels* the defendants became bound to make delivery even if the goods were not on board, citing *Hale* v. *Rawson* (1). In that case which was an action for failure to deliver tallow on the arrival of a certain steamship, it was held that they were not relieved for their obligation because it turned out the ship had no tallow on board. Here, we think, it is clear from the language of Exhibit A and having regard to the course of business and the stipulation as to the non-arrival of the steamers, that the defendants were only bound to make deliveries out of the lots consigned to the defendants in the ordinary course of business by the steamers referred to and arriving therein, and that they were not bound to make any such delivery on the arrival of the steamer without having on board any such goods consigned to the defendants. This being the interpretation of the contract, as the goods had not arrived before the coming into force of the proclamation of the 9th September 1914 against trading with the enemy, the effect of that proclamation was to render the further performance of the contract illegal, as it would admittedly have been impossible for the defendants to take up the goods and pay for them, and to put an end to the contract, *Karberg (Arnhold) & Co.* v. *Blythe, Green, Jourdain & Co.* (2).

The case may also be disposed of on another ground. The *Barenfels* and her cargo were captured in October 1914 as prize of war and taken into Alexandria for condemnation, and they were subsequently condemned as prize of war in September 1915, a condemnation which related back and divested the owners of the goods as from the date of seizure. *The Odessa* (3), *The Zamora* (4). Under the contract, as already stated, the defendants were not to be responsible for the supply of goods if steamers did not come to Madras or Madura, and these steamers clearly were the "other steamers", already mentioned, by which the three consignments were coming out. In these circumstances, the capture of the *Barenfels*, which must have been one of the possibilities contemplated, in our opinion relieved the defendants of liability under this clause and put an end to the contract so far as this particular consignment was concerned: And it seems to us immaterial that some six months later the ship and cargo were sent out to Colombo, Madras and Calcutta by bailees from the Prize Court who landed the goods in question, which were consigned to Tuticorin at Colombo, and did not forward them by transhipment to the defendants, the consignees at Tuticorin. There was no certificate of release from the Prize Court in respect of these goods which at the time were being proceeded against for condemnation, and the only terms on which the defendants were able to obtain delivery of them was by depositing a sum amounting to twice their invoice value and by agreeing that, if the goods were condemned, as happened, this sum should be treated as the sale price paid to the Prize authorities as vendors. It cannot be said that the defendants were under any obligation to purchase these goods at a greatly enhanced price from the Prize authorities and make them over to the plaintiff, and we think the plaintiff's claim in respect of these casks fails.

The case as regards the plaintiff's other ground of claim on account of the consignment on the *SS. Frimley* is even clearer. The evidence, for there is nothing explicit in the plaint, is that kegs of 16 per cent. strength arrived by that ship. The contract being for delivery of kegs of 40 per cent. strength, it was for the plaintiff to show that the defendants were in a position to deliver dye such as that described in the contract. We think it is clear that the plaintiffs have not done so and that the description of the dye on the *Frimley* differs *in toto* from the description stipulated for. We may add that on the evidence the plaintiffs failed entirely to establish that the dye on the *Frimley* could be accepted as equivalent to that referred to in the contract, the only witness who had any practical knowledge of dyeing deposing that dye of 16 per cent. strength could not produce the same quality of colour as that of 40 per cent. strength after admixture.

(1) (1858) 27 L. J. C. P. 189; 4 C. B. (N. S.) 85; 4 Jur. (N. S.) 362; 6 W. R. 339; 31 L. T. (O. S.) 59; 114 R. R. 632; 140 E. R. 1013.

(2) (1916) 1 K. B. 495; 85 L. J. K. B. 665.

(3) (1916) A. C. 153; 85 L. J. P. C. 49.

(4) (1916) 2 A. C. 77.

In the result, the appeal fails and is dismissed with costs. (Two Counsel).

*Appeal dismissed.*

V.R.P.

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## PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1264 OF 1916.

June 12, 1917.

*Present*:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

RAM LOCHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

JATADHARI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1, s. 11—Appeal—Withdrawal of suit*—Res judicata.

Once a case is taken on appeal it cannot be said to have been finally determined until the Appellate Court has adjudicated upon the question in issue between the parties, and by reason of the Court allowing the suit to be withdrawn by the plaintiff it cannot be said that its order possesses that necessary degree of finality so as to operate as *res judicata* relative to the rights of the parties to the antecedent litigation. [p. 853, col. 1.]

Appeal from a decision of the District Judge, Gya.

Mr. *Kailashpati*, for the Appellants.

Mr. *Shambhu Saran* for Mr. *Anugrah N. Sinha*, for the Respondents.

JUDGMENT.—The plaintiffs in the year 1316 F. S. purchased the interest of one Rajnath Singh in 5-annas 9-pies share in *Mouza* Rajpore. Prior to this purchase by the plaintiffs, the defendants, with some of their relations, obtained a *thicca* of one anna 3 *dams* share comprised within the 5 annas 9 pies share purchased by the plaintiffs. The one anna 3 *dams* share which was leased to the defendants represented lands which were in the possession of the defendants and other members of their family together with 19 *bighas* which the defendants in this suit had purchased from one Chhatu Singh. The total area of the land which was in the possession of the defendants and their relations and which was termed their ancestral *kasht* property was 57 *bighas*. This area of land together with the 19 *bighas* which was the property of Chhatu Singh was leased to the defendants at an annual cash rent of Rs. 178 for the years 1304 to 1310 inclusive. It does not appear clearly if after the expiration of the lease in 1310 the defendants continued to pay to Rajnath Singh a cash rent or a *bhauli* rent. The plaintiffs, however, allege in paragraph 6 of their plaint that a *bhauli* rent was paid by the defendants to Rajnath Singh after the lease had expired, but this is denied by the defendants. Of the total area of 57 *bighas* of *kasht* land the defendants acquired 24 *bighas* and the residue 33 *bighas* remained with the defendants' other relations. Subsequently the defendants purchased Chhatu Singh's interest of 19 *bighas*; and thereby the defendants in this suit became entitled to, and were in possession of, 44 *bighas* in round figures of the original lands comprised in the *thicca* of 1304. Thus the reserve rent of Rs. 178 ought to be apportioned between the defendants in this suit and the relations of the defendants who are still in possession of the 33 *bighas* odd of the original *kasht* lands.

The plaintiffs bring this suit to recover *bhauli* rent for the years 1317 to 1320. The plaintiffs brought a suit originally in the year 1909 claiming a *bhauli* rent against these defendants and the number of that suit was 253 of 1909. That suit was dismissed by the Munsif who tried it. On appeal it was also dismissed by the learned District Judge The case then went in second appeal before the High Court at Calcutta, and the High Court was pleased to allow the plaintiffs to withdraw the suit and gave them liberty to institute a fresh suit provided that they paid the costs of the defendants in that suit within two months of the date of the record reaching the lower Court. The plaintiffs paid the costs of the High Court and also the costs of the District Judge's Court but omitted to pay the costs incurred in the Munsif's Court. The Munsif, however, allowed a fortnight's time to the plaintiffs to make a further deposit of the costs which were due for the Munsif's Court. The plaintiffs made a deposit within the time allowed by the Munsif and the money deposited was withdrawn by the defendants in satisfaction of the costs due from the plaintiffs.

The learned Subordinate Judge, who tried the present suit, held that the proceedings

of 1909 did not operate as *res judicata* in respect of the plaintiffs' claim in this suit. The learned Judge on appeal, however, has taken a contrary view and has held that the order made by the Calcutta High Court did operate as a bar to the plaintiffs' right to sue in this action and that it operates. But we think that the learned District Judge was wrong. Once a case is taken on appeal it cannot be said to have been finally determined until the Appellate Court has adjudicated upon the question in issue between the parties; and by reason of the High Court allowing this suit to be withdrawn by the plaintiffs, it cannot be said that its order possesses that necessary degree of finality so as to operate as *res judicata* relative to the rights of the parties to the antecedent litigation. In a case reported as *Ghurphekni* v. *Purmeshar Dayal Dubey* (1), the law upon this question is clearly summarised in the following words: "When the decision of the lower Court is taken on appeal to a superior Tribunal and that Tribunal for any reason does not think fit to decide the matter, it is left an open question." Here their Lordships of the Calcutta High Court allowed the plaintiffs to withdraw the suit and by reason of this permission to withdraw, the very foundation or basis of the order of dismissal passed by the lower Court was cut away. Therefore, in no sense can the order made by the Calcutta High Court be deemed to operate as *res judicata* in any subsequent proceeding. We think that the learned Subordinate Judge was right in the determination of the question of law arrived at by him and that the learned District Judge was wrong.

The only question which remains for determination is whether the plaintiff is entitled to a *bhauli* rent or to a cash rent. The learned District Judge held that they were not entitled to *bhauli* rent having regard to the determination of the point of law which arose. The learned Subordinate Judge held that they were entitled to cash rent because under the lease of 1304 the original *bhauli* rent was converted from *bhauli* into *nakdi*. The learned Subordinate Judge, however, dismissed the plaintiffs' claim on the ground that they had wrongly claimed *bhauli* rent when they should have claimed cash rent. In the Record of Rights the defendants are recorded as being tenants of the 44 *bighas* in their possession at a rent of Rs. 104 per annum. This rent bears the same proportion to the total rental specified in the *thika* of 1304, *viz.*, Rs. 178, as the area in respect of which it is payable bears to the total area covered by the lease of 1304. There is nothing on the record to show that the presumption of accuracy attaching to the entry in the Record of Rights has been rebutted. Accordingly we think that the plaintiffs are entitled to receive a cash rent from the defendants at the rate of Rs. 104 per annum in respect of the total area of land in their occupation, namely, 44 *bighas*. Accordingly, by consent of the parties, we modify the decree of the learned District Judge and declare that the plaintiffs are entitled to have a decree from the defendants for the years in suit for cash rent at Rs. 104 per annum. Owing to the inefficient manner in which this appeal has been argued we will give no costs in this appeal which is, therefore, decreed in a modified form without costs.

*Appeal partly allowed.*

(1) 5 C. L. J. 652.

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## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 28 OF 1916.

June 11, 1917.

*Present*:—Mr. Justice Maung Kin.

MAUNG BA MAUNG—DEFENDANT—APPELLANT

*versus*

MAUNG PYU AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Buddhist Law, Burmese—Gift—Transfer of Property Act (IV of 1882), ss. 122, 123—Death-bed gift—Registration—Possession, delivery of, whether necessary.*

Under section 123 of the Transfer of Property Act delivery of possession is not essential to the validity of a gift, and a gift by registered deed would be valid without more. But where a gift involves questions of marriage, succession, inheritance or religious usage, the Buddhist Law will apply. [p. 855, col. 2; p. 856, col. 1.]

Under the Buddhist Law a gift made during the donor's last illness with the effect of excluding his heirs would be invalid without delivery of possession. [p. 856, col. 1.]

MAUNG BA MAUNG *v.* MAUNG PYU.

Mr. *Ko Ko Gyi*, for the Appellant.

Mr. *R. N. Burjorjee*, for the Respondents.

JUDGMENT.—The subject-matter of the suit is a piece of paddy land which was the property of the deceased Maung Aung Ba. The plaintiffs claimed it by way of inheritance on the ground that the deceased was their brother. The defendant, who took possession of the land on Maung Aung Ba's death, claimed it as an adopted son of the deceased and also by way of gift from him. He denied that the deceased was the brother of the plaintiffs and said if they were, they had failed to maintain fraternal relations with the deceased.

The concurrent findings of the lower Courts are:—

(1) that the deceased was the brother of the plaintiffs and that they had not failed in their duties towards him;

(2) that the defendant was not proved to be an adopted son as alleged.

As to the validity of the gift the lower Courts differed. The Trial Court held that the gift was valid. The Divisional Court held that the document evidencing the gift was executed by the deceased and was duly registered, but that it was not valid on the grounds that there was no delivery of possession, that the donee was a minor who was not in a position to accept the gift, and that no duly appointed guardian had accepted the gift on his behalf.

Before me the learned Counsel for the defendant contended that the lower Courts erred in holding that there was not evidence of that publicity and notoriety of the adoption which was essential to establish it. The ground of the contention was that in the registered deed of gift the defendant is described as the deceased's adopted son, "adopted as his heir." A number of Indian rulings were cited to show that registration is notice to the world of what is done or intended to be done by means of the document registered. I do not think that those cases can be applied to this case. The deed of gift was executed when the deceased was ill; and he died from that illness a few days after. There is nothing to show that the words relied on were inserted under his instructions. As a fact someone went to the township headquarters and got the deed written by a petition-writer; and it was executed at the deceased's house at a village some four miles away from the headquarters. It was, of course, read over to the deceased before he signed it. Even so, I am not disposed to find that he acknowledged the truth of every assertion in the deed. Moreover, there is nothing extraordinary in the presence of this particular assertion as a part of the deed, because it is clear that the deceased desired to give the land to the defendant and even if the assertion had been inserted without his instructions, the deceased would not have demurred to it. I am, therefore, unable to hold that the fact that the defendant was described in the deed as an adopted son is evidence of the necessary publicity or notoriety of the alleged relationship. The second of the concurrent findings above mentioned is, therefore, correct. There is no reason to think the first of them is wrong either. In fact its correctness was not seriously impugned by defendant's Counsel and I hold that it is correct.

As regards the question whether an acceptance of the gift was necessary, I hold that it was not. Section 122 of the Transfer of Property Act does indicate that without an acceptance there cannot be a valid gift as defined by it, but that section has not been extended to the districts but only section 123. That being the case, it cannot be held that the special definition of a gift under section 122 applies. In English Law acceptance is not necessary but it seems that by section 122 the Legislature makes a special rule requiring acceptance of a gift as an essential to its validity. Such a special rule cannot, however, be applied unless its applicability has been extended.

As regards the question whether delivery of possession was necessary, the answer will depend upon circumstances. If it was an ordinary gift the delivery of possession would not be necessary. The registered deed without more would have made it valid, for under section 123 of the Transfer of Property Act delivery of possession is not an essential to the validity of a gift. Under Hindu Law delivery of possession was necessary for the validity of the gift and it has been held with regard to Hindu gifts that section 123 of the Act has abrogated the rule. More-

over, Buddhist Law cannot be applied to the case of a gift, unless questions of marriage, inheritance, succession or religious usage are involved in it. But it has been urged that the gift was made during the deceased's last illness and was of the whole of his property and that the intention was to prevent the natural heirs from inheriting the property or any portion of it. In the case of *Maung Pan U* v. *Ma Kyi Nyo* (1) Mr. Justice Twomey referred with approval to an extract given at page 4 of the Upper Burma Rulings 1907-08, under the head Buddhist Law, Gift, and said that the applicability of the Buddhist Law to gifts depends on the circumstances of each case. "In one case it may be a matter of religious usage as where a gift is made on the occasion of a *shinbyu* ceremony. In another it may be either a matter of religious usage or inheritance or succession, as when a father gave land to his daughter and her husband on the occasion of her ear-boring and betrothal. In a third it may be a matter of inheritance as in the case of a death-bed gift. In all such cases the Buddhist Law applies and not the general law contained in the Transfer of Property Act and other Acts". It may be doubted whether the Buddhist Law would apply to the second of the above three cases. But in regard to the first of them and to the *shinbyu* gift in particular, Mr. Justice Twomey held in *Ma Pan Nyun* v. *Ma Hla Sein* (2) that questions regarding their validity must be decided according to the Buddhist Law, as they are questions regarding the religious usage. As regards the third of the three cases, I have not found any dissentient view. In *Pan U's* case (1) above cited, the alleged gifts were made by a father far advanced in years (75) two years before his death. The gifts involved the whole of his estate and their effect was to give three of his seven children a much larger share than they could obtain after his death under the ordinary Buddhist rules of inheritance. And the learned Judge held that the donor's purpose was plainly to evade those rules and that in such a case the Buddhist Law is applicable. The case before me is much stronger inasmuch as the gift was made during the donor's last illness and the effect was to exclude the heirs. I would, therefore, hold that Buddhist Law applies and there being no delivery of possession, the gift was invalid.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 8 Ind. Cas. 1200; 3 Bur. L. T. 107.
(2) 30 Ind. Cas. 665; 8 L. B. R. 190; 8 Bur. L. T.

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## PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 427 AND 468 OF 1915.

May 23, 1917.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

IN No. 427 OF 1915

THE OFFICIAL TRUSTEE OF BENGAL—PLAINTIFF—APPELLANT

*versus*

NIM CHAND MARWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 468 OF 1915

NIM CHAND BAID MARWARI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

C. E. GREY, ESQ.—RESPONDENT.

*Muhammadan Law—Trust or gift, deed of, operation of—Possession, delivery of, necessity of.*

In order to make a deed of trust or gift operative under the Muhammadan Law, it is necessary that possession should forthwith be delivered to the donee or trustee. [p. 857, col. 2.]

*Nawab Umjad Ally Khan* v *Musammat Mohumdee Begum*, 11 M. I. A. 517; 10 W. R. (P. C.) 25; 2 Suth. P. C. J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195, followed.

*Rahim Bakhsh* v. *Muhammad Hasan*, 11 A 1; A. W. N. (1888) 266; 13 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 429, relied upon.

Where a deed of trust is divisible, and possession has been taken of some of the property comprised in the deed, the deed is operative only to the extent to which possession has been taken. [p. 858, col. 1.]

Appeals from a decision of the Subordinate Judge, Purneah, dated the 19th July 1915.

Dr. *D. N. Mitra* and Mr. *B. N. Mitra*, for the Appellant.

Messrs. *Harnarain Parsad* and *Sarushi Charan Mitra*, for the Respondent.

JUDGMENT.—The suit from which these appeals arise is based upon certain acts of waste on the part of one Nawab Sayad Delawar Reza in respect of the property claimed by the Official Trustee of Bengal

to be held in trust under a deed dated the 19th February 1900. This trust deed relates to an allowance of Rs. 2,000 a month payable to the Nawab by purchasers of the *zemindari*, who in consideration of that purchase have made themselves liable to pay this monthly allowance. Excluded from the purchase of the *zemindari* was a palace and grounds measuring some 150 *bighas*. The acts of waste are alleged to have been committed in regard to this palace and grounds.

By the terms of the deed, executed in favour of the Official Trustee, the allowance is to be divided between the Nawab and certain relatives and the Nawab himself is to remain in possession of the palace and grounds during his lifetime. The actual words of the deed are —

"That the said Official Trustee of Bengal shall allow the said Nawab Sayed Delawar Reza during his lifetime to reside in the said palace and to use and occupy the same and all other messuages, bungalows, land, etc., and every part thereof free of rent."

The defendants obtained a money decree against the Nawab and in execution thereof purchased a stable and outbuildings valued at Rs. 2,062. This they demolished and for this and other damages done to the property, a decree for Rs. 2,262 has been made by the lower Court.

The plaintiff also claims possession of 20 *bighas* of the compound which have been leased by the Nawab to the same set of defendants. The Court below has held that as the deed of endowment gives the Nawab a right to enjoy the property, the lease granted by the Nawab must be held good for his lifetime. The plaintiff's suit for recovery of possession of the land leased has been dismissed.

In the lower Court the chief defence taken was that the deed was never acted upon. The lower Court decided this issue by reference to the fact that the Official Trustee received the monthly allowance and divided it in accordance with the terms of the trust. The lower Court did not specifically enter into the question whether the deed was acted upon in its entirety, that is to say, whether possession of the palace and compound ever vested in the Official Trustee, but it is clear from the evidence that the Official Trustee was never in fact in actual possession of the property, and this is indicated by the following passage from the Subordinate Judge's judgment:—

"In short he (the Nawab) has been doing all sorts of acts of waste without any check from the plaintiff, though he was allowed only to occupy and use the palace and its compound with the buildings on it free of rent during his life."

Now as we understand Volume III, Chapter XXX, of the Hedaya one of the most important points in the operation of a deed of trust or gift is that possession should forthwith be delivered to the donee or trustee. This principle was recognized in *Nawab Umjad Ally Khan* v. *Musammat Mohumdee Begum* (1). The whole case law on the subject has been gone into, if we may say so, exhaustively by the Hon'ble Mr. Justice Mahmood in *Rahim Bakhsh* v. *Muhammad Hasan* (2). There can be no doubt that a deed of gift is not valid under Muhammadan Law if possession is not given. It is suggested that in the circumstances of the present case there was no necessity that the Official Trustee should travel all the way from Calcutta to take possession of the palace. The terms of the trust showed that it was not intended that he should take physical possession of the property. In the cases cited by the Hon'ble Mr. Justice Mahmood a clear distinction has been drawn between cases in which it was possible and the cases in which it was not possible to take possession of the property, as for instance, in the case decided in *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (3). In that case the property at the time of the gift was in usufructuary mortgage to a third party. A distinction has also been drawn in cases in which the usufruct has been reserved to the donor while the donee has been regarded as in possession of the corpus of the property itself. In the case before us there was no bar to an actual

(1) 11 M. I. A. 517; 10 W. R. (P. C.) 25; 2 Suth. P. C. J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195.

(2) 11 A. 1; A. W. N. (1888) 266; 13 Ind. Jur. 152; 6 Ind. Dec. (N s.) 429.

(3) 12 W. R. 498; 4 B. L. R. A. C. 86.

delivery of possession at the time of signing the deed of gift. It cannot be said that the donor is receiving only the usufruct. He has not only been in actual possession he has actually pulled up the marble floors and iron railings and sold them and appropriated the proceeds. It is urged that an actual taking of possession would have been an idle ceremony. We cannot accept this suggestion. No ceremony prescribed by the sacred law can be deemed idle. In the case before us the ceremony would have been most valuable as putting third parties on their guard against dealing with the Nawab in respect of the property given in trust.

The result is that the trust deed is operative only to the extent to which possession has been taken. It is clearly divisible into two parts. Possession has been taken of the monthly allowance. The deed is operative as regards the monthly allowance. Possession has not been taken of the palace and grounds. The deed is inoperative to that extent. The plaintiff has no title in the palace and grounds. His suit should have been and now is dismissed with costs. Appeal No. 427 of 1915 is dismissed with costs. Appeal No. 468 of 1915 is decreed with costs.

*Appeal No. 427 of 1915 dismissed;*
*Appeal No. 468 of 1915 decreed.*

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LOWER BURMA CHIEF COURT.
SPECIAL FIRST CIVIL APPEAL No. 176 OF 1916.
May 4, 1917.
*Present*:—Mr. Justice Maung Kin.
YAGAPPA CHETTY—PLAINTIFF—APPELLANT
*versus*
K. Y. MAHOMED AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 21 (b)—Part-payment—Payment of interest by one heir, whether binds other heirs—Civil Procedure Code (Act V of 1908), s. 34 (2)—Decree silent as to interest, construction of.*

Payment of interest by one of his heirs on a debt due by a deceased person does not save limitation as against the other heirs [p. 858, col. 2.]

*Arjun Ram Pal v. Rohima Banu*, 14 Ind. Cas. 128, relied upon.

Where a decree is silent with respect to further interest from date of decree to date of payment, the Court must be deemed to have refused such interest and a separate suit will not lie for its recovery. [p. 859, col. 2.]

The matter must be treated as if the Court had exercised its discretion and refused to give interest, unless it can be shown that its silence was due to oversight or mistake. [p. 859, col. 2.]

*Hiralal Ichhalal Majumdar* v. *Desai Narsilal Chaturbhujdas*, 18 Ind. Cas 909; 37 B. 326 at p. 338 & 339; 17 C. W. N. 573; 13 M. L. T. 415; (1913) M. W. N. 428; 11 A. L. J. 432; 17 C. L. J. 474; 15 Bom. L. R. 483; 25 M. L. J. 101; 40 I. A. 68, relied upon.

Mr. *Kastgir*, for the Appellant.

Mr. *J. R. Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the defendants-respondents were sued on a pro-note in their respresentative capacity. The pro-note was executed by K. Y. Cassim, since deceased. Defendant No. 1 is the elder brother, and defendants Nos. 2 and 3 are daughters of the deceased. Defendant No. 4 is the deceased's nephew. Defendant No. 3 is a minor and appeared by her guardian *ad litem* even in this Court. She was eleven years old, when the suit was filed. Of the defendants the first three only are the heirs of the deceased, the fourth defendant Mahomed not being an heir at all.

The plaintiffs claim that the suit is not barred by limitation on the ground that the defendant No. 1 made two part-payments which save limitation as against all the defendants. Defendant No. 1 did not appear to contest the suit. I have to take it that the alleged part-payments have been proved as the suit has been decreed as against defendants Nos. 1 and 4. The finding has not been assailed here either.

Now it has been held in *Arjun Ram Pal* v. *Rohima Banu* (1) that the payment of interest by one of his heirs on a debt due by a deceased person does not save limitation against the other heirs.

But it is alleged that defendant No. 1 made the part payments on his own behalf as well as on behalf of the 2nd and 3rd defendants as their duly authorized agent, inasmuch as he was then the manager and head of a joint family of which defendants Nos. 2 and 3 were members. This the latter defendants deny. And there is not a scrap of evidence to show that defendant No. 1 was such a head. Moreover although the case-law shows that the head of a joint Hindu family might have the necessary authority, it does not appear

(1) 14 Ind. Cas. 128.

that the same rule prevails among the Muhammadans.

The learned Judge below observed in his judgment that it is not alleged that defendant No. 1 was the natural guardian of either of the defendants Nos. 2 and 3. But it has been argued before me that defendant No. 1 was the lawful guardian of defendant No. 3 and as such was a person who falls within the meaning of the words "agent duly authorized in that behalf" in sections 19 and 20 of the Limitation Act, as defined by section 21 (1) of the same Act. Sections 107 and 109 of Wilson's Digest of Anglo-Muhammadan Law show that failing all the female relatives mentioned in section 107, the custody of a minor girl under the age of puberty belongs to the father, and failing him to the nearest male paternal relative within the prohibited degrees, reckoning proximity in the same order as for inheritance. In Muhammadan Law puberty is presumed on the completion of the fifteenth year in the case of both males and females, unless there is evidence to show that puberty in the particular case was attained earlier. Defendant No. 3 was only eleven years old at the date of the institution of the suit and as the part-payments were made nearly three years before, she must have been about eight years old then. Defendant No. 1 was, therefore, the natural guardian of the person of the minor defendant, which means according to the books that the guardianship is for custody and education. I find also that even if the minor defendant had attained puberty defendant No. 1 would be the guardian of her person (failing father), executor of father's Will and father's father H. H. S. provided the minor is unmarried. See section 111 of Wilson's book. But this is not, in my opinion, sufficient for the purposes of section 21 (1) of the Limitation Act. I think defendant No. 1 should be the guardian of the minor's property as well, because the act in question of his is sought to be made binding on the minor's estate.

Section 112 of Wilson's book gives a list of the natural guardians of the property of a minor indicating the order of priority among them. The father's brother is not included in that list and the section goes on to say that failing all of these it is for the Court to appoint a guardian or guardians. I hold, therefore, that defendant No. 1 was not "a person duly authorised" within the meaning of section 21 (1) of the Limitation Act. The result is that the payments made by defendant No. 1 cannot bind defendants Nos. 2 and 3. The appeal is, therefore, dismissed as against defendants Nos. 2 and 3 with costs.

Defendants Nos. 1 and 3 have not appeared before this Court and as against them the plaintiffs ask for interest at 6 per cent. per annum from the date of institution of the suit till realisation. They say that they ask for that in their plaint and the learned Judge below failed to deal with their prayer.

Section 34 (2) provides that where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. The matter must, therefore, be treated as if the lower Court had exercised its discretion and refused to give interest, unless perhaps the plaintiff can show that the silence of that Court upon the point was due to an oversight or mistake, but there is nothing to show this. That being the case, the proper course is to follow the case of *Hiralal Ichhalal Majumdar* v. *Desai Narsilal Chaturbhujdas* (2) of which the facts were similar to those in this case, and which decided that the High Court was right in declining to allow the prayer. The appeal is dismissed as against the 2nd and 3rd respondents with costs, the costs in this Court being confined to one Advocate's costs, as at the hearing. Mr. Das appeared for both and Mr. Judge, though set down as an Advocate for the 3rd respondent, did not appear. The appeal against the 1st and 4th respondents as regards the interest asked for is dismissed. The lower Court's decree against them will stand. There will be no order as to costs in their favour, as Mr. A. C. Dhar who, the list shows, was appearing for 1st respondent did not appear and the 4th defendant was absent.

*Appeal dismissed.*

(2) 18 Ind. Cas. 909; 37 B. 326 at pp. 338, 339; 17 C. W. N. 573; 13 M. L. T. 415; (1913) M. W. N. 428; 11 A. L. J. 432; 17 C. L. J. 474, 15 Bom. L. R. 483; 25 M. L. J. 101; 40 I. A. 68.

JANARDHAN PROSAD *v.* JANKIBATI THAKURAIN.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 7 OF 1913.
June 6, 1917.
*Present*:—Mr. Justice Sharfuddin and
Mr. Justice Roe.
*Babu* JANARDHAN PROSAD THAKUR
AND ANOTHER—APPELLANTS
*versus*
*Musammat* JANKIBATI THAKURAIN
AND OTHERS—RESPONDENTS.

*Accounts, suit for, against administrator—Limitation—Limitation Act (IX of 1908), s. 10—Administrator, whether trustee.*

The limitation for a suit for accounts against the administrator of an estate runs from the date when the plaintiff is entitled to put an end to his administration *i.e.*, on attaining majority and not from the date on which he does in fact put an end to it. [p 861, col. 1.]

An administrator in whom no special trust is vested for a specific purpose is not a trustee within the meaning of section 10 of the Limitation Act. [p. 861, col. 2.]

Appeal from a decision of the Subordinate Judge, Purneah, dated the 28th August 1912.

Messrs. *Sahay Ram Bose*, *Chandra Sekhar Banerji*, *Purendra Narain Sinha* and *Sivnandan Rai*, for the Appellants.

Messrs. *P. K. Sen*, *Lachmi N. Sinha*, *Abani Bushan Mukerji* and *Rai Tribhuvan Sahai*, for the Respondents.

JUDGMENT.—The appellants in this case are the nephews of one Rudranand Thakur, that is to say, second cousins once removed. Their case is that on the death of their father Shiva Pershad Thakur in 1894 Rudranand Thakur took out Letters of Administration for the management of his estate during their minority and that during that management, he made purchases of properties out of the proceeds of the minors' estate and having wrongfully obtained entry of his own name in the documents of title refused to deliver to the plaintiffs their shares in the property acquired during his administration. They also allege that Rudranand had, on the expiry of his administration, refused to deliver accounts and upon these causes of action ask for the following reliefs:--

(*a*) That an account be taken from defendant No. 1 of the income and expenditure of the plaintiffs' share of the estate during the management of the defendant No. 1 from the year 1894 to the end of *Bhadro* 1315 M. S. and that he may be ordered to pay to the plaintiffs the sum that may be found due by him on taking such accounts.

(*b*) That if upon taking account, any other defendants be found liable to pay any sum to the plaintiffs, such sum may be ordered to be paid to the plaintiffs.

(*c*) That the defendants be ordered to make a discovery of all the properties, moveable and immoveable, appertaining to the estate of Shiva Pershad Thakur, Tirthanand Thakur, Kulanand Thakur and Rudranand Thakur and their descendants and not acquired with the private funds of any member or branch of the family.

(*d*) That the Court may be pleased, after adjudication of the title of the plaintiffs and of the shares belonging to the different branches or members of the family, to order a partition and separate allotment to be made of the moveable properties mentioned in schedule 5 hereto annexed and separate possession of the landed properties comprised in the several schedules 1, 2, 3 and 4 hereto annexed, and of all other properties that may be found to belong to the plaintiffs after the discovery prayed for as above or otherwise awarded to the plaintiffs.

(*e*) That the costs of the suits be awarded to the plaintiffs from the defendant No. 1 or any other defendants who may be found liable.

(*f*) That any other or further relief in the premises to which the plaintiffs may be entitled in the judgment of the Court may also be given them.

In dealing with the reliefs sought the learned Subordinate Judge found that the suit for an account was barred by limitation, that the suit for recovery of any money that might be due on that account was barred by limitation. The prayer for discovery of the immoveable properties acquired during the administration of the estate by Rudranand was apparently not pressed, but the learned Subordinate Judge went in detail into the title of the plaintiffs in each of the properties mentioned in the schedule and dismissed or decreed the plaintiffs' suit according to his adjudication on their title. The defendants have not appealed. The plaintiffs have appealed. The points for decision are (1) Is the suit for an account barred by limitation? (2) Having failed to secure an account have the plaintiffs succeeded in establishing

by other evidence their title to the properties claimed?

There are two points in issue, upon which the question of limitation turns. *Firstly*, when did the younger plaintiff attain his majority? and *secondly*, from what date should limitation run under Article 120 or section 10 of the Limitation Act?

We have no hesitation in finding that the learned Subordinate Judge's arguments with regard to the present age of the younger plaintiff are unassailable. It is vain to attempt to explain away as mistakes the numerous indications of the plaintiff's age given at a time when the question of his age was not in dispute. There is no substantial evidence on the plaintiff's side that the plaintiff was not a major at the dates given by the learned Subordinate Judge. Knowing that these records were likely to be cited against him, the younger plaintiff failed to submit himself for medical examination. He was only himself to blame, if indeed the decision of the learned Subordinate Judge is wrong. We find as a fact agreeing with the lower Court that the younger plaintiff came of age in the year 1903.

The suit was instituted on the 3rd September 1910. The next question is whether limitation runs from the date upon which the plaintiffs were entitled to put an end to the administration of Rudranand or from the date on which they did in fact put an end to it. In our view, the legal position of the defendant as an administrator terminated upon the day the younger plaintiff came of age. If thereafter the plaintiffs allowed him to remain in charge of the property, Rudranand Thakur was in charge of the property from that date, not as an administrator, but as the agent of the plaintiffs and a suit against him for an account would fall under Article 89. The view taken in *Saroda Pershad Chattopadhya* v. *Brojo Nath Bhuttacharjee* (1) clearly indicates that in suits of this nature, the cause of action arises upon the date of the plaintiffs' majority. We are of the same opinion. The administration of Rudranand was by the definite order of the District Court limited to the plaintiffs' minority. It was open to the plaintiffs immediately they came of age to inform the District Court that the administration was at an end and to ask for an account, and on failing to get that account to maintain a suit to obtain one. Their cause of action undoubtedly arose from the date of the majority of the younger plaintiff and the date of that majority being more than six years prior to the institution of the suit, the suit is barred by limitation unless saved by section 10 of the Limitation Act. We see no reason to depart from the rule of law, which has been observed in the Calcutta High Court for the last forty years with regard to this section. The first dictum is that reported in *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2). This has been followed in *Greender Chunder Ghose* v. *Mackintosh* (3), *Hemangini Dasi* v. *Nobin Chand Ghose* (4), *Barcda Prosad Banerji* v. *Gajendra Nath Banerji* (5) and *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6). It has also been followed in other Courts. It must be taken as well settled that an administrator, in whom no special trust is vested for a specific purpose, is not a trustee within the meaning of section 10 of the Limitation Act. The prayer for an account for the period between the date of the younger plaintiff's majority and the date of the plaintiffs entering into direct management of the property is barred, unless it be shown that the latter date was within three years of suit. The learned Subordinate Judge has clearly shown that the plaintiffs must have been in direct management of the property at least from the 31st July 1907. It is well known that changes in management ordinarily take place prior to the settlements and arrangements to be made for the *bhadoi* crop, that is, in July each year. The assertion of the plaintiffs that they did not take charge till the middle of September is against the probabilities. The finding of the lower Court is in accordance with probabilities. We

(1) 5 C. 910; 6 C. L. R. 195; 2 Ind. Dec. (N. s.) 1188.

(2) 4 C. 455; 3 C. L. R. 315; 2 Shome L. R. 153; 2 Ind. Dec. (N. s.) 289.

(3) 4 C. 897; 4 C. L. R. 193; 4 Ind. Jur. 287; 2 Ind. Dec. (N. s.) 568.

(4) 8 C. 788; 11 C. L. R. 370; 7 Ind. Jur. 17; 4 Ind. Dec. (N. s.) 509.

(5) 1 Ind. Cas. 289; 13 C. W. N. 557; 9 C. L. J. 383.

(6) 25 C. 103; 13 Ind. Dec. (N s.) 70.

accept the finding of fact that the agency of Rudranand terminated not later than the 31st July 1907. The first two reliefs asked for the plaintiffs were, therefore, rightly refused as barred by limitation.

The properties affected by the second part of the case may be dealt with in three divisions. We may say at once that we regard it as unfortunate that the learned Subordinate Judge should have allowed a case of this complex nature to be prosecuted as one suit. The plaintiff is attempting under cover of one plaint to obtain an account for the period of Rudranand's administration, to take up family history for the past 20 to 30 years, and to obtain a re-partition of the estate. He has attacked a number of transactions to which Rudranand Thakur was not a party at all in a vain attempt to encroach upon the property of other cousins, who were not interested in the administration of the estate by Rudranand. The suit as a whole seems to us to have been framed in direct contravention of Order II, rule 4, whereby the plaintiff is precluded from joining a suit for recovery of immoveable property with suit for a sum of money due. The suit in effect was a suit to recover damages for malfeasance under sections 146 and 147 of the Probate and Administration Act. It should have been kept within those limits. The suit for the recovery of immoveable property in the hands of Rudranand Thakur and the cousins Girjanand and Gajanand Thakur was in no way connected with the suit for an account. The result of interweaving this quarrel with regard to the immoveable properties with the quarrel over the administration has been that the plaintiffs' evidence on the real ownership of each item of property claimed is so hopelessly meagre that the learned Subordinate Judge cannot possibly be taken to task for refusing to rely on it. We are asked to declare for instance that a large batch of properties were taken in the name of such *benamidars* as Bulan Kawas, Nanul Dutt Pande, Khublal Thakur and Badri Nath Thakur, on evidence which covers for each case not more than 10 or 12 lines of the paper-book for each *benamidar*. It is suggested that sufficient evidence has been given to show that these people were probably *benamidars* of the plaintiffs' family. This was not sufficient for the plaintiffs' case. The plaintiffs were required to show that they were *benamidars* of Rudranand Thakur. The evidence of their own witnesses makes it perfectly clear that if indeed they were *benamidars* for any member of the family, they were *benamidars* for Girjanand Thakur or his father Thirthanand Thakur and not for Rudranand Thakur at all. This disposes of the cases dealt with in schedule 4 to the plaint.

With regard to the properties covered by schedules Nos. 1 and 2, a considerable number of them have already been decreed to the plaintiffs. With regard to the others, we agree with the learned Subordinate Judge that there is no real evidence of the plaintiffs' title.

It has been strongly urged upon us that because a number of these properties were acquired by Rudranand Thakur during the period of his administration and because during that period the plaintiffs lived in the same house with him as members of the same family we should assume that the *tahbil* or purse of the family was a common purse and that all sums taken from it by Rudranand Thakur for the purchase of property must be regarded as taken from the common purse of a joint family. Evidence has been given by the plaintiffs to show that they and Rudranand Thakur messed together, but even in that evidence there is no definite statement that Rudranand Thakur and the plaintiffs had a common purse. The position was that Rudranand was managing his share of the properties for himself and plaintiffs' share of the properties for them. He was required by law to keep a separate account for the plaintiffs' properties and to submit a separate account of the collections and disbursements from those properties annually to the District Judge. The fact that he failed to do so would not constitute the purse into which he placed the collections from both his own and the plaintiffs' properties a common purse. Such a purse is merely the private purse of a fraudulent trustee. When a trustee makes a profit by the improper employment of trust money, he is liable to make good to the beneficiary the amount of that profit in addition to the money improperly employed. But it is not the case that the beneficiary is entitled to claim a title in the property acquired by the impro-

per use of trust funds. The properties claimed were not purchased by Rudranand on plaintiffs' behalf. There was never any intention in the mind of Rudranand to acquire for the plaintiffs a title therein. It is clearly the plaintiffs' case that Rudranand was throughout acting fraudulently. If he did purchase these properties with the plaintiffs' money (and this is very far from being proved), he was using the plaintiffs' money improperly. Even if it be granted that the refusal of Rudranand to file an account of the administration raises the presumption that he improperly used the plaintiffs' money in these speculations in landed property, and even if it be granted that the cases quoted in Halsbury's Laws of England, Volume 28, at pages 192 and 193 are authority for the proposition that the plaintiff is entitled at his option to claim either the money used with interest, or the property acquired with the money, limitation for the exercise of such an option would be the limitation for the recovery of the money used. This disposes of the plaintiffs' claims to the properties acquired in the name of Rudranand himself during the period of his administration. It is unnecessary to discuss at length the plaintiffs' title to properties acquired in the name of Rudranand prior to the period of his administration. The family was clearly separate at the time of their acquisition and there is no evidence at all to show that the properties were acquired in part from the funds of the plaintiffs' side of the family.

The appeal fails on all the points raised and is dismissed with costs.

*Appeal dismissed.*

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LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 137 OF 1916.
June 13, 1917.
*Present*:—Mr. Justice Maung Kin.
MAUNG MA LA *alias* MAUNG PO SAING —APPELLANT
*versus*
MAUNG CHOT AND OTHERS—RESPONDENTS.

*Mortgage—Forfeiture, clause for, in default of redemption within given time—Transfer of Property Act (IV of 1882), s. 60—Clog on equity of redemption.*

The rule of English Equity Courts which forbids any clogging of the right of redemption is not applicable in India and a clause for forfeiture in a mortgage should be given effect to in the absence of any specific law or of any established practice to the contrary. [p. 863, col. 2.]

*Maung Naung* v. *Ma Bok Son*, 1 L. B. R, 192; *Pattabhiramier* v. *Vencatarow Naicken*, 7 B. L R. 136; 13 M. I. A. 560; 15 W. R. (P. C.) 35; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 E. R. 660; *Thumbusawmy Moodelly* v. *Hossain Rowthen*, 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. S.) 1 (P. C.), followed.

Mr. *Ba U*, for the Appellant.
Mr. *Ba Dun*, for the Respondents.

JUDGMENT.—The mortgage in this case cannot be held to be a usufructuary mortgage. It is a mortgage like that in *Maung Naung* v. *Ma Bok Son* (1), where according to the terms thereof the relationship of mortgagor and mortgagee is first created but made subject to a clause to the effect that if the mortgagor did not redeem within a certain time therein specified, the mortgagee would be entitled to outright ownership of the land. In that case Sir Charles Fox said, "If section 60 of the Transfer of Property Act were applicable, or if the decision had to be according to the rules of Equity as administered by the English Chancery Courts, this last clause would have to be held to be invalid". That section did not apply. And the learned Judge, therefore, followed the Privy Council cases of *Pattabhiramier* v. *Vencatarow Naicken* (2) and *Thumbusawmy Moodelly* v. *Hossain Rowthen* (3), in which it was held that the rule of English Equity Courts which forbids any clogging of the right of redemption is not applicable in India, and that a clause for forfeiture in a mortgage should be given effect to in the absence of any specific law to the contrary or of any established practice, and Sir Charles Fox proceeded to hold that the clause rendered the mortgagee's interest in the land become absolute by the mere failure of the mortgagor to redeem within the stipulated time.

(1) 1 L. B. R. 192.
(2) 7 B. L. R. 136; 13 M. I. A; 560; 15 W. R. (P. C.) 35; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 E. R. 660.
(3) 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. S.) 1 (P. C.)

SAIYIDUDDIN *v.* AVADH BEHARI SINGH.

Before me it is contended by Mr. Ba Dun that as the Transfer of Property Act applies to the district where the land in dispute is situate, the above ruling does not apply. But the fact is that in regard to mortgages of immoveable property only section 59, which relates to the subject of how such mortgages should be made, has been extended. Even section 58 which defines a mortgage of immoveable property and specifies and defines certain well known mortgages has not been extended. What matters really in this case is section 60. If it has been extended the clause must be held to be invalid, for that section means that where there is a mortgage there is an equity of redemption which the mortgagor cannot contract himself out of; it is not prefaced with the words "in the absence of a contract to the contrary", thus indicating that the mortgagor will have the right to redeem even in spite of express terms contained in the mortgage to the contrary. The section has not been extended to Lower Burma outside of certain towns. The general law propounded in the above Privy Council cases must, therefore, prevail.

The appeal is allowed with costs.

*Appeal allowed.*

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PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 1086 OF 1916.
June 7, 1917.
*Present*:—Mr. Justice Atkinson and
Mr. Justice Jwala Prasad.
*Babu* SAIYIDUDDIN AND ANOTHER—
DEFENDANTS—APPELLANTS
*versus*
*Babu* AVADH BEHARI SINGH AND
ANOTHER—PLAINTIFFS—RESPONDENTS.

Res judicata—Malikana, *suit for recovery of—Limitation Act (IX of 1908), Art.* 131, *scope of.*

Where the plaintiffs' claim for *malikana* is established by suit, its denial by the opposite party in a subsequent suit is barred by *res judicata*. [p. 865, col. 2.]

Article 131 of the Limitation Act means no more than this that if a party entitled to claim *malikana* is refused the enjoyment of his right after demand, he must establish his right by suit brought within twelve years from the date of such refusal. The Article does not apply where the plaintiff has already in a former suit obtained a decree declaratory of his title. [p. 865, col. 1.]

Appeal from a decision of the District Judge, Monghyr.

Messrs. *Sultan Ahmed Rajendra Prasad* and *Syed Muhammad Tahir*, for the Appellants.

Mr. *Surendra Mohan Das*, for the Respondents.

JUDGMENT.—The plaintiffs seek in this action to recover a sum of Rs. 75-8-0 by way of principal and interest from the defendants as a personal debt. The money claimed is represented to be *malikana* money payable out of the defendants' property to the plaintiffs and the years in respect of which the said *malikana* is claimed are 1315 to 1318 inclusive. Both the lower Courts have decreed the plaintiffs' suit.

In second appeal it is argued before us that the plaintiffs' right to recover the *malikana* money is barred on two grounds, *viz.*, that in the first place no right to claim *malikana* from the defendants ever in fact existed; and that in the second place even if it did exist, it has never been recognized.

The learned Government Advocate, who appears on behalf of the defendants, has addressed a very lengthy and elaborate argument to us; but after carefully considering it we are satisfied that his argument is unfounded. He contends that Article 131 of the Limitation Act applies and that the period within which an action for a periodically recurring right must be brought is twelve years from the date when the plaintiff is first refused the enjoyment of the right.

It appears that in the year 1877 the plaintiffs sued to establish their right to recover from the defendants the *malikana* they claim. The written statement filed in that suit on behalf of the predecessors of the present defendants denied the plaintiff's right to this *malikana*; but notwithstanding that denial the Court declared the right and established the plaintiffs' claim. It

is now contended that inasmuch as the defendants or their representatives-in-interest filed that written statement in 1877, the right of the plaintiffs must be deemed to have become extinguished on the expiry of twelve years from that date. In our opinion Article 131 bears no such meaning as is contended for. That Article means no more than this; that if a party entitled to claim *malikana* is refused the enjoyment of his right after demand, he must establish his right by suit brought within twelve years from the date of such refusal. In this case the plaintiffs brought a suit to establish their right and as between them and the present defendants the right has been established and the decree in that suit is *res judicata* between the parties. The case reported as *Gopinath Chobey* v. *Bhugwat Pershad* (1) clearly lays this down. In a suit for *malikana* the issue between the parties substantially raises the question of the proprietary right to the estate in respect of which *malikana* is claimed, and when the question of the proprietary right has been decided in a previous suit between the same parties, a subsequent suit for *malikana* will be barred as *res judicata*. Subsequent suits were brought in 1882 and 1894, all upon the basis that the right to claim *malikana* existed and the suits were for the recovery of a money demand based on that right. The case reported as *Roaji* v. *Bala* (2) also demonstrates that the construction which we have put upon section 131 is the true and right construction. At page 141 of the report their Lordships say: "Article 131, Schedule II, of Act IX of 1871, requires a plaintiff, who seeks to establish a periodically recurring right, to bring his suit within twelve years from the date when he was first refused the enjoyment of his right. If such plaintiff were to allow this period to elapse, without suing to establish his right, he could not be allowed indirectly to accomplish the same object by bringing a suit for arrears falling due within the period of limitation. But while this is the rule, which must be applied to cases in which a plaintiff must establish his title, before he can ask for arrears accruing due under such title, it does not appear to us that the same rule applies, when, as in the present case, the plaintiff has already in a former suit obtained a decree declaratory of his title." This ruling was applied and followed in Calcutta by Mr. Justice Mukherji.

In the present case we are not concerned with the effect of Article 131, inasmuch as the plaintiffs' right has already been declared by the decree obtained in 1877 and that decree is *res judicata* as between the plaintiffs and the defendants. The plaintiffs are, therefore, clearly entitled to recover the amount they claim. They are entitled to recover from the defendants the sum of Rs. 75 8-0 which represents the arrears of *malikana* for three years preceding the institution of the suit, which was instituted on the 20th of September 1910. Accordingly the decision of the lower Appellate Court is affirmed, and the plaintiffs' suit is decreed and the appeal is dismissed with costs.

*Appeal dismissed.*

(1) 10 C. 697; 5 Ind Dec. (N. S.) 468.
(2) 15 B. 135; 8 Ind. Dec. (N. S.) 91.



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CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 495, AND 544 OF 1914 AND NOS 268 AND 275 OF 1915.

April 3, 1917.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

SRIMATI SYAM PEARY DASSYA WIDOW OF MADHUSUDAN DASS, AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

*versus*

THE EASTERN MORTGAGE AND AGENCY COMPANY, LTD., AND OTHERS—RESPONDENTS.

*Mortgage*—Pardanashin *lady, deed executed by—Proof—Clause restraining alienation by mortgagor, operation of—Necessity—Reversioners, consent of, value of—Presumption—Charge, whether can be created without specific description of property—Transfer of Property Act (IV of 1882), s. 58—"Specific immoveable property"—Contract Act (IX of 1872), s. 74—Penalty—Stipulation to pay interest at higher rate on default*

SYAM PEARY DASSYA *v.* EASTERN MORTGAGE & AGENCY CO., LTD.

*of payment of lower rate—Court, power of, to give relief —Mortgage suit—Paramount title, whether can be gone into.*

In considering the question whether there was intelligent execution of a deed by a *pardanashin* lady, the circumstances under which the transaction took place should be borne in mind. [p. 869, col. 2.]

The mere translating the deed or communicating the substance thereof to the *pardanashin* lady is not sufficient. [p. 870, col. 1.]

To make it binding upon her it must be shown that the deed was interpreted and explained to her. [p. 870, col. 2.]

Where a deed of English mortgage written out in English was read out and explained to a *pardanashin* Hindu widow before she executed it in the presence of her own people, and the reversionary heirs witnessed the execution and were consenting parties to it:

*Held*, that the deed was binding upon the lady. [p. 871, col. 2.]

The clause restraining alienation of the mortgaged property, which is generally inserted in mortgage bonds in this country, does not prevent alienation subject to the rights of the mortgagee. [p. 870, col. 2.]

The consent given by the reversioners to a mortgage executed by a Hindu widow raises a presumption of the existence of legal necessity, even where a sum of money is paid to one of the reversioners for obtaining his consent. [p. 872, col. 2; p. 873, col. 1.]

Where the operative part of an *ekrarnama*, executed by a person in whose favour a lady released her claim to a certain share of a property, stated that the lady was to get an annuity from the said share and was entitled to recover it by suit from the share:

*Held*, that the annuity was made a charge upon the share, even though there was no specification of the property in the schedule attached to the *ekrarnama*, as the property was easily ascertainable without such schedule. [p. 874, col. 1.]

There is no reason why a general description of the property should be held not to constitute a charge if the description, though wide, is not uncertain. [p. 874, col. 1.]

The question whether a charge was or was not created upon a certain property is one of intention. In equity no charge can be created unless there is an intent to charge. [p. 875, col. 1.]

*Semble.*—Difficulty might arise in the case of a mortgage from a general description of the mortgaged property, as a mortgage under section 58 of the Transfer of Property Act must be of "specific immoveable property." [p. 875, col. 1.]

A stipulation to pay interest at a higher rate on default of punctual payments of interest at a lower rate is a penalty. But in the converse case, *i. e.*, where the stipulation is for a certain rate of interest which would be reduced to a lower rate, if punctually paid, the stipulation for the higher rate would not be treated as a penalty, although if the question were *res integra* there is no reason why the stipulation for the higher rate of interest should not be regarded as a penalty in both cases. [p. 877, col. 1.]

Section 74 of the Indian Contract Act does away with the distinction between penalty and liquidated damages, and under the section, as amended by Act VI of 1899, the Court has the power to grant relief if the contract contains any stipulation by way of penalty, even where the contract was entered into before the amendment by Act VI of 1899. [p. 877, col. 2.]

Where a mortgage-deed stipulated for the payment of interest at 9½ per cent. to be reduced to 7½ per cent. on punctual payment, but the scheme for liquidation of the mortgage debt, which was a material part of the deed, showed that interest was calculated at 7½ per cent. only:

*Held*, that, as it appeared from the construction of the mortgage deed taken together with the scheme that the intention of the parties was that interest should be paid at 7½ per cent. and on default at 9½ per cent., the mortgagees could not recover interest at more than 7½ per cent. but that they were entitled to reasonable compensation for non-payment of interest punctually—which compensation would be interest at 7½ per cent. on the interest which was not punctually paid. [p. 877, col. 2.]

In a suit upon a mortgage no question of title paramount to the mortgaged property should be gone into. [p. 888, col. 1.]

IN NOS. 267 & 268 OF 1915.

**Appeals against the decrees of the Subordinate Judge, first Court, Dacca, dated the 13th March 1915.**

IN NOS. 495 & 544 OF 1914.

**Appeals against the decrees of the Subordinate Judge, first Court, Dacca, dated the 25th May 1914.**

Sir *Rash Behary Ghose*, Dr. *Sarat Chandra Basak* and Babus *Basanta Kumar Bose*, *Bipin Behary Ghose*, *Surendra Nath Ghosal*, *Suresh Chandra Das* and *Satish Chandra Chowdhury*, for the Appellants.

Mr. *B.C. Mitter* and Babus *Provash Chandra Mitter* and *Ambika Pada Chowdhury*, for the Respondents.

JUDGMENT.—These appeals arise out of two suits instituted by the Eastern Mortgage & Agency Company, Limited, on the basis of two separate mortgages executed by one Priomoyee Dasi and Mohini Mohan Das respectively. Appeal No. 495 of 1914 is against the preliminary decree in the suit to enforce the mortgage executed by Priomoyee Dasi and Appeal No. 268 of 1915 is against the final decree in that suit, while Appeal No. 544 of 1914 is against the preliminary decree in the suit to enforce the mortgage executed by Mohini Mohan Das and Appeal No. 275 of 1915 is against the final decree in that suit.

The mortgaged properties originally belonged to one Modusudan Das, who died in April 1865 leaving his widow Sham Peary

Dasi the defendant No. 1 in the suits and five sons Mohini Mohan, Radhika Mohan, Lal Mohan, Khetra Mohan and Shosi Mohan, Shosi Mohan died unmarried and intestate on the 1st October 1865 and his one-fifth share thereupon devolved upon his mother Sham Peary. By an *ekrar*, dated the 29th September 1877, Sham Peary gave up the share inherited by her in favour of her sons, the document being executed in favour of Mohini Mohan who was the executor of the estate, for natural affection and in consideration of his paying an annuity of Rs. 1,800 a year, Mohini Mohan also executing an *ekrar* in her favour. One of the questions raised in the case is whether the said annuity is a first charge upon the said share. Mohini Mohan, whose original share was increased to a four annas by the surrender by Sham Peary, subsequently acquired the four-annas share of Khetra Mohan so that his total share became 8 annas. The third brother, Lal Mohan, died on the 18th December 1885 and his four-annas share was inherited by his widow, Priomoyee. The second brother Radhika Mohan had a four-annas share, but this litigation has nothing to do with that share.

On the 22nd September 1890, Mohini Mohan executed a mortgage in favour of the Eastern Mortgage & Agency Company, Limited, (who may be conveniently referred to as the Company) for Rs. 2,50,000, mortgaging his eight-annas share and executed a deed of management of the property in favour of Messrs. Garth & Weatherall, through whom the loan was raised. On the 7th November 1890 Priyomoyee executed a mortgage for Rs. 1, 20,000 in favour of the said Company in respect of her four-annas share.

The main provisions of the mortgage deed are that the deed is to be construed as an English mortgage as defined by the Transfer of Property Act, 1882, and the mortgagees shall have and exercise all the rights and remedies of an English mortgagee expressly including the power of sale, that the interest is to be at the rate of $9\frac{1}{2}$ per cent. payable half yearly, but that on punctual payment interest would be charged at the rate of $7\frac{1}{2}$ per cent., that until the mortgagees entered into possession the mortgaged properties shall be managed entirely (and without any interference whatever by the mortgagor) by Messrs. Garth & Weatherall so long as they fulfilled the terms and conditions, in the event of the death, resignation or dismissal of either of them by the survivor of them or failing such survivor by another duly qualified manager to be nominated by the mortgagees, the manager to have the fullest powers for the proper management and improvement, including the power to appoint and dismiss all servants and to make settlements with *raiyats* and farmers and to give leases and to institute and conduct and defend suits and will not be liable to dismissal except for misconduct or neglect of duty proved to the satisfaction of the mortgagees. The mortgagor shall not in any event execute any documents for the sale, mortgage or permanent lease or other alienation of any part of the mortgaged properties without the written concurrence of the mortgagees, "it being the intention of the parties and being of the essence of the negotiation for the grant of the said loan that the mortgagor shall in no way interfere with the management of the mortgaged premises." The managers in the first place were to pay the Government revenue and other outgoings, and in the second place to pay to the mortgagees interest at the times stated and in the third to pay all proper costs and charges for management and realization of rents and auditing and scrutinizing by professional auditors chosen by the mortgagees (if they think necessary) and in the fourth place to pay Rs. 2,400 to the mortgagor. The managers shall render to the mortgagee such accounts and information and such statements as to rent roll, etc., as may be called for by the mortgagees. If the manager for the time being fails to apply any part of the rents and profits in the manner provided by the deed the mortgagees may appoint (upon such salary or remuneration and with such powers of management as they shall think proper) such person as they in their absolute discretion shall think fit to be Receiver, and the mortgagees at their absolute discretion may from time to time suspend, remove or dismiss any Receiver and appoint another Receiver in his place. The power to appoint a Receiver shall not prejudice or affect any of the rights or remedies of the mortgagees as mortgagees and they shall not be liable for any loss or misapplication of the rent and profits by reason of any default, neglect or misappro-

priation of any manager or Receiver, and any Receiver, appointed as aforesaid, shall be forthwith discharged by the mortgagees and the property shall be again managed as hereinbefore provided by a manager upon the mortgagor making good the deficiency on default in consequence of which the Receiver was appointed and upon the mortgagor paying all the expenses incurred in connection with the appointment and during the employment of the Receiver.

A scheme was prepared for the liquidation of the debts and set out in the schedule, according to which the principal and interest were to be paid off by the year 1317.

It is unnecessary to state the provisions of the mortgage bond executed by Mohini Mohan Das except that they were similar.

A deed of management was simultaneously executed by Priyomoyee giving full powers of management to Messrs. Garth & Weatherall; the terms being similar to those of the deed of management executed by Mohini Mohan Das on the 22nd September 1890.

Subsequently a deed of trust was executed by Priyomoyee Dasi on the 7th April 1897 in favour of Messrs. Garth & Weatherall for the better management of the properties. The property was accordingly managed by Messrs. Garth & Weatherall, and for a few years payments were made by them of the principal and interest as provided in the scheme, then the payments became less. The sum of Rs. 2,400 which was to be paid to Priyomoyee was paid until the year 1898 and was then stopped. On the 10th February 1898 a deed of endowment was executed by Priyomoyee in favour of a deity (Pryabullas) by which certain property was dedicated to it, and on the 14th December 1902 by a second deed of endowment certain other properties were dedicated by her to the deity. She died on the next day, the 15th December 1902.

Mr. Garth died on the 16th June 1904 and on his death the property was managed by Mr. Weatherall. He left for England on the 13th April 1908 and obtained a release on the 26th November 1908 from Sham Peary Dasi in consideration of Mr. Weatherall undertaking to appoint one Mr. Lockhart as trustee in his place. Mr. Lockhart was allowed to manage her estate and he remained in possession as manager in succession to Mr. Weatherall.

Priyomoyee died on the 15th December 1902 and Mohini Mohan died on the 28th December 1896 and thereupon their shares devolved upon Sham Peary, the mother of Mohini Mohan.

The suits upon the two mortgages were brought by the Company against Sham Peary as defendant No. 1 and Motilal Das, son of Khetra Mohun Das and who as the reversionary heir was joined as the defendant No. 2. The suits were decreed by the Court below, and the defendants have appealed to this Court.

The questions raised in the appeal which arises out of the suit upon Priyomoyee's mortgage are: 1*st*, whether there was intelligent execution of the mortgage deed and the deed of management by Priyomoyee and had she independent advice in the matter: 2*nd*, was the deed of mortgage properly attested within the meaning of section 59 of the Transfer of Property Act: 3*rd*, whether there was legal necessity for Rs. 25,000 out of the one lac and twenty thousand raised upon the mortgage: 4*th*, whether the annuity of Rs. 1,800 a year in favour of Sham Peary is a charge upon the 4 annas share of the mortgaged properties: 5*th*, whether the stipulation to pay interest at $9\frac{1}{2}$ per cent, in case the interest was not paid punctually, is or is not a penalty: 6*th*, whether Messrs. Garth & Weatherall were the agents of the mortgagor or the mortgagees and whether it is competent to a mortgagee in this country to nominate and appoint an agent to manage the mortgaged premises for the purpose of relieving himself from the liability to which a mortgagee is subject when he enters into possession of the mortgaged properties. The last three questions are common to both the suits.

The *first* question for consideration, therefore, is whether there was intelligent execution of the mortgage deed and the deed of management by Priyomoyee and had she independent advice. The mortgage-deed was executed in the presence of Kunja Behary Das the maternal uncle of the lady and Mohini Mohan Das her brother-in-law, and it was read over and explained to her by Babu Iswar Chandra Ghose, Pleader. The document bears an endorsement by Mohini Mohan Das and Khetra Mohan Das the

then reversioners, who gave their consent stating that the arrangement was necessary.

In considering these transactions the circumstances under which they took place should be borne in mind. Both Priyomoyee and Mohini Mohan Das had debts due for very large amounts to Ruplal and Raghunath Das, the amount due by Priyomoyee being Rs. 95,000 and that due by Mohini Mohan about Rs. 2,50,000. Mohini Mohan had borrowed Rs. 2,50,000 from the plaintiff Company through Messrs. Garth & Weatherall only two months before and he had to pay a commission of 10 per cent. to those gentlemen for raising the loan. He had appointed them as managers of the estate which was mortgaged on certain terms. Ruplal and Raghunath Das had obtained a decree against Priyomoyee and proceedings in execution were pending. She tried to raise money elsewhere but did not succeed. It appears that under these circumstances her uncle Kunja Behary asked Mohini Babu to procure advance of money from the plaintiff Company, and Mohini Babu said that he could induce the plaintiff Company to advance money on conditions on which he himself had borrowed money from the Company. Those conditions were that 10 per cent. of the money borrowed from the Company was to be paid to Messrs. Garth and Weatherall who would manage the estate, the interest payable being $9\frac{1}{2}$ per cent. to be reduced in case of punctual payment to $7\frac{1}{2}$ per cent. The evidence shows that Priyomoyee then called in her cousin Babu Debendra Nath Das (a Pleader), her *Dewan* Bhagawan Ghose and Kunja Babu her maternal uncle and after consulting them settled to borrow money from the plaintiff Company on such conditions. Afterwards Messrs. Garth & Weatherall and Mohini Babu came to the house of Priyomoyee and she offered to borrow Rs. 1,20,000 from the plaintiff Company. Two drafts, one of the mortgage deed and the other of the deed of management, were then sent by Messrs. Garth & Weatherall to the lady. They were practically on the same terms as those executed by Mohini Mohan, the only difference being that out of the balance of the profits of the property Rs. 2,400 a year were to be paid to the lady whereas in the case of Mohini Mohan, the balance of the profits was to be divided half and half between him and Messrs. Garth & Weatherall. Mohini Mohan appears to have been a leading banker at Dacca. He was an adult male and mixed in European and Indian societies. If he could not raise the loan on better terms, it is not to be expected that the lady could do so herself. It was under these circumstances that the documents were executed. The drafts were taken to Iswar Babu who was one of the leading Pleaders of Dacca and was her legal adviser. He "touched up" the drafts, and interpreted them in Bengali to the lady. We do not think that the case of *Annoda Mohun Rai Chowdhri* v. *Bhuban Mohini Debi* (1) relied upon on behalf of the appellants applies to the present case. In that case the mortgage bond was read out fluently (*i. e.*, without stopping anywhere) to a *purdanashin* lady and there was no evidence to show that the document was explained to her at all. In the present case the drafts (which are in English) were interpreted to Priyomoyee by reading 2 to 4 lines at a time, and it took about 3 hours to do so. Ten or twelve days afterwards the deeds were executed when they were again explained to her by giving out the substance of each of the deeds in Bengali. She was surrounded by her own people. There was, as already stated, her relation Babu Debendra Nath Das (a Pleader, banker and *zemindar*), and Kunja Behary her maternal uncle was also there and these two gentlemen used to look after her affairs. Her old servant Ganga Narain was also there. Babu Iswar Chandra Ghose, a Pleader of the family, advised her and explained the drafts and the deeds to her, and the reversionary heirs Mohini Mohan and Khetra Mohan were present at the execution of the deeds and were consenting parties to the arrangement. It is true that Babu Iswar Chandra was the Pleader of Mr. Garth also, and it is urged that he was not a proper person to advise the lady. It would have been better had some other Pleader been engaged for the purpose But as we have said, the terms were almost the same as those of the deeds executed by the lady's brother-in law Mohini Mohan. Then, again, the lady had only a widow's interest in the estate. Mohini Mohan and Khetra Mohan

(1) 28 C. 546; 11 M. L. J. 164; 28 I. A 71; 5 C. W. N. 489; 3 Bom. L R. 386; 8 Sar. P. C. J. 58 (P. C.),

were the reversionary heirs and it was certainly their interest to protect the estate which would ultimately come to them or to their heirs. They gave their consent and the consent is endorsed on the documents themselves. It is true the lady consented to the draft being adopted on the Pleader Iswar Babu assuring her that the deeds would not prejudice her. But having regard to the fact that her brother-in-law Mohini Mohan had already entered into a similar arrangement, and no better arrangement could be secured elsewhere, the Pleader cannot be said to be wrong in saying what he said to the lady. The Pleader told the lady that the properties would come back to her by 1317. That no doubt was the expectation of the parties, but it was nothing more than this, that according to the scheme the debt due would be paid off by 1317, there was no guarantee that she would get back the property if for any miscalculation or untoward circumstances, the debt was not paid off by 1317. We will presently refer to what the lady said in later documents on the point. It is contended, however, that there is nothing to show that the Pleader Iswar Babu explained to Priyomoyee, a young *pardanashin* lady, the position in which she was placing herself, that she could not dismiss Messrs. Garth & Weatherall, however fraudulent their conduct might be, unless the mortgagees were satisfied of such misconduct, that the mortgagees would not be accountable for any loss which might be due to the default or misconduct of Messrs. Garth & Weatherall and that such loss would fall upon herself; there is also nothing to show that the attention of the lady was drawn to the clause in the mortgage bond that a Receiver could be appointed with such powers of management as the mortgagees thought proper, nor is there anything to show that the Pleader told her that the power of sale and the clause restraining alienation of the property by the mortgagor was void in law.

It is no doubt true that the mere translating deeds or communicating the substance thereof to a *purdanashin* lady is not sufficient. But the evidence shows, as stated above, that the drafts were interpreted and explained to her by the Pleader Iswar Babu. The powers given to Messrs. Garth & Weatherall and the liabilities of the parties concerned were expressly stated in the deeds, and if they were properly interpreted and explained (and there is no reason to think that they were not) the lady became aware of the provisions. The clause restraining alienation of the mortgaged property is generally inserted in mortgage bonds in this country, though of course it does not prevent alienation subject to the rights of the mortgagee.

The question of intelligent execution has been raised 24 years after the execution of the deeds. The Pleader who explained the deeds to the lady, Kunja Behary, her uncle and the reversionary heirs, Mohini Mohan and Khetra Mohan, are all dead. At this distance of time it cannot be expected that the witnesses should remember the details of what the Pleader stated to the lady and the witnesses Debendra Nath and Ganga Narain do not remember the words which the Pleader Iswar Babu used in interpreting the drafts or giving out the substance of deeds and are unable to give the details. But even assuming that the Pleader had not drawn the attention of the lady to all the provisions of the deed and to the precise position in which she was placing herself by appointing Messrs. Garth & Weatherall nominated by the mortgagees on the conditions stated in the mortgage deed and the deed of management, we do not think, having regard to the fact that her own brother-in-law Mohini Mohan had under similar circumstances to raise money by executing a mortgage and a deed of management on practically the same terms, that the Pleader's advice on the matters referred to above would really have made any difference in the result.

No doubt it is difficult to explain an English mortgage specially to a *purdanashin* lady, and had the deeds of mortgage and management stood alone, there might be force in some of the arguments addressed on behalf of the appellants, and we might have attached more importance to the fact that the lady agreed to the arrangement on her being assured that the estate would come back by 1317. But there are subsequent documents executed by the lady and they leave no room for doubt that she was aware of her position under the deeds. In 1897 she executed a deed of trust (Ex-

hibit 7) in favour of Messrs. Garth & Weatherall (by which the deed of management was revoked), in which the deed of mortgage was referred to. The trust deed, which fully set out the powers of management given to those gentlemen and which were more extensive than those given in the deed of management, was interpreted and explained to her by the Pleader Iswar Babu and the witness Kalidyal Ghose. This document, however, was also in English and is an elaborate one. But then she executed a deed of endowment on the 10th February 1903, *i.e.*, about eighteen years after the deeds of mortgage and management were executed, there is a recital in it of the circumstances under which deeds of mortgage and management were executed. Then again, in Exhibit 2 (another deed of endowment) executed by the lady on the 24th December 1902, that is 12 years after the mortgage, there is also a recital of the arrangement entered into under the deeds of mortgage and management. It is stated in the latter deed that "if no untoward circumstance intervened" the entire debts of her husband would have been liquidated in a short time and under that impression she had placed the management of the properties in the hands of two European gentlemen; but that "unfortunately on account of various adverse circumstances intervening in the management of the properties" the allowance granted for her maintenance had been stopped since 1898. It appears, therefore, that although the money payable under the mortgage had not been paid as stipulated in the mortgage deed, and although her own allowance had been stopped for several years, there was no complaint in either of the said two documents that she had executed the deeds of mortgage and management without properly understanding them. On the other hand, they go to show that the lady was fully aware of the arrangement made by the deeds of mortgage and management. These two deeds of endowment were in the Bengali language. There is evidence to show (and the evidence is one-sided) that they were read over and explained to her and she had the advice of her maternal uncle Kunja Behary and her relations and servants when she executed them. Babu Ananda Charan Roy, another leading Pleader of Dacca, appears to have been consulted in connection with the deed of endowment Exhibit 11. There is an endorsement on the deed by Khetra Mohan Das the then sole reversioner, which runs as follows:—"Having learnt and understood the contents of this deed with the advice of my well-wishers and friends and on a full consideration of my personal interests I give my full consent to this gift." It was attested by the Pleaders Iswar Babu and Debendra Babu besides four other Pleaders and several other persons, and Exhibit 12 the second deed of endowment was also attested by Pleaders Debendra Nath and Ananda Chandra, her servant Radha Ballav, her maternal uncle Kunja Behary and several other persons. It is true the lady died the day after she executed the deed of endowment Exhibit 12, but no case was made in the Court below that she did not understand the contents of the deed. The lady died in 1902, so that she lived for twelve years after the execution of the mortgage. During all these years the deeds of mortgage and management were never challenged by the lady. On the contrary their validity was recognized by her in the deeds of endowment. Not only is that so, but the defendant No. 1 Sham Peary Dasya herself never challenged it before the present suit. Having regard to all these circumstances, we are of opinion that the *first* contention on behalf of the appellants must be overruled.

The *next* question is whether the deed of mortgage was properly attested within the meaning of section 59 of the Transfer of Property Act. The deed bears the names of Mohini Mohan Das and Kunja Behary Das as attesting witnesses and there is an attestation clause which runs thus:—"Signed, sealed and delivered by the above-named Srimati Priyomoyee Dassi in the presence of Kunja Behary Das and Mohini Mohan Das, and after the deed was read and explained by Babu Iswar Chandra Ghose, Pleader, she being identified also by them, Mohini Mohun Das, Kunja Behary Das." Both Mohini Mohan and Kunja Behary are dead. Babu Debendra Nath Das (Pleader) a cousin of Priyomoyee, in whose presence she executed the deed, has been examined on behalf of the plaintiffs. It is true he is not an attesting witness but he says that both

Mohini Mohan and Kunja Behary were present when Priyomoyee affixed her signature on the deed. We are referred to a passage in his cross-examination where he said, "Priyomoyee was in a south room where we all including Iswar Babu were, while he read the Exhibit 5 and gave out its purport somebody took the Exhibit 5 inside the south room and she signed it in my presence and in the presence of some others whom I forget." It is contended on behalf of the appellant that as the witness says that she signed the deed in the presence of "some others" whose names he has forgotten, there is no evidence that she signed it in the presence of Mohini Mohan and Kunja Behary. A few lines after that, however, the witnesses says, "Mohini Babu and Kunja Babu signed the Exhibit 5 as its witnesses in the room in which we all sat." And the witness in his examination-in-chief is positive in his statement that Priyomoyee signed the mortgage bond in the presence of Mohini Mohan, Kunja Behary and himself. The words "some others" must, therefore, be taken to refer to some persons other than Mohini Mohan and Kunja Behary. We are also referred to the evidence of Ganga Narain Bose where he stated, "Kunja Babu and Debendra took the deeds inside the room in which Priyomoyee was, to secure her signature thereon. Priyomoyee signed the mortgage deed at that time.....Iswar Babu, Kunja Babu and Mohini Babu signed the mortgage deed as its attesting witnesses." It is contended that both the attesting witnesses Kunja and Mohini Mohan cannot be said to have been present when she signed the mortgage deed. But there is the positive evidence of the Pleader Debendra Babu, and having regard to the distance of time at which the witnesses were giving their depositions no better evidence on the point could reasonably be expected. There is no specific plea taken in the written statement that there was no proper attestation of the mortgage deed; but the sixth paragraph thereof in which the defendant put the plaintiff to prove the due execution of the mortgage may cover such a plea. However, having regard to the evidence adduced, we think it sufficiently proved that the mortgage deed was attested by the two witnesses Mohini Mohan and Kunja Behary.

The *third* contention raises the question whether there was legal necessity for the whole amount. Legal necessity to the extent of Rs. 95,000 is admitted, that being the debt which was due under a bond executed by the husband of the lady in favour of Ruplal and Raghunath Das; and the said debt was paid off out of the consideration for the mortgage bond advanced by the plaintiff Company. The only question, therefore, is whether there was necessity for the balance namely Rs. 25,000. The evidence shows that out of one lac and twenty thousand Mr. Garth deducted his commission Rs. 12,000 and paid the balance of Rs. 1,03,000 to Kunja Babu, the uncle of the lady. So there remains Rs. 13,000 to be accounted for. The mortgage deed in reciting the necessity for the loan refers to the debt created by the husband of the lady and "also certain other moneys due to Sreemuty Syam Peary Dassya, the mother of the late Babu Lal Mohan Das, and which are the first charge upon the said estate." It is contended on behalf of the appellant, first, that it is not shown that it was absolutely necessary for the lady to pay a commission of Rs. 12,000 to Mr. Garth for raising the loan; and, secondly, that there were, in fact decrees obtained by Syam Peary which the lady had to pay and they were, in fact, paid out of the consideration. In dealing with the question of legal necessity, however, we must bear in mind that the then reversioners Mohini Mohan and Khetra Mohan gave their full consent to the mortgage. There is an endorsement on the mortgage bond which runs as follows:—"We, Mohini Mohan Das and Khetra Mohan Das, both having reversionary interest in the estates set out in the schedule above written and being fully cognisant of the terms of the above mortgage deed, hereby notify that we consent to the same as being an arrangement necessary for the saving of the estate from sale and we agree to abide by the terms thereof," and the execution of this note was admitted by them before the Registrar. The consent given by the reversioners would certainly raise a presumption of the existence of the necessity [see *Debi Prosad Chowdhry* v. *Golap Bhagat* (2)]. In the recent case,

(2) 19 Ind Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

*Hari Kishen Bhagat* v. *Kashi Parshad Singh* (3), the Judicial Committee observed that the requirement of the law that an alienation by a Hindu widow must be proved to have been made by her for valid and legal necessity, (the onus of proving which rests heavily on the alienee) may be fulfilled by proving the consent or concurrence of the reversioners to the transaction, which consent, however, must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests."

It is pointed out that Rs. 500 was paid to Khetra Mohan for obtaining his consent. But the mere fact that Rs. 500 was paid to one of the reversioners does not, we think, rebut the presumption as to existence of the legal necessity arising from the consent given by reversioners. So far as the payment of Rs. 12,000 to Mr. Garth is concerned, we do not think it can be contended that there was no necessity for such payment. Mohini Mohan, the brother-in-law of the lady, only two months before raised a loan of Rs. 2,50,000 through Messrs. Garth & Weatherall and he had to pay 10 per cent. commission to them. If Mohini Mohan had to pay that commission, it cannot be expected that the lady could raise the loan on payment of commission at a lower rate. The 10 per cent. commission, it must be remembered, included the costs of stamps, registration and other incidental expenses. However that may be, we think that, in the circumstances, it cannot be said that there was no necessity for payment of the sum of Rs. 12,000 as commission. Then as to the payment of the decrees of Shyam Peary, it is true that the copies of the execution proceedings have not been produced. But the plaintiffs have proved that the records of the execution cases brought by Shyam Peary had been destroyed, and were not in existence. The plaintiffs have also examined Ganga Narain Bose who was in the service of the lady, and he stated that Shyam Peary obtained five or six decrees for her maintenance against her sons or their representatives and that she had realised all the debts from Priyomoyee, Rs. 3,300 or 3,400. Rupees 1,500 and 1,600 were paid to Shyam Peary in satisfaction of two decrees in his presence out of the moneys borrowed on the mortgage bond. It was the defendant Shyam Peary to whom these payments are said to have been made. Her servant Radha Bullav was actually present in Court and looking after the case on her behalf. But he was not examined nor any account books produced by her to show that the moneys were not paid to her in satisfaction of her decrees for maintenance. The *ekrarnama*, Exhibit A, dated the 29th September 1877 shows that Rs. 150 per month was payable to Shyam Peary. It is more likely that she would proceed against her daughter-in-law and not against her son for realising the said annuity and the deed of endowment, Exhibit 11, executed by Priyomoyee states that Shyam Peary had obtained decree for a large sum of money due to her on account of her allowance against Mohini Mohan and others and was about to recover the money by executing it against herself alone. Having regard to the fact that the moneys due to Shyam Peary were recited in the mortgage bond as "immediate, pressing necessity" and that the reversioners who had full knowledge of the terms gave consent to it as an arrangement necessary for saving the estate from sale, we think the evidence adduced on behalf of the plaintiff is sufficient for proving legal necessity. Then, in the release, dated the 26th November 1908, executed by Shyam Peary herself in favour of Mr. Weatherall, there is an admission that Priyomoyee obtained a loan of Rs. 1,20,000 from the plaintiff. There is a similar statement in the agreement executed by her in favour of Mr. Lockhart on the same day. Radha Ballav Das, her *am-muktear*, who was looking after the case on her behalf was a witness to the deed of release and the deed was drafted by Babu Ananda Chandra Roy, Pleader, at the instance of the said Radha Ballav. The fact that Rs. 1,08,000 (after deducting the commission to Mr. Garth) was paid to the lady was never challenged during the lifetime of Priyomoyee; on the contrary, it was admitted by her in subsequent documents and lastly by Shyam Peary herself in that deed of release. Having regard to the positive evidence and the circumstances, we think that the Court below is right in hold-

(3) 27 Ind. Cas. 674; 42 I. A. 64; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 C. 876 (P. C.).

ing that there was legal necessity for the entire amount advanced under the mortgage.

The *next* question is whether the annuity agreed upon to be paid to Shyam Peary is a charge upon the share of the estate which she inherited from her son Soshi Mohan. The *ekrarnama* executed by Mohini Mohan Das recites that there was some litigation over the said share, that she was intending to institute a regular civil suit for recovery of the share, and that she expressed her willingness to give up her claim to the share on receipt of a monthly allowance of Rs. 150 by executing a *ladani* to that effect. The operative part of the deed then states as follows :—"You shall receive Rs. 150 net during your lifetime from the aforesaid share, you shall not be able to make a gift, sale, *bai*, *heba*, of it. Myself and the succeeding executor shall pay you the aforesaid money every month and if I or they do not pay it you shall be entitled to recover it by suit from the share left by my aforesaid deceased brother."

It will be seen that the lady was to get the annuity *from the aforesaid share*, and entitled to recover it by suit from *the share*, and we have no doubt having regard to the terms of the deed that the annuity was made a charge upon the share. The only reason given by the learned Subordinate Judge for holding otherwise is that the property is not specified in the deed. But the property can be easily ascertained, and that being so, it does not matter that no schedule of property is given in the deed. In the case of *Ramsidh Pande* v. *Balgobind* (4), where the debtor had pledged all her "wealth and property" to her creditor, it was held that the maxim "*certum est quod certum reddi potest*" applied, overruling the contention that the property was not described by metes and bounds or by name.

The description is no doubt wide, but not uncertain. As pointed out by Cotton, L. J., in *Montague* v. *Earl of Sandwich* (5), "I think it is an established rule, that where the covenant is to charge the real estate, which can be ascertained by existing facts and circumstances, for example if there is a covenant to charge all the real estate which a man has at a particular time, that covenant will itself make a charge. But where the covenant is to charge, not all or any definite portion of a man's estate, but only that which is worth £1,000 a year, or which would be sufficient to secure £1,000 a year, then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards executed to give effect to the covenant; and it remains simply a covenant to be enforced as against the assets of the covenantor."

In some cases in our Court a general description of property has been held not to constitute a charge. See *Gunoo Singh* v. *Latafut Hossain* (6), *Najibulla Mulla* v. *Nusir Mistri* (7) and *Jagatdhar Narain Prasad* v. *A. M. Brown* (8). But in the first case there was merely a covenant not to alienate any property of the debtor until payment of the money advanced, and there were no expressions to indicate an intention to charge any property. In the second it was observed that a charge can only be created where specific property is mentioned. But as pointed out in the Tagore Lectures, 1876, at page 172 (foot note), "But this dictum seems to be based upon a misapprehension of a passage in Sugden's Vendors and Purchasers, to the effect that a covenant to convey and settle lands will not be a specific lien on the lands of the covenantor, a proposition which is deduced by the learned author from the case of *Mornington* v. *Keane* (9), where there was a covenant merely to settle lands of a particular value which, as pointed out by the Lord Chancellor, was a very different thing from a covenant to charge either the whole or a definite portion of a person's estate. But the decision itself may perhaps be supported on the ground that there was no intention on the part of the grantor to create any charge whatever on his property."

(4) 9 A. 158; A. W. N. (1887) 15; 5 Ind. Dec. (N. S.) 538

(5) (1886) 32 Ch. D. 525; 55 L. J. Ch. 925, 54 L. T. 502.

(6) 3 C. 336; 1 C. L. R. 91; 1 Ind. Dec. (N. S.) 801.

(7) 7 C. 196; 8 C. L. R. 454; 3 Ind. Dec. (N. S.) 675.

(8) 33 C. 1133; 10 C. W. N. 1010; 4 C. L. J. 121.

(9) (1858) 2 De G. & J. 292; 27 L. J. Ch. 791; 4 Jur. (N. S.) 981; 6 W. R. 434; 44 E. R. 1091; 119 R. R. 134.

In the third case the bond stated that if the creditor failed to repay the loan the creditor would be entitled to recover the debt by sale of "the Nyagaon Factory" and from "his (the debtor's) person and other properties," and it was held that it was a general admission of liability which was merely that the creditor could recover his debt as provided under the law and created no special lien on the Nyagaon Factory.

It is to be observed that the question in all such cases is one of intention. "In equity no charge can be created unless there is an intent to charge:" see *Omrao Begum* v. *Secretary of State* (10).

It will further be observed that in all the above three cases the question raised was whether there was a *mortgage* which, under section 58 of the Transfer of Property Act, must be of "specific immoveable property," and difficulty in such a case is likely to arise from a general description.

In the last two cases noticed above the learned Judges relied upon the fact that the document was not registered in Book I (which is a register of documents relating to immoveable properties) but in Book IV as showing the intention of the parties not to create any charge.

It is unnecessary, however, to discuss this question further, as in the present case the plaintiff admitted the existence of the charge in the mortgage deed itself. In stating the necessity for the loan taken by Priyomoyee, the indenture of mortgage states, "certain other moneys due to Shyam Peary Dasya the mother of the late Babu Lal Mohan Das and which are a first charge upon the said estate."

Then again in the plaint itself there is a clear and distinct admission by the plaintiffs themselves that the annuity was a first charge. In the first paragraph of the plaint the plaintiffs refer to the moneys due to Shyam Peary as being "a first charge upon the estate of late Lal Mohan Das." The plaintiffs, therefore, actually took the mortgage subject to the charge. We are accordingly of opinion that the annuity of Rs. 1,800 a year in favour of Shyam Peary is a charge upon the share which she inherited from her son Lal Mohan, and that the plaintiffs' mortgage is subject to that charge.

The *fifth* question is whether the stipulation to pay interest at $9\frac{1}{2}$ per cent. is in the nature of a penalty. The mortgage deed provided that interest at $9\frac{1}{2}$ per cent. was to be paid by equal half yearly payments, but that if the interest at the rate of $7\frac{1}{2}$ per cent. was paid before the half yearly day appointed for payments of interest, the mortgagees shall accept the same in lieu and in satisfaction of interest at $9\frac{1}{2}$ per cent. If the stipulation was to pay interest at $7\frac{1}{2}$ per cent., and on default of payment on a certain date interest was to be paid at $9\frac{1}{2}$ per cent. there is no doubt that it could be treated as a penalty. In the converse case it would not be a penalty according to English Law. In *Wallis* v. *Smith* (11) Jessel, M. R., referring to the rule of equity stated by Mr. Justice Heath in *Hardy* v. *Martin* (12), *viz.*, that "It is a well-known rule in equity that if a mortgage covenant be to pay £ 5 per cent., and if the interest be paid on certain days then to be reduced to £ 4 per cent., the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay £ 4 per cent., and if the party do not pay at a certain time, it shall be raised to £ 5 per cent., then the Court of Chancery will relieve," observed: "It was settled so early as that, I am sorry that it was so settled, because anything more irrational than the docrine I think can hardly be stated. It entirely depended on form and not on substance."

On behalf of the defendants we were referred to the case *of Union Bank of London* v. *Ingram* (13) where Jessel, M. R., held that a mortgagee in possession is entitled on accounts being taken to charge the mortgagor with the higher rate of interest under a proviso in the mortgage deed for reduction of interest on punctual payment. In the case of *Wallingford* v. *Mutual*

(10) 19 I. A. 95; 19 C. 584; 6 Sar. P. C. J. 192; 9 Ind. Dec. (N. S.) 832 (P. C.).

(11) (1882) 21 Ch. D. 243; 47 L. T. 389; 52 L. J. Ch. 145; 31 W. R. 214.

(12) (1783) 1 Bro. C. C. 419*n*; 28 E. R. 1214

(13) (1881) 16 Ch. D. 53; 50 L. J. Ch. 74; 43 L. T. 659; 29 W. R. 209.

*Society* (14) Lord Hatherley observed (see page 702):—"The form adopted long since—I do not know whether it is still continued or not—in mortgages was when you wished to reserve in reality interest at 4 per cent. to reserve the interest by contract at 5 per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at 5 per cent., to be reduced, in the event of your punctual payment, to 4 per cent.; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. If that definite and fixed time were exceeded, then the original contract revived in all its force. Sometimes mortgage deeds being somewhat unskilfully drawn, interest at 4 per cent. was reserved by the contract to be raised to 5 per cent. if there was non-payment at a particular day; and although that brings the case to an extremely fine and nice distinction, it all the better illustrates the rule which has been applied at all times by the Courts, with reference to this question of penalty. If there had been indulgence at any time upon given terms, as long as those terms are observed, the indulgence lasts. When those terms are departed from the indulgence at once fails, and the original contract is revived in full force." The question appears to have been considered in two cases in this country.

In the case of *Kirti Chunder Chatterjee* v. *J. J. Atkinson* (15) a sum of money was borrowed at a certain rate of interest. Subsequently on a settlement of account between the parties it was agreed that a lower rate of interest would be chargeable on the amount remaining due, if paid within a certain date, but if not so paid the higher rate originally contracted for would be payable, and it was held that the stipulation for the payment of interest at the higher rate cannot be regarded as a penalty, that being the rate contracted for. Maclean, C. J., observed:—"Then it is said that this provision as to a higher rate of interest by reason of default of payment on the 31st March, was a penalty within section 74 of the Contract Act. I should have been glad if I could have taken that view; but the authorities are against it. Here the higher rate of interest was only that originally payable under the bond: and the new bargain under the endorsement was merely a concession to the defendant, of which he failed to take advantage. This is not the case of a lower rate of interest being mentioned in the bond, with a provision that, if the debt be not paid, a higher rate shall prevail as from the date of the loan. Here the higher rate was originally contracted for; it cannot then be regarded as a penalty."

In the case of *Kutub ud-din Ahmad* v. *Bashir-ud-din* (16), Stanley, C. J., after stating "that according to the English authorities it is well settled that if a mortgagee stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate, but that he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in equity as in the nature of a penalty", observed "this rule is not altogether intelligible". He referred to the observation of Jessel, M. R., in *Wallis* v. *Smith* (11), quoted above, but he was of opinion that an agreement on the part of a mortgagee to accept on punctual payment interest at a lower rate than the rate agreed to be paid was free from objection, and accordingly upheld the decree of the Court below which awarded the higher rate of interest. Banerji, J., was inclined to hold at the hearing of the appeal that the provision as to interest was an attempt to circumvent the rule of law as to penalties but in the face of English authorities and in the absence of authority in this country to the contrary, agreed with Stanley, C. J.

(14) (1880) 5 A. C. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

(15) 10 C. W. N. 640.

(16) 5 Ind. Cas. 635; 7 A. L. J. 394; 32 A. 448.

If the question were *res integra*, we would have been prepared to hold that there should be no distinction in principle between a stipulation to pay a certain rate of interest to be reduced to a lower rate on punctual payment, and a stipulation to pay a certain rate of interest to be raised to a higher rate in the event of non-payment of the interest punctually: the object being to ensure punctual payment, and not to settle the damages, it would be a penalty whatever might be the form in which the agreement is expressed. But it appears from the cases cited above that in England, it is settled law that where there is a contract to pay a higher rate of interest to be reduced to a lower rate on punctual payment, the stipulation to pay the higher rate is not a penalty. In the case of *Union Bank of London* v. *Ingram* (13) Jessel, M. R., allowed the higher rate of interest on default of punctual payment, though the learned Judge himself in the subsequent case observed that "anything more irrational than the doctrine can hardly be stated. It entirely depended on form and not on substance." In *Wallingford* v. *Mutual Society* (14) also Lord Hatherley, although referring to the distinction as an "extremely fine and nice distinction", held the stipulation to pay at the reduced rate in the event of punctual payment to be a relaxation of the original contract to pay at a higher rate, "not taking it by way of penalty at all, but a relaxation of the contract which the debtor would merit and purchase by paying at a definite and fixed time." The two Indian cases cited above appear to have followed the rule of English Law, and Maclean, C. J., held in the case reported as *Kirti Chunder Chatterjee* v. *J. J. Atkinson* (15), that the stipulation to pay the higher rate was the original contract, and, therefore, was not a penalty.

Now the question is, what was the real contract in the present case. Clause 1 (3) of the mortgage deed no doubt stipulated for the payment of interest at $9\frac{1}{2}$ per cent. to be reduced to $7\frac{1}{2}$ per cent. on punctual payment, but the scheme for liquidation of the mortgage debt which is a material part of the deed shows that interest was calculated at $7\frac{1}{2}$ per cent. only. In construing a document effect should be given to all parts of it. Now taking clause 1 (3) together with the scheme, it appears that the intention of the parties was that interest should be paid at $7\frac{1}{2}$ per cent., and on default at $9\frac{1}{2}$ per cent.; otherwise we would have expected the calculation of interest in the scheme at $9\frac{1}{2}$ per cent., if that was the 'original contract.' It is true that interest at $9\frac{1}{2}$ per cent. was paid in the years in which there was default in punctual payment, but that by itself would not affect the rights of the parties under the contract, if the payments were made under a mistake as to their rights under the contract, and the payments made by Messrs. Garth & Weatherall can be of very little value, if any, on the question of intention of the mortgagors themselves.

Section 74 of the Indian Contract Act does away with the distinction between penalty and liquidated damages and under the section as amended by Act VI of 1899, the Court has the power to grant relief if the contract contains any stipulation by way of penalty. It is true the contract in the present case was entered into before the amendment, but the amendment does not appear to have made any real change in the law, the only difference being that if the stipulation is penal, relief can now be granted under the provisions of the section and it is not necessary for Courts to resort to their equitable jurisdiction in order to grant relief.

The mortgagees, however, are entitled to reasonable compensation for non-payment of interest punctually. But 2 per cent. does not represent the damages which the creditor suffered for non-payment of the interest on the date fixed. The reasonable compensation to which he is entitled would be the interest on $7\frac{1}{2}$ per cent. interest in respect of payments not punctually made. We accordingly hold that the plaintiffs are entitled to interest upon interest at the rate of $7\frac{1}{2}$ per cent. from the date of the bond up to the date which may be fixed for payment.

The *last* question is whether Messrs. Garth & Weatherall were the agents of the mortgagor or the mortgagees and whether it is competent to a mortgagee in this country to

nominate and appoint an agent to manage the mortgaged properties and at the same time relieve himself from the liability to which a mortgagee is subject when he enters into possession of the mortgaged properties.

We have, therefore, to see whether or not under the terms of the mortgage, Messrs. Garth & Weatherall became agents of the mortgagor or the mortgagees. If they were the agents of the mortgagees, the latter would be bound to account as mortgagees in possession and must bear the loss, if any, caused by Messrs. Garth & Weatherall as if they had actually entered into possession.

Mortgage deeds in the English form generally contain an appointment of, or a power for the mortgagee to appoint a person to be Receiver of the mortgaged premises, by means of which mortgagees are able to obtain the benefit of possession without its disadvantages.

It is contended on behalf of the appellant that this practice should not be recognized in this country. It is further contended that having regard to the provisions of the mortgage deed even in England the Receiver would be treated as agent of the mortgagee. Lastly, it is contended that whatever the English Law may be on the subject, having regard to the deed of mortgage in this case, the mortgagees cannot be heard to say that Messrs. Garth & Weatherall were not their agents.

The manner in which mortgagees in England acquired the power of appointing a person to be the Receiver of the mortgaged premises was traced by Lord Justice Rigby in the case of *Gaskell* v. *Gosling* (17). The learned Judge pointed out that having regard to the exceptional severity with which a mortgagee in possession was treated in a suit for redemption and made to account, the Court favoured any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks, and observed: "Mortgagees began to insist upon the appointment by the mortgagor of a Receiver to receive the income, keep down the interest on incumbrances, and hold the surplus, if any, for the mortgagor, and to stipulate often that the Receiver should have extensive powers of management. Presently mortgagees stipulated that they themselves should in place of the mortgagor appoint the Receiver to act as the mortgagor's agent. This made no difference in the Receiver's position, and imposed no liability on the mortgagee appointing. Though it was the mortgagee who in fact appointed the Receiver, yet in making the appointment the mortgagee acted, and it was the object of the parties that he should act, as the agent for the mortgagor. Lord Cranworth in *Jefferys* v. *Dickson* (18) stated the doctrine of the Courts of Equity on the subject to the effect follwing. The mortgagee, as agent of the mortgagor, appointed a person to receive the income, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions were supposed to emanate, not from the mortgagee, but from the mortgagor; and the Receiver, therefore, in the relation between himself and the mortgagor, stood in the position of a person appointed by an instrument to which the mortgagee was no party. Lord Cranworth in the case referred to was speaking of a mortgage of lands; but the same doctrine applies to all kinds of property, being founded, as it is, not upon any considerations peculiar to the law of real property, but upon the contract between the debtor who gives and the creditor who takes the security. Of course the mortgagor cannot of his own will revoke the appointment of a Receiver, or that appointment would be useless."

The grounds urged on behalf of the appellant in support of the contention that the practice should not be followed in this country are as follows:—In England a landowner has always an attorney at his elbow, and can take care of himself, whereas in this country mortgagors generally are helpless. The power of sale which the mortgagee possesses in England is recognized in this country only in a limited form under section 69 of the Transfer of Property Act, and the proviso to that section shows that a Receiver in this country except in exceptional cases is an agent of the person appointing him. The law on the subject in England is due to the practice of English conveyancers adopted to get rid of the responsibility of mortgagees and the practice itself is not very old. Section 69 of the Transfer of Property Act goes

(17) (1896) 1 Q. B. 669; 65 L. J. Q. B. 435.

(18) (1866) 1 Ch. 183 at p. 190; 35 L. J. Ch. 376; 12 Jur. (N. S.) 281; 14 L. T. 208; 14 W. R. 322.

to negative the existence of such a practice in this country. In America there is conflict of authority on the question whether a mortgagee who nominates and procures the appointment of a Receiver is responsible for his default. See Jones on Mortgage, 6th Edition, section 1537A. Even in England in 1811, in the case of *Hutchinson* v. *Masareene* (19), the trustees were treated as the agents of the mortgagees and the losses caused by the trustees were held to fall upon the creditor. That appears to have been the law in England before the practice, to which Rigby, L. J., refers, had grown up.

There is a good deal of force in these arguments. A private Receiver deriving his power from the appointment of a mortgagee is almost unknown to Indian people. (See Woodroffe on Receivers, 2nd Edition, page 167.) No case in which a private Receiver, deriving his power from the appointment of a mortgagee, has come up to the Courts of this country and the question is one of considerable importance and requires careful consideration. We think, however, that it will be unnecessary to decide this question in the present case, if as contended on behalf of the respondent, Messrs. Garth & Weatherall were appointed by the mortgagor and were agents of the mortgagor and acted as such.

In support of the contention that under circumstances similar to those of the present case the Receiver is treated as an agent of the mortgagee even in England, reliance is placed on the cases *Vimbos Ltd., In re* (20), *Robinson Printing Co.* v. *Chic Ltd.* (21) and *Deys* v. *Wood* (22). In these cases the appointment of the Receiver was made by the mortgagees and in the deed of mortgage.

In the first case powers were given to the Receiver to enter into compromise in the interests of the mortgagees and to sell the mortgaged property or concur in selling it. There was nothing said about the Receiver keeping down the interest, there was no direction to him to pay any surplus over to the mortgagor, and nothing was said about the Receiver being the agent of the mortgagor. It was under these circumstances that Cozens Hardy, J., observed: "It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the Receiver is to be the agent of the mortgagor, who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the Receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture holders themselves would be answerable for all the faults and omissions of the Receiver."

In the second case debentures gave power to the holders to appoint a Receiver to take possession of the assets, carry on the business, sell the property, make any arrangements he should think expedient in the interest of the debenture holders and apply in a specified way the moneys received, but they did not provide that the Receiver was to be the agent of the mortgagors.

Warrington, J., observed that there is no general rule of law as to the position of the Receiver and referring to the observation of Cranworth, L. C., in *Jefferys* v. *Dickson* (18), said: "The Lord Chancellor is there dealing with a Receiver appointed under the ordinary power, that is to say, either by the mortgagor himself in pursuance of provisions in the mortgage deed or by the mortgagee under similar provisions, or under the Act then subsisting—namely, Lord Cranworth's Act. In all these cases there was an express provision that the Receiver should be the agent of the mortgagor. See the remarks of Rigby, L. J., in *Gaskell* v. *Gosling* (17)" and held following *Vimbos Limited, In re* (20) that the Receiver was not the agent of the mortgagor.

In the third case also there was no provision that the Receiver shall be the agent of the mortgagor. He was to have power not only to take possession of the property and

(19) (1811) 2 Ball. & Beaty. 49.

(20) (1900) 1 Ch. 470; 69 L. J. Ch. 209; 82 L. T. 597; 48 W. R. 520; 8 Manson 101.

(21) (1905) 2 Ch. 123; 74 L. J. Ch. 399; 93 L. T. 262; 53 W. R. 681; 12 Manson 314; 21 T. L. R. 446.

(22) (1911) 1 K. B. 806; 80 L. J. K. B. 553; 104 L. T. 404; 18 Manson 229.

to carry on the business, but he was to sell the property comprised in the debentures. He might make any arrangements in the interest of the debenture holders and finally any moneys in his hands were to be applied in satisfaction of the debentures. Scrutton, J., observed, "If he exercises his power to sell, it must be by virtue of and for the purpose of realizing the charge created by the debentures; the business is carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture holders, and in my opinion, having regard to all the points I have mentioned, he is their agent." As pointed out by Farwell, L. J., (in the course of argument in the Court of Appeal), it was not like an ordinary receivership deed which provides for the payment of any surplus, beyond what is necessary to satisfy what is due to the mortgagee, to those who may be entitled to it; the proceeds of any assets were apparently payable under it to the debenture holders only. At page 821, Vaughan Williams, J., observed that the object of the appointment of the Receiver was really the sale and realization of the security to the satisfaction of the debenture debts, and the provisions went to show that it was intended that the Receiver should be Receiver on behalf of the mortgagees and not on behalf of the mortgagors.

The present case is distinguishable from the above three cases on the following grounds:—

(1). The managers, though nominated by the mortgagees, were not appointed by them.

(2). The mortgagees were not parties to the deed of appointment, and the managers were no parties to the deed of mortgage.

(3). There was a direction to the managers to keep down the interest and to apply the income as laid down in the deed of mortgage.

(4). There was a destination as to the surplus (if any) of the income, (*a*) in the case of Priyomoyee (after payment of Rs. 2,400 to her) to the managers themselves as part of their remuneration over and above the 15 per cent., and (*b*) in the case of Mohini Mohan one half to the managers and the other half to the mortgagor himself; and no portion of the surplus was to go to the mortgagees in either case.

It may be pointed out here that in *Hutchinson* v. *Lord Masereene* (19) cited before us, the trustees were appointed by the creditors who had obtained the power of appointment from Lord Maserene; the latter did not appoint the trustees nor had he any power to remove them and it was accordingly held that the loss occasioned by the default of the trustees should fall upon the creditors who appointed them. In *Gaskell* v *Gosling* (17) also it appears that it was the trustees of the debenture holders who appointed the Receiver and had the power to remove him without notice to the mortgagors, although the Receiver under the terms of the agreement was to be the agent of the mortgagors who were to be liable for his acts and defaults.

We have next to see whether under the deed of mortgage Messrs. Garth & Weatherall became the agents of the mortgagees or of the mortgagor.

Now, paragraph IV of the mortgage deed contemplates possession by the mortgagor, "until the mortgagees shall enter into and take possession of the mortgaged premises." Paragraph VI (2) provides for payment of the Government revenue and other charges by the mortgagor, and the production of the receipts of payment by the mortgagor to the mortgagees, and paragraph VII deals with the management of the property and sets forth the provisions relating to management "until the mortgagees shall enter into and take possession of the mortgaged premises." We will deal with these provisions later on. But in the first place, Messrs. Garth & Weatherall were to manage the mortgaged premises (without any interference by the mortgagor) so long as they fulfilled the terms and conditions, and in the event of their death, resignation or dismissal of either of them, by the survivor of them, or failing such survivor by another qualified manager who would be nominated by the mortgagees provided that any manager subsequently so appointed by the mortgagees shall, if required by the mortgagor, give security for the proper performance of his duty and management. It thus appears that the first managers (Messrs. Garth & Weatherall), though nominated by the mortgagees, were appointed by the mortgagor. Messrs. Garth & Weatherall were no parties to the mortgage deed, the indenture being between the mortgagor and the Company (the mortgagees)

The mortgagees again were no parties to the deed of appointment which was between the mortgagor and Messrs. Garth & Weatherall.

We were referred on behalf of the appellant to Key and Elphinstone's Precedents in Conveyancing, 10th Edition, Vol. II, page 81, where the specimen form shows that the appointment is made by the mortgagor *with the concurrence of the mortgagee* as indicating that the mortgagees are no parties to it, and there is a proviso (see page 84) that the Receiver shall be deemed to be in all respects the agent of the mortgagor, and that the mortgagee shall not under any circumstances be answerable for any loss or misapplication or default, etc., of the Receiver. But the passage at page 83 (bottom), "and the Receiver *covenants with the mortgagee* and also as a separate covenant with the borrower," and the passage at page 85, "In consonance with the premises the borrower with the concurrence of the mortgagee hereby appoints the Receiver," show that the mortgagee is also a party to the appointment.

The form given in Davidson's Precedents and Forms at page 1016 shows that the mortgagor, the mortgagee and the Receiver are all parties to the deed of mortgage. That form is one in which the Receiver is appointed by the mortgage deed itself, and the Receiver is, therefore, a party to it. There are other forms in which the Receiver is appointed by a separate deed, which is more convenient. A form where the appointment is made by a separate deed contemporaneously with the deed of mortgage is given at page 287 of Key and Elphinstone, and that shows that the parties are (1) the mortgagor, (2) the mortgagee, and (3) the Receiver. See also Prideaux's Precedents, Volume I, page 781, where the appointment is made by the mortgage deed itself and page 1045 where the appointment is made by a separate deed; Wood and Jarman's Conveyancing, Volume II, pages 158-159; Encyclopædia of Forms and Precedents, Volume IX, page 210 (see page 912, clause 4).

It appears, therefore, from all the forms that the mortgagee and the Receiver are parties to the deed of mortgage and to the deed of appointment, and the reason why it is stated that the Receiver "is to be deemed the agent of the mortgagee" appears to be that the mortgagee being a party to the deed, a question may arise that he is the agent of the mortgagee.

In the present case, however, such a question does not arise. As already stated Messrs. Garth & Weatherall are no parties to the mortgage deed, nor are the mortgagees parties to the deed of appointment.

Paragraph VII, clause (2), of the deed of mortgage lays down the powers of management conferred upon the managers more fully detailed in the deed of management, which will be presently referred to. The main provisions in the deed, which are relied upon on behalf of the appellant as showing that Messrs. Garth & Weatherall were the agents of the mortgagor, are as follows:—

(1) That the managers shall not be liable to dismissal except for misconduct or neglect of duty or of the terms of the deed proved to the satisfaction of the mortgagees.

(2) The managers shall at all times render to the mortgagees all such information and accounts as shall be called for, and specially for the purpose of any audit or scrutiny which the mortgagees may think necessary at any time.

(3) For the purpose of satisfying and informing themselves as to the management of the mortgaged premises or as to the circumstances thereof or for the purpose of any audit or scrutiny, the mortgagees may from time to time and at any time call for and require to have furnished to them by the managers for the time being a statement of the then existing rent roll of the mortgaged premises and the production of all documents required to verify the same.

The provisions relating to the appointment by the mortgagees of a manager in the event of the mortgagor failing to execute powers of attorney or other deeds which might be necessary to enable the manager for the time being to carry on the management, and those relating to the appointment of a Receiver will be dealt with later on.

The first provision referred to above is that the mortgagor shall have no power of dismissal except for misconduct or default proved to the satisfaction of the mortgagees. It does not appear reasonable that the manager should be nominated by the mortgagees and the mortgagor will have no power

to dismiss him without the concurrence of the mortgagees, even if he is guilty of misconduct. But apparently the plaintiffs, an English Company, did not agree to advance the loan, except upon the conditions that the mortgaged property would be managed by persons in whom they had confidence. It was not only Priyomoyee, but Mohini Mohan also agreed to have the loan on that condition, which is expressly stated in the deeds. It is true, as observed by Lord Macnaghten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation Ltd.* (23), "Necessitous men are not truly free men", and that observation applies with much greater force in this country but at the same time the mortgagees had to safeguard their interest and to see that the estate was managed by persons whom they trusted, in order to ensure the payment of the interest and the principal according to the sliding scale as provided in the bond. If under these circumstances the mortgagees made it a condition that the estate must be managed by particular persons and the mortgagors agreed to it and acted upon it for about 18 years, it cannot now be urged that the managers must be treated as agents of the mortgagees on the ground that the contract was an unreasonable one. Besides although the managers could not be dismissed even for misconduct without the concurrence of the mortgagees, it does not follow that the mortgagees could arbitrarily refuse to be satisfied even if there was misconduct on the part of the managers. The mortgagor was not given an absolute power of dismissal, but a power reserved to the mortgagor to dismiss the manager at the will of the mortgagor would defeat the very object of the provisions. If the mortgagor had such a power, the manager could be dismissed the very next day. The object being to secure regular payment of the interest and principal as provided in the scheme, the parties agreed to have the estate managed by persons in whom the mortgagees had confidence without interference by the mortgagor, and it was necessary, therefore, to restrict the power of the mortgagor to dismiss the managers unless the mortgagees were satisfied of such misconduct, and, therefore, with their concurrence. But because their appointment was irrevocable except as provided for in the deed it does not follow that they ceased to be the agents of the mortgagor: and it is to be observed that the mortgagees had no power of dismissing Messrs. Garth & Weatherall, except as provided in clause 6 and in paragraph VIII, which relates to the appointment of a Receiver and which will be dealt with later on.

Under the 2nd and 3rd provisions referred to above, Messrs. Garth & Weatherall were bound to render such information and accounts as might be called for by the mortgagees for the purpose of satisfying themselves as to the management or for audit or scrutiny which they may think necessary and to submit statements of rent roll of the estate and documents for verifying the same, if so required by the mortgagees. This, however, appears only for the information of the Company as to how the mortgage estate was being managed and for scrutiny if the Company required the account. It does not appear that the managers were to account to the mortgagees in the same manner as an agent is liable to render accounts to his principal and which Messrs. Garth & Weatherall covenanted to render to Priyomoyee, as appears from the deed of appointment. The mortgagees in order to protect their interests were interested in seeing that the revenue and other charges were regularly paid, and the rents and profits duly applied in payment of the principal and interest as laid down in the mortgage deed, and in order to satisfy themselves of the same they reserved the power of calling for information and accounts and for auditing the same if *thought necessary* by them. We do not think it was intended to reserve to the Company any direct control over or power of interfering with the management of estate, but the provisions appear to have been made for the protection of their interest and only as a check to prevent any mismanagement or misapplication by the managers. The mortgagees could not sue Messrs. Garth & Weatherall if the latter refused to account to the former, except through the mortgagor.

On the other hand, the deed of management to which the mortgagees were no parties shows that Messrs. Garth & Weatherall were appointed managers by

(23) (1904) A. C. 323 at p. 327; 73 L. J. Ch. 526; 52 W. R. 673; 90 L. T. 731; 20 T. L. R. 536; 11 Manson 276.

Priyomoyee. It recites that it was one of the conditions on which the Company agreed to advance the loan that she should appoint Messrs. Garth & Weatherall as managers of the estate, which was to be managed entirely by them without any interference by her. Those persons were accordingly appointed her managers, attorneys and agents to collect the rents and profits in her name, and the powers of management set forth in the deed were to be exercised in her name and for her benefit but without any interference by her. They were to get a commission of 15 per cent. on the gross collections. which was to cover all charges of management and collections including costs of litigations for realizing rents. They were to keep down interest, pay Rs. 12,600 a year to the mortgagees as provided in the mortgage deed, and Rs. 2,400 a year to the mortgagor (Priyomoyee) and they were to get the balance of the income, if any, as their remuneration in addition to the 15 per cent.

The deed further provided that the managers were faithfully to account to Priyomoyee, keep books of account which shall be open to her inspection, and once every year, if so required, furnish to her a clear statement of the income and expenditure of the estate, but that they were not to be dismissed or removed from the office of manager except with the written consent of the mortgagees.

It will be seen, therefore, that it was Priyomoyee who appointed Messrs. Garth & Weatherall though they were nominated by the mortgagees, and they were to act as her agents and exercise all the powers of management in her name. They were to keep books of account open to her inspection and faithfully to account to her. There was no such covenant with the mortgagees. That being so, the mere fact that Messrs. Garth & Weatherall were, under the terms of the mortgage deed, liable to submit to the mortgagees all such information and accounts as might be called for by them for the purpose of satisfying themselves as to the proper management of the mortgaged premises or for the purposes of auditing and scrutiny, if thought necessary by them, did not constitute them agents of the mortgagees. As already stated, the mortgagees had no power of dismissing Messrs. Garth & Weatherall, and all that the mortgagees were entitled to get was Rs. 12,600 a year as provided in the mortgage deed, and the balance of the profits, if any were to go to Messrs. Garth & Weatherall as part of their remuneration and, therefore, as agents of the mortgagor. In the case of Mohini Mohan, half of the surplus profits were to go to him, and the other half to the managers. The mortgagees were not to get anything over and above Rs. 12,600 a year. Having regard to all the provisions of the deed of mortgage and management we think that Messrs. Garth & Weatherall were the agents of the mortgagors.

There was no provision in the deed of mortgage that Messrs. Garth & Weatherall were to account to Priyomoyee and that is because they were no parties to it. It was necessary, however, to provide in the deed of mortgage that the managers would be liable to submit information and accounts to the mortgagees if required by them, because the latter, in the absence of any authority from the mortgagor, would have no power to call for the same from the managers, and they (the mortgagees) were no parties to the deed of appointment.

It is pointed out that it is not expressly stated in the mortgage deed that Messrs. Garth & Weatherall were to be the agents of the mortgagor, but such a statement is necessary where, as in the English cases cited before us, both the mortgagee and the Receiver are parties to the deed. Here Messrs. Garth & Weatherall were appointed by Priyomoyee alone by a separate deed of appointment to which the mortgagees were no parties, and all the provisions of the deed show that they were to be agents of hers only. It was unnecessary under these circumstances to make an express statement that they were to be the agents of the mortgagor.

Paragraph VIII of the mortgage deed provided that if the manager for the time being failed to apply any part of the rents and profits as provided in the deed, then the mortgagees would be able to appoint any person, upon such salary and remuneration and with such powers of management as they shall think fit to be Receiver of the rents and profits of the mortgaged premises and the mortgagees would, at their absolute discretion, be able from time to time to suspend, remove or dismiss any Receiver in his place, and that the mortgagees shall not incur any personal liability in respect of or be personally answerable for

any loss or misapplication of the rents or profits of the mortgaged premises or any part thereof by reason of any default, neglect or misappropriation of any manager or Receiver. It was further provided that "any Receiver appointed as aforesaid shall be forthwith discharged by the mortgagees, and the mortgaged premises shall be again managed as hereinbefore provided by a manager upon the mortgagor making good the deficiency or default in consequence of which the Receiver was appointed, and upon the mortgagor paying all the expenses incurred in connection with the appointment and during the employment of the Receiver." This clause makes clear the distinction between a Receiver who could be appointed and dismissed by the mortgagees (though the latter would not be liable for his default or misapplication) and a manager who was to be appointed by the mortgagor and into whose management the estate was to revert on the mortgagors making good the deficiency which led to the appointment of the Receiver by the mortgagees. Clause 6 of paragraph VII provided for the dismissal of the manager by the mortgagee, if the mortgagor failed to execute powers of attorney or other deeds in order to enable the managers to properly carry on the management. It will be seen that clause VIII related to the appointment of a Receiver by the mortgagees only in certain events, and only then they could exercise the absolute powers given to them. So long as they fulfilled the conditions, Messrs. Garth & Weatherall could not be removed by the mortgagees.

The mortgagees, however, never appointed a Receiver, and the provisions relating to the power of the mortgagees to appoint a Receiver never came into operation, nor did the contingency contemplated in clause 6 of paragraph VII ever arise. If they had, the questions raised on behalf of the appellant, *viz.*, whether in such a case the Receiver should be treated as agent of the mortgagor or the mortgagees and whether the English Law on the point should be followed in this country, would have required consideration. As it is, so far as Messrs. Garth & Weatherall wer concerned, we think that they were agents of the mortgagor. It will be observed that Messrs. Garth & Weatherall were to get 15 per cent. on the gross collection as their commission and the remainder of the income (after payment of the amounts specified in the deed of management) by way of remuneration in addition to the said 15 per cent., whereas in England the Receiver's commission does not exceed 5 per cent. under the Statute, but the mortgagees were to get nothing beyond their principal and interest. It also appears that in some respects the powers given to Messrs. Garth & Weatherall were more extensive than those which a Receiver has in England. It may have been imprudent to appoint them on such terms and with such powers, but that cannot affect the construction of the deeds nor make them agents of the mortgagor.

The evidence shows that Messrs. Garth & Weatherall were treated and acted as agents of the mortgagors. After the death of Mohini Mohan, Sham Peary made an application for Letters of Administration. Thereupon Messrs. Garth & Weatherall made a petition to the District Judge of Dacca on the 13th January 1897 (see Exhibit B), in which they stated that accounts had been rendered from time to time to Mohini Mohan up to the end of 1301, that Mohini Mohan had been in the habit of taking advances from them and that he had overdrawn Rs. 12,844. On account of such advances, and for the reasons stated in the petition they prayed that a Receiver or Administrator might be appointed of the moveables and also immoveable properties other than those under the management, as the estate was likely to suffer loss and damage if left in the hands of Sham Peary, his heiress. A similar application was made by the Bank of Bengal (Dacca Branch) as a creditor of the deceased for the appointment of a Receiver. It appears from the order of the District Judge, dated the 29th January 1897, passed upon that petition that Sham Peary in showing cause stated that no adjustment of accounts *since the year* 1301 had been made with the managers. So the adjustment of accounts up to that year was admitted. The District Judge appointed the *Nazir* of his Court as Administrator. The order sheet (Order No. 7, dated the 16th February 1897) shows that accounts were filed by Messrs. Garth & Weatherall, and the Administrator was directed to examine them. All this goes to

show that at that time both Sham Peary and Garth & Weatherall proceeded on the footing that the latter were accountable to the mortgagor. If they were the agents of the mortgagees, the mortgagor or his Administrator could not call upon them to account, and the Court could not order such accounts except in a suit for redemption.

Then in the deed of endowment, dated the 14th December 1902, Priyomoyee distinctly stated that she had placed the management of the properties in the hands of Messrs. Garth & Weatherall. This deed was, as we have seen, attested among others by Debendra Nath Das, Pleader, and Kunja Behary Das, who managed her affairs, and there is no suggestion that she did not understand this document.

Then again in the subsequent deed of endowment, dated the 10th February 1898, (which was consented to by the then sole reversioner Khetra Mohan) she made a similar statement. Admittedly her allowance of Rs. 2,400 a year was stopped from the year 1898, and if these gentlemen were the agents of the mortgagees, Priyomoyee would certainly have complained to the Company that her allowance had been stopped or that Messrs. Garth & Weatherall were mismanaging the properties. This shows how the arrangement was understood by the parties. Lastly, in the release executed by Sham Peary herself on the 26th November 1908 in favour of Mr. Weatherall, it is stated, "after looking into and examining the accounts which you have up to this day submitted to me and to my predecessors and upon taking into consideration the effect thereof, upon receipt of the cash *tahbil* of this day according to the *jamakharach* submitted by you and with the advice of well-wishers and persons having knowledge of law I execute in your favour this deed of release in respect of all acts done by you and Mr. Garth, and after his death by you alone." This unmistakably shows that Messrs. Garth & Weatherall acted as the agents of the mortgagor. The accounts were admittedly submitted up to 1301, and the release by Sham Peary is only consistent with their being the agents of the mortgagor. If they were not the agents of the mortgagor Sham Peary would not have given a release to Mr. Weatherall.

It is contended in this Court that no importance should be attached to the deed of release executed by Sham Peary, an old lady in her dotage. But in her written statement she did not attack the said deed nor plead that it was not binding upon her, and no issue was raised as to the validity thereof. It appears from the evidence that her servant Radha Bullav Das attested the deed. This Radha Bullav signed her name in the written statement and looked after this litigation on her behalf, and was actually present in Court at the trial and he was not examined. Under these circumstances we are unable to discard the deed of release as being of no value.

The deed of release was to be kept in the custody of the Bank of Bengal and was not to operate until a trust deed executed by Mr. Weatherall was to reach the hands of Mr. Lockhart, who was appointed manager in his place. In the agreement executed by Sham Peary in favour of Mr. Lockhart on the same day it was stated, "I am entitled to take away from him (Mr. Weatherall) the management and possession of the properties", and that Mr. Weatherall had resigned according to her wishes, and the provisions of that agreement show that Mr. Lockhart became her agent. Mr. Lockhart, it appears, was appointed on new terms by Sham Peary, and he managed the estate as her *am-mukhtear*, paid moneys to the Company from 1908 to 1910, as shown in the statements annexed th the plaint. The defendant in her written statement (paragraph 22) stated that Mr. Lockhart had been appointed manager by the plaintiff Company without her knowledge and consent, and that he remained as their agent until May 1910 that he had committed various acts of mismanagement and misappropriated large sums of money, and that the plaintiffs, in order to avoid their responsibility to the defendant, had caused a suit for accounts to be instituted against Mr. Lockhart in the name of Mr. Weatherall by suppression of material facts. Mr. Weatherall, it is true, promised to execute a power of attorney in favour of Mr,

Lockhart, who had been nominated a trustee by Sham Peary and the Company in the interval pending the execution of the deed of trust by Mr. Weatherall in his favour. Mr. Weatherall did not execute the deed of trust, and the order sheet dated the 30th January 1913 shows that Mr. Weatherall instituted a suit against Mr. Lockhart. But the fact remains that Sham Peary did execute a release in favour of Mr. Weatherall and which can only be upon the footing that he was the agent of the mortgagor, and the defendant has not attempted to substantiate the allegation that Mr. Lockhart was appointed manager by the plaintiff Company without her knowledge or consent.

We do not see how Sham Peary after herself having made the statements which she did in the release referred to above, and given a release to Mr. Weatherall, can say that Messrs. Garth & Weatherall were the agents of the mortgagees, or hold the Company liable for their misconduct, if any.

Lastly in the letter, dated the 19th September 1909, (Exhibit XL) written by Sham Peary to Messrs. Gillander Arbuthnot & Co. (the agents of the mortgagees) there is not a word of complaint against the Company or about any mismanagement by Messrs. Garth & Weatherall. The letter was drafted by the Pleader Gagan Chandra Ghose, who says that he explained it to Sham Peary and the letter bears an endorsement to that effect. This gentleman states that he used to write letters, give legal advice and watch whether any property of the estate was going to be ruined on account of the bad management of Messrs. Garth & Weatherall, and he used to get a retainer of Rs. 25 per month from Sham Peary for such services. He, however, says that he never asked Messrs. Garth & Weatherall about their management of the estate nor thought it his duty to ask them anything bearing on the management of the estate. He admits that he saw tabular statements (gross collections, Government revenue, cesses, landlord's rents, establishment charges, net income, amount to be paid for interest formed the principal headings or columns of such tabular statements) submitted by Messrs. Garth & Weatherall at the place of Sham Peary, that every year such tabular statements used to be submitted to Sham Peary, and that in the columns of interest and principal the amounts due to the Company were mentioned. He says that Messrs. Garth & Weatherall used to send similar statements to the plaintiff Company, but he did not see any statement being sent, he only saw such statements ready to be sent. He further says that every year auditors from the plaintiff Company used to come to Dacca to check the management account kept by Messrs. Garth & Weatherall, and gives the name of one of the auditors as Kamikhya Nath Sen. This Kamikhya Nath was the accountant of Messrs. Gillanders and he says that the Company were never in possession and never interfered with the management thereof by Messrs. Garth & Weatherall. He admits that he went to Dacca on several occasions and states the business for which he went there. He was not cross-examined as to whether he had at any time audited the accounts of Messrs. Garth & Weatherall. He was examined on commission in March 1914, while Gagan Chandra Ghose was examined in April 1914. Kali Dyal Ghose, who was the head clerk of Messrs. Garth & Weatherall, says that no member of Gillanders' firm ever came to the firm of Messrs. Garth & Weatherall to make any enquiry about the income and expenditure of the mortgaged estate, and does not remember if any accounts were submitted to them. He says that Messrs. Garth & Weatherall had a power of attorney from the plaintiff Company to look after their interest, but that was three years after the execution of the mortgage deeds. One Jonmeyjoy Dutt, who was in the service of Messrs. Garth & Weatherall as the *peshkar* of their *zemindari* office, was examined by the plaintiffs and he says that he does not know if they sent any account to the Company. Mr. Grazebrook of the firm of Messrs. Gillanders Arbuthnot & Co. has deposed that the plaintiff Company had nothing to do with the annual collection or expenditure or the management of the mortgaged properties, that Messrs. Garth & Weatherall were not their agents and no statements were called for by the Company from them.

It appears, therefore, that there is conflict of testimony upon the question whe-

ther tabular statements were sent by Messrs. Garth & Weatherall. But even assuming that they did submit tabular statements to the Company, that fact by itself would not constitute them agents of the Company, as the latter were entitled under the terms of the mortgage to get information and accounts from the manager for satisfying themselves as to the management of the mortgaged premises. It is contended that the mortgagees ought to have removed Messrs. Garth & Weatherall when they defaulted in paying the principal and interest as provided in the scheme. But we do not know the reasons why they defaulted, and although the mortgagees had the power under clause VIII, they were not bound to exercise that power. On the other hand if Messrs. Garth & Weatherall were the agents of the mortgagees, it is remarkable that the mortgagor did not complain to the Company about such default although yearly statements were submitted by Messrs. Garth & Weatherall to the mortgagor, and although the allowance payable to Priyomoyee herself had been stopped. We have seen that Priyomoyee in the deeds of endowment stated that "unfortunately on account of various adverse circumstances intervening in the management of the properties," her allowance had been stopped since 1898.

The plaintiffs *have* produced a large number of decrees to show that rent suits were instituted by Messrs. Garth & Weatherall in the name of the mortgagors and copies of mutation proceedings to show that they got themselves registered as managers for the mortgagors under the Land Registration Act and subsequently as trustees. If Messrs. Garth & Weatherall were the agents of the plaintiff Company, the mortgagors would have complained of their mismanagement to the Company; and it is remarkable that throughout the long period from the date of mortgage to the date of the suit there was not a word of complaint to the Company by Priyomoyee, Mohini Mohan, or even by Sham Peary after their death.

It is to be observed that there is no evidence that Messrs. Garth & Weatherall actually mismanaged the estate, or were guilty of misconduct or neglect of duty. It is contended that they must have satisfied themselves before they took over the management that the income was sufficient to meet the payment of Rs. 12,600 a year to the mortgagees and Rs. 2,400 a year to Priyomoyee, besides the 15 per cent. commission for themselves, and even a balance of profits was anticipated, the whole of which was to go to them in the case of Priyomoyee and a moiety of which was to be received by them in the case of Mohini Mohan and that the facts that the payments were made for the first few years as stipulated in the deeds and then became less show that there was at any rate mismanagement by them in subsequent years.

But there was no evidence as to why the payments became less in subsequent years. Debendra Nath Das who managed the 4-annas share of Gobindarani (widow of Radhika Mohan) says that the net income of the share was between Rs. 12,000 and Rs. 13,000. He, however, managed that share without any remuneration. Then he says that during two years the realization was less on account of a litigation for a *chur*. We have seen what Priyomoyee herself said in the deed of endowment on the point although her own allowance had been stopped, and having regard to the fact that accounts had admittedly been submitted to Mohini Mohan until 1301, it is very unlikely that the mortgagors would not have complained at any time if there was misappropriation or mismanagement by Messrs. Garth & Weatherall.

If they were the agents of the mortgagors, the Company would not be responsible even if there was any mismanagement by them but the absence of any complaint on the part of the mortgagor during such a long period has a bearing on the question whether Messrs. Garth & Weatherall acted as agents of the mortgagor.

There remains only one other point raised in this Court.

Moti Lall Das (the son of Khetra Mohan), who is the reversionary heir, is the defendant No. 2 in the suit, and a contention is raised on his behalf that the arrangement between Sham Peary and Mohini Mohan by which the former gave up the right (which she inherited from her deceased son Sashi Mohan) in favour of the latter in consideration of the maintenance of Rs 150 a month is not binding upon him (Moti Lall Das) after the death of Sham Peary. The question was not raised

in the Court below and in a suit upon the mortgage, no question of title paramount should be gone into. This contention is accordingly disallowed.

The result is that the decree of the Court below will be varied in this way. It will be declared that the property mortgaged to the extent of the 4-annas share which Sham Peary inherited from Sashi Mohun is subject to the charge of Rs. 150 a month in her favour. The interest under the deeds of mortgage executed by Priyomoyee and Mohini Mohan respectively will be calculated at the rate of $7\frac{1}{2}$ per cent. together with simple interest at that rate upon the amount of interest which was not punctually paid. The principle of calculation will be according to that adopted in the plaint. The usual mortgage decree will be prepared in each of the suits giving the defendants six months' time from this date (3rd April 1917) for redemption. In all other respects the appeals will be dismissed with three-fourths costs, except that in calculating the costs incurred on account of Court-fee, the costs will be proportionate in inverse ratio to the success of each party, and only one hearing fee will be allowed in the appeals against the final decrees.

*Decrees varied.*

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ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1745 OF 1915.

February 13, 1917.

*Present*:—Mr. Justice Rafique and Mr. Justice Piggott.

SUKHLAL RAI AND OTHERS—DECREE-HOLDERS—APPELLANTS

*versus*

LACHMI NARAYAN RAI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

*Execution—Decree, construction of—Mortgage—Executing Court, powers of.*

One *G.* was a co-sharer in four villages to the extent of eight *gandas* in each village. He executed a deed of mortgage in respect of his eight-*gandas* share in the villages in favour of *R.* and *J.* The latter obtained a decree for sale on foot of their mortgage and in execution applied for the sale of a four-annas share in *mahal* G. in each of the four villages, stating that the description of the property given in the mortgage-deed as eight *gandas* came to four annas in *mahal* G. in each village. The judgment-debtor filed objections and contended that only eight-*gandas* out of the entire four annas, that is to say, one-tenth of the original share in each village was meant:

*Held*, that the property directed by the decree to be sold was the entire share of the mortgagor, which after partition was described as four annas in *mahal* G. in each village, and that the mortgagor had mortgaged his entire share which he described as eight *gandas* in each of the four villages. [p. 889, cols. 1 & 2.]

Execution second appeal against the order of the District Judge, Azamgarh.

Mr. *Peary Lal Banerji* (with him Mr. *Iqbal Ahmad*), for the Appellants.

Mr. *Mukhtar Ahmad* (with him Mr. *Haribans Sahai*), for the Respondents.

JUDGMENT.—This appeal arises out of the following facts. One Gaya Prasad Rai was a co-sharer in four villages to the extent of eight *gandas*. On the 2nd of April 1898 he executed a deed of mortgage in respect of his eight-*gandas* share in the villages in favour of Ram Bachan and Jagat Rai. The mortgagees brought a suit on the mortgage and obtained a decree for sale. In execution of their decree the mortgagees applied for the sale of a four-anna share in *Mahal* Gaya Prasad in each of the four villages, stating that the description of the property given in the mortgage-deed as eight *gandas* came to four annas in *Mahal* Gaya Prasad in each village. The judgment-debtors filed objections. They said that a partition among the co-sharers of the four villages had taken place as long ago as 1896 and it came into operation from the 1st of July 1897, some eight months prior to the execution of the mortgage in suit. The share of Gaya Prasad Rai before partition was eight *gandas* in each village; but subsequent to the partition, after formation of fourteen *mahals*, the share of Gaya Prasad was described as four annas in *Mahal* Gaya Prasad in each village. It must, therefore, be taken that what Gaya Prasad mortgaged under the deed of the 2nd of April 1898 was not his entire share of four annas in *Mahal* Gaya Prasad in each village, but only eight *gandas* out of the entire four annas, that is to say, one-tenth of the original share in each village. The Court of First Instance purported to allow this objection, but as a matter of fact ordered sale of eight *gandas* in each village "without any addition." This would involve the selling of 1/40th share of the proprietary

rights in each village which would be really what the decree-holders wanted. On appeal the case was put by the learned Judge in a clearer way for the objectors, *i. e.*, judgment-debtors. But the learned Judge upheld the decree of the First Court. The decree-holders have come up to this Court in second appeal and contend that the order of the lower Courts is likely to mislead the intending purchasers or bidders at the auction and to lead to further litigation. For the judgment-debtors it is urged that the decree-holders cannot go behind the decree and they are bound by its terms. They cannot sell any other property than that which is mentioned in the decree. The decree directs the sale of the mortgaged property as it is described in the mortgage-deed of the 2nd of April 1898. The description in the deed is eight *gandas* in each village. It is, therefore, quite clear, as the partition had taken place prior to the execution of the mortgage deed, that the parties to the deed knew perfectly well what the share of the mortgagor was. The mortgagees, if they meant to take the entire share of the mortgagor as security, would have got four-annas share in *Mahal* Gaya Prasad in each village entered in the deed. In their plaint the mortgagees did not say that the property mentioned in the mortgage-deed was the same as four annas share in *Mahal* Gaya Prasad in each village, nor did they bring this fact to the notice of the Court at the time of the passing of the decree. It must, therefore, be taken that all that was mortgaged was eight *gandas* out of the share of Gaya Prasad. We do not think that there is any force in the contention for the judgment-debtors. On a reference to the deed of mortgage of the 2nd of April 1898 it is quite clear that Gaya Prasad mortgaged his entire share which he described as eight *gandas* in each of the four villages. Probably Gaya Prasad and other co-sharers had not by that time become quite familiar with the description of their shares as brought about by the partition of 1896 and consequently the old description found place in the mortgage-deed. The decree naturally followed the description given in the mortgage-deed. We have to find out what property ought to be sold in execution of this decree. We have no hesitation in holding that the property directed by the decree to be sold is the entire share of Gaya Prasad, which after partition is described as four annas in *Mahal* Gaya Prasad in each village. We allow this appeal and direct that in execution of the decree in question the sale of four-annas share of Gaya Prasad in *Mahal* Gaya Prasad in each village be proclaimed. The appellants are entitled to their costs here and in the Court below.

*Appeal allowed.*

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## MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEALS NOS. 123 AND 124 OF 1916.

February 7, 1917.

*Present*:—Sir John Wallis, KT., Chief Justice.

IN C. M S. A. No. 123 OF 1916

MATHAR DRAVIA SAHAYA ELA NIDHI COMPANY, LTD., AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS NOS. 1 TO 3—APPELLANTS

AND

IN C. M. S. A. No. 124 OF 1916

SUBRAMANIA PILLAI—DEFENDANT NO. 3—PETITIONER—APPELLANT.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment of decree out of Court not certified to Court, whether can be recognised.*

An adjustment of a decree out of Court can, under no circumstances, be recognised unless certified to Court. [p. 890, col. 1.]

*Alathoor Padrudeen* v. *Gulam Mohideen*, 12 Ind. Cas. 562; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541, followed.

*Trimback Ramkrishna* v. *Earl Laxman*, 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686, dissented from.

Appeal against the order of the District Court, Tinnevelly, in Appeal Suit No. 48 of 1916, preferred against that of the District Munsif, Srivaikuntam, in Execution Petition No. 699 of 1915, in Original Suit No. 150 of 1912.

Appeal against the order of the District Court of Tinnevelly, in Appeal Suit No. 49 of 1916, preferred against that of the District Munsif, Srivaikuntam, in Execution Appeal No. 60 of 1916, in Execution Petition No. 699 of 1915, in Original Suit No. 150 of 1912,

KO KYAW ZAN v. DAW MYA.

Messrs. *K. R. Guruswami Aiyar* and Mr. *A. Subbarama Aiyar*, for the Appellants.

These appeals against appellate orders coming on for orders as to admission, the Court delivered the following

JUDGMENT.—I am bound by the decision of this Court in *Alathoor Badrudeen* v. *Gulam Mohideen* (1), which dissented from the view expressed by Heaton, J., in *Trimback Ramkrishna* v. *Hari Laxman* (2) which has recently been followed in that Court. The decision in *Alathoor Badrudeen* v. *Gulam Mohideen* (1) was in accordance with the current of authority in this Court and may, I hope, be treated as having settled this question here. The Legislature, when it considered it necessary to legislate against the possibility of executing Courts being flooded with false cases of satisfaction out of Court set up merely for purposes of delay, and provided that no such adjustments should be recognised unless certified, must have been alive to the fact that it was giving an opportunity to dishonest decree-holders to commit fraud by denying adjustments which had not been so certified and must have regarded them as the lesser evil. It is not, however, open to the Court, it seems to me, to guard against this evil by recognising in execution proceedings adjustments out of Court contrary to the express provisions of the Statute. These appeals are dismissed.

*Appeals dismissed.*

V.R.P.

(1) 12 Ind. Cas. 562; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541.

(2) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686.

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LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 146 OF 1916.

June 5, 1917.

*Present*:—Mr. Justice Maung Kin.

KO KYAW ZAN AND OTHERS—APPLICANTS

*versus*

DAW MYA—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XX, r. 4 (1)—Judgment of Small Cause Court, contents of—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision, grounds for.*

The judgment of a Court of Small Causes need not contain more than the point for determination and the decision thereon. [p. 890, col. 2]

Where the decree of a Court of Small Causes, which must also include the judgment, involves a clear error of law, the High Court has power to interfere with the decree, but the error of law must be a substantial one and the Court must be satisfied that there has been a failure of justice. [p. 890, col. 2; p. 891, col. 1.]

*Nilmani Maitra* v. *Mathura Nath Joardar*, 5 C. L. J. 413 at p. 415, relied upon.

Where the point for determination is obvious, the omission to state it in the judgment cannot be deemed to have caused a failure of justice. [p. 890, col. 2.]

Mr. *Agaleg*, for the Applicants.

Mr. *Ko Ko Gyi*, for the Respondent.

JUDGMENT.—This application for revision arises out of a suit for money alleged to be due on six pro notes.

The defence was denial of the execution and receipt of consideration by the alleged executant.

This suit was decreed and the defendants have made this application for revision. The only ground pressed before me is that the judgment of the lower Court which was a Small Cause Court was not in form in accordance with law. The judgment is as follows:—

"I see no reason for disbelieving the evidence adduced by the plaintiff and decree the suit with costs as claimed against the defendants in their representative capacity".

It no doubt contravenes the provisions of Order XX, rule 4 (1), which provides that judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon, because the point for determination is not stated therein Mr. Agabeg asked me to send the case back to the Court of Small Causes directing it to give a judgment which will be in form in accordance with the rule cited above. But the point for determination is obvious and the omission to state it cannot have caused any failure of justice. And I do not see what the applicant will gain by having this obvious point stated in the judgment; the decision will be the same.

In *Nilmani Maitra* v. *Mathura Nath Joardar*(1) Banerjee, J., lays down the law which gives this Court power to interfere in revision under section 25 of the Provincial Small Cause Courts Act to the following effect:- "Where the decree of a Court of Small Causes, which must also include the judgment, involves a clear error of law, the High Court has power to interfere but....., the error of law must be a substantial one and this

(1) 5 C. L. J. 413 at p. 415.

Court must be satisfied that there has been a failure of justice." Obviously, in the case before me although there is an error of law, it is neither substantial nor one which can be said to have caused a failure of justice, having regard to the nature of the suit and the defence. I shall dismiss the application and it is accordingly dismissed with costs.

*Application dismissed.*

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PATNA HIGH COURT.
SECOND CIVIL APPEAL NO. 177 OF 1916.
May 22, 1917.
*Present*:—Mr. Justice Mullick.
LAL MAN NAIK AND OTHERS—
APPELLANTS
*versus*
KANHAYA LALL PANDEY AND ANOTHER
—RESPONDENTS.

*Chota Nagpur Tenancy Act (VI of* 1908), *s.* 224 (2) *—Declaration, suit for, that entry in Record of Rights is wrong—Appellate decree by Judicial Commissioner—Appeal, second, whether lies to High Court—Decree, meaning of—Civil Procedure Code (Act XIV of* 1882), *Ch. XLII.*

Where the Judicial Commissioner in pronouncing judgment in an appeal makes an appellate decree within the meaning of section 224 (2) of the Chota Nagpur Tenancy Act, there is a second appeal from his decree to the High Court and the provisions of Chapter XLII of the Civil Procedure Code, 1882, apply. [p. 892, col. 1.]

In a suit under section 87 of the Chota Nagpur Tenancy Act filed in the Revenue Court for a declaration that an entry in the Record of Rights is wrong and that the lands are the *zerait* lands of the plaintiffs and that the defendants have no right of occupancy therein, a second appeal lies to the High Court from the decision of the Judicial Commissioner in appeal. [p. 892, col. 1.]

The word 'decree' in section 224, clause 2, of the Chota Nagpur Tenancy Act means 'decision'. [p. 892, col. 1.]

Appeal from a decision of the Judicial Commissioner, Hazaribagh.

Messrs. *D. N. Mitra* and *B. N. Mitra*, for the Appellants.

Mr. *Bankim Ch. Dey*, for the Respondents.

JUDGMENT.—In the Record of Rights published under section 84 of the Chota Nagpur Tenancy Act the lands in suit were shown as the *raiyati* holding of the defendants. The plaintiffs, who are mortgagees, thereupon brought a suit under section 87 of the Act before the Revenue Officer for a declaration that the entry in the Record of Rights was wrong and that the lands were their *zerait* lands and that the defendants had no right of occupancy therein.

The Revenue Officer dismissed the suit. There was then an appeal to the Judicial Commissioner who reversed the decision of the Revenue Officer and decreed the suit. The present second appeal is preferred by the defendants.

The first question that has to be determined is whether or not a second appeal lies to this Court. On behalf of the respondents it is urged that the suit was one under section 87 of the Chota Nagpur Tenancy Act for the decision of a dispute regarding an entry in the Record of Rights under Chapter XII of the Act and by Notification No. 786 T. R., dated the 24th of May 1909 made by the Local Government under powers conferred by section 264 of the Act, an appeal from the Revenue Officer's decision lay to the Judicial Commissioner. It is urged that although a first appeal lies to the Judicial Commissioner, there is no provision of law which allows a second appeal to this Court.

Now the matter turns upon the interpretation of section 224 (2) of the Act. The Judicial Commissioner, by the Notification above mentioned, was not following the procedure prescribed by the Civil Procedure Code. He was following the special procedure prescribed under sections 220 to 223 of the Act. What the object of the Legislature was in thus restricting the Judicial Commissioner in the trial of the appeal is not for me to say. But it is quite conceivable that these sections, which deal with the power of dismissing an appeal for default, hearing it *ex parte*, re-admitting an appeal if so dismissed, and delivering judgment in the manner provided by section 170 of the Act, may be found in practice to be quite insufficient for the satisfactory trial of an appeal. For instance, the Judicial Commissioner may consider it desirable to take additional evidence or to remand or the parties may desire to file cross-appeals and objections. In the absence of definite provisions for these matters it is difficult to see what procedure the Appellate Court should follow. However that may be, the question is whe-

LAL MAN NAIK *v.* KANHAYA LALL.

ther the Judicial Commissioner, when he pronounces judgment in an appeal, makes an appellate decree within the meaning of section 224 (2). If he does, then there is a second appeal from his decree to the High Court and the provisions of Chapter XLII of the Code of Civil Procedure apply to such a second appeal.

The word "the decree" is not defined in the Chota Nagpur Tenancy Act. Section 224, clause (1), gives a right of appeal to the Judicial Commissioner or the High Court against a "judgment" of the Deputy Commissioner. The notification published under section 87 and referred to above gives the right of appeal against the "decision" of the Revenue Officer. What then is the meaning to be assigned to the word "decree" in section 224, clause 2? In my opinion "decree" means nothing more than "decision." Therefore if the decision is one made under Chapter XVI of the Act, then a second appeal lies. Next what is the meaning to be attached to the words "decree passed by the Judicial Commissioner under this Chapter?" Do they mean a decree passed in exercise of the jurisdiction conferred by this Chapter? or do they mean also a decree passed in compliance with the procedure ordained by this Chapter? I think the words ought to be given a wide meaning and made to bear the latter meaning also. And as the Judicial Commissioner was following the procedure prescribed by sections 220 to 223 of this Chapter, his decision was a decree under this Chapter and, therefore, a second appeal lies to this Court

But the learned Vakil for the appellant contends that the Judicial Commissioner had no jurisdiction to hear the appeal at all and he relies upon a Notification of the 29th of October 1909 prescribing that in respect of decisions under section 87 of the Act, arising out of a Survey made under section 119 of the Act, an appeal from the decision of the Revenue Officer lies either to his immediate superior in the Settlement Department or to the Commissioner of the Division, as the case may be.

It is true that the course of appeal against a decision under section 87 of the Act is different according as the Survey is one under Chapter XIV or one under Chapter XII. But in this case there is no evidence whatsoever that the Survey was under Chapter XIV. The latter Chapter empowers the Local Government, on the application of parties, to direct by notification that a Survey and Record be made of lands in any specified local area which are landlords' privileged lands within the meaning of section 118 of the Act. The learned Judicial Commissioner before whom this point appears to have been taken clearly states that it has not been shown that any Survey under section 119 was ordered by the Local Government. Therefore, upon the facts, the Record of Rights was one under Chapter XII and an appeal from the decision of the Revenue Officer under section 87 lay to the Judicial Commissioner and, as I have already held, a second appeal lies to this Court.

There remains the question of the merits of the second appeal. The learned Judicial Commissioner has found that the lands in suit have never been settled with the defendants; that the defendants were in possession in 1960 and 1969 on payment of half the produce but that no tenancy in respect of that possession had been proved. This is a finding of fact which must conclude the matter. The learned Vakil for the appellants urges that sufficient reason has not been given for holding that the presumption arising from the entry in the Record of Rights has been rebutted. The learned Judicial Commissioner had evidence before him upon which he could come to a finding and in second appeal it is incompetent for me to interfere with his decision on findings of fact. The learned Judicial Commissioner, however, while declaring that the defendants have no right to a tenancy, has made a declaration that the lands are *gerait*. Now, this term is not known to the Chota Nagpur Tenancy Act and if the learned Judicial Commissioner intended to find that the lands were the privileged lands of the landlord within the meaning of Chapter XIV, he should have clearly stated that custom as required by section 118 had been proved, but there is no clear finding in his judgment as regards any such custom. The learned Vakil for the respondents, however, agrees to accept a decree merely declaring that the defendants have no tenancy in the lands in suit.

The order, therefore, that I will make is

that the decree of the learned Judicial Commissioner be set aside and in lieu thereof let a decree be made declaring that the defendants have no right of tenancy in the lands in suit. The appeal is, therefore, decreed in this modified form. The respondents will get their costs in all the Courts.

*Appeal partly accepted.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1531 AND 1533 OF 1915.

February 23, 1917.

*Present*:—Justice Sir William Ayling, KT , and Mr. Justice Napier.

BOMMANABOYINA KOTINAGULU AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

RAMARAJU ANKAYYA AND OTHERS—PLAINTIFFS NOS. 2 TO 5—RESPONDENTS.

*Registration Act* (*XVI of* 1908), *s.* 17, *cls.* (1) (c), (2) (*XI*)—*Endorsement, unregistered, of payment on mortgage-deed, admissibility of—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 97, 62—*Earnest money, suit for, on contract for sale of land—Limitation.*

Endorsements of payments on mortgage deeds are admissible in evidence, though unregistered. They fall within the scope of clause (2) (XI), and *not* of clause (1) (*c*) of section 17 of the Registration Act. [p. 893, col. 2.]

*Dupaguntla Subba Rao* v. *Gollapudi Elthirajulu*, 26 Ind. Cas. 360; (1915) M. W. N. 33, distinguished.

A suit for the recovery of an advance paid under a contract for sale of land on the Court's refusal to decree specific performance is governed by Article 97, and *not* by Article 62 of the Limitation Act. [p. 894, col. 1.]

Second appeals against the decrees of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suits Nos. 74 of 1913 and 501 of 19 2 preferred against those of the District Munsif, Narasaraopet, in Original Suits Nos. 425 and 427 of 1911.

Mr. *V. Ramadoss*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—These were suits for specific performance of two contracts to sell two items of property, which were already mortgaged to the plaintiff by the defendant.

The plaintiff had been in possession, but as found by the lower Appellate Court, decrees had been obtained by the defendant for recovery of the two items sometimes after August 10th, 1911. The prayer for specific performance was rejected, but the Court decreed repayment of the consideration.

The first point taken is that Exhibits A1 and A2, endorsements on the mortgage documents, are not admissible in evidence as not being registered. This objection cannot prevail. On their true construction, we do not think that they acknowledge the receipt or payment of any *consideration* on account of the limitation or extinction of a right within the meaning of section 17 (1) (*c*) of the Registration Act. The true scope of this section was pointed out in *Venkayyar* v. *Venkatasubbayyar* (1) and we can find nothing in the terms of these endorsements which amount to such consideration. Further, the object of these endorsements was to acknowledge the payment of a part of the mortgage money and so they fall within the scope of section 17 (2) (XI). We are pressed with a decision of this Court in *Dupaguntla Subba Rao* v. *Gollapudi Elthirajulu* (2), but that decision was on an endorsement of an entirely different character and we have only to construe the endorsement with which we are dealing. The principles laid down in the case of *Venkayyar* v. *Venkatasubbayyar* (1) have lately been re-affirmed in a case reported as *Parasharampant* v. *Rama Yellappa Lakundi* (3). The endorsements are, therefore, admissible in evidence and prove the discharge of the mortgage *pro tanto*.

The next objection is that the suit is barred under Article 62 of the Limitation Act as more than three years had elapsed since the receipt of the money. We think that the lower Appellate Court rightly applied Article 97. On the language of the judgment the Court clearly found an oral contract for sale, though the Judge refused to grant specific performance. There having been a contract, consideration necessarily existed and it was not till the date of the decree for recovery of the property that the consideration failed. We are referred to a decision of the Privy

(1) 3 M. 53; 1 Ind. Dec. (N. S.) 593.
(2) 26 Ind. Cas. 360; (1915) M. W. N. 33.
(3) 4 Ind. Cas. 588; 34 B. 202; 11 Bom. L. R. 1321.

Council in *Bassu Kuar* v. *Dhum Singh* (4). That was a much stronger case than this, because the Privy Council found that the parties had never in fact been, *ad idem*, yet they applied Article 97. The decision of the Board in *Hanuman Kamat* v. *Hanuman Mandur* (5) is directly in point, for there they applied Article 97 to a case where a party endeavoured to obtain possession of the property the subject of the contract and held that limitation ran from the date of the failure. The appeals must, therefore, be dismissed with costs.

*Appeals dismissed.*

V.R.P.

(4) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458 (P. C.).

(5) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 871 OF 1915.

March 19, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Smither.

BADAL MOLLA—PLAINTIFF—APPELLANT

*versus*

CHEMAI MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 60, 98—Mortgage, anomalous—Redemption, clog on.*

One of the elementary rules of equity is that once a mortgage always a mortgage, and that a mortgagee should not be allowed to obtain any undue advantage by his mortgage except the amount of the principal, interest and costs due on his mortgage. [p. 896, col. 1.]

Section 60 of the Transfer of Property Act applies to all mortgages including anomalous mortgages within the meaning of section 98. [p. 896, col. 1.]

A mortgage by conditional sale is not an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act. [p. 896, col. 1.]

Where under an usufructuary mortgage the mortgagee was put into possession to receive the usufruct of property in lieu of interest, and there was a condition in the mortgage that if the mortgagor should fail to pay the rent of the mortgaged holding to the landlord, the transaction will become an absolute sale in favour of the mortgagee:

*Held*, that the condition of forfeiture or the transaction becoming an absolute sale in the event of the mortgagor failing to pay the rent was void, being a clog on the equity of redemption. [p. 896, col. 1.]

Appeal against the decree of the Additional District Judge, 24-Pergunnahs, dated the 19th January 1915, affirming that of the Munsif, first Court, Alipur, dated the 29th August 1913.

FACTS material to the report will appear from the following extract from the judgment of the lower Appellate Court:—

"In this case the plaintiffs brought a suit to redeem a mortgage. Their case is that their predecessor-in-interest, Adel Molla, executed an usufructuary mortgage on the 16th *Kartick* 1301 in favour of defendant No. 1 for Rs. 88.

Under the terms of the deed, the defendant No. 1 was to hold the mortgaged property in lieu of interest and Adel Molla was to pay the rent year by year. They say that Adel accordingly paid the rent till his death in 1304. When he died he left as his heirs the present plaintiffs and the *pro forma* defendants. Being unable to pay the rent, the plaintiffs say that they made over by an oral agreement another one *bigha* one *cotta* to the defendant out of the profits of which the rent was to be paid.

They have now offered to repay the principal but their offer has been refused; hence this suit.

The defence set up is that under the terms of the mortgage bond the mortgagor was to pay the rent due and show the receipt every year to the mortgagee. His successors failed to do so and so under the terms of the bond the mortgage, which was not only a usufructuary one but also a mortgage by conditional sale, became a deed of absolute sale. Hence without the intervention of any Court the mortgagor's successors had lost their right of redemption. It is further alleged, though the evidence does not prove it, that Adel's heirs agreed not to redeem. Other points were pleaded which are not raised in appeal.

The learned Munsif held that no evidence could be admitted under section 92, proviso 4, of the Evidence Act to prove that, as a matter of fact, the plaintiffs handed over the extra one *bigha* one *cotta* to the defendant to secure the payment of the rent. He further treated the mortgage bond as an anomalous mortgage, and holding that, therefore, the parties were bound by its terms to the letter and those terms had not been complied with, held

that the non-payment of the rent had, without the intervention of the Court in a foreclosure suit (such suit having admittedly not been filed), converted the mortgage into an out-and-out sale from the date of default in paying the landlord's rent. He, therefore, dismissed the suit. * * * * * * * * * * * * The mortgage is a usufructuary mortgage, with a further contract given by the mortgagor which reads: "I will pay the rent myself and I will present the *dakhila* to you at the end of the year. If I do not do so you will be entitled to enforce this *kat kobala* without any objection on my part and the *kat kobala* will become a *saf* (absolute) *kobala*." It is argued that this condition makes the whole document a combination of a usufructuary mortgage and a mortgage by way of conditional sale, and not an anomalous mortgage as the Munsif has found. Therefore the rules as to the necessity of a suit for foreclosure and the doctrine 'once a mortgage always a mortgage' apply. But the essence of a mortgage by way of conditional sale is that there should be a certain date on which the debt is to be paid; there is no such date in this deed. Further, if it had been only a usufructuary mortgage there could have been no suit for foreclosure.

I agree then that the mortgage must be held to be an anomalous mortgage and so the parties are bound by the contract induced therein under section 98 of the Transfer of Property Act * * * * * * I hold, therefore, that the mortgage was an anomalous one and that on default of the mortgagor in complying with its terms it became an out-and-out sale. The plaintiffs are, therefore, not entitled to redeem. I dismiss the appeal with costs."

Babu *Mohini Mohun Chatterjee*, for the Appellant.—The appeal arises out of a suit for redemption. On the construction of the mortgage bond the lower Appellate Court was wrong in holding that the document in question was a *kat kobala* and it has become a *khas kobala* (out-and-out sale) for breach of the covenant contained therein, *viz.*, for non-payment of rent by the mortgagors, and so the plaintiff has no right of redemption. My contention is that the document in question cannot be anything but an usufructuary mortgage with a covenant that in case of non-payment of rent it would become an out-and-out sale; but the covenant for non-payment being by way of penalty is bad in law and hence not enforceable. So the plaintiff ought to have been allowed to redeem the mortgage. It is a clog on the equity of redemption and is, therefore, void.

Babu *Gunada Charan Sen*, for the Respondents.—The document in question is only a type of anomalous mortgage within the meaning of section 98, Transfer of Property Act, because the transaction does not come within any of the three kinds of mortgage mentioned in section 58 of the Transfer of Property Act. If then the transaction is an anomalous mortgage, we have to look to the document only for the purpose of ascertaining the rights and liabilities of the parties. Section 98 obviously excludes the applicability of section 60. Under section 98 the parties can contract as they like. Their contract cannot be fettered by the operation of section 60. With regard to the anomalous mortgage the latest case is *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (1). The document cannot be an usufructuary mortgage within the meaning of section 58.

[FLETCHER, J.—The case of *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (1) is against you.]

No. The case is not against me on the point now at issue.

It can be distinguished from the present case. The present case cannot be one of usufructuary mortgage, because in the case of an usufructuary mortgage there must be provision for repayment within a certain date, whereas in the present case there is none. The definition of usufructuary mortgage as given in section 58, Transfer of Property Act, is very clear. Under all these circumstances the lower Appellate Court was justified in holding that the mortgagor cannot now exercise his right of redemption.

Babu *Mohini Mohun Chatterjee*, in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff from a decision of the learned Additional District Judge of the 24-Pergunnahs, dated the 19th January 1915, affirming the decision of the Munsif of the first Court at

(1) 22 Ind. Cas. 54; 38 M. 667; 14 M. L. T. 547; (1914) M. W. N. 81; 26 M. L. J. 47.

Alipur. The plaintiff brought the suit for redemption. It is admitted that the plaintiff's predecessor was the mortgagor and the defendant No. 1 was the mortgagee. The equity of redemption has not been foreclosed or put an end to either by the acts of the parties subsequent to the mortgage or by an order of the Court. One would have expected, therefore, that a case for redemption had clearly arisen, because one of the elementary rules of equity is that once a mortgage always a mortgage. The Courts of Equity have always held that a mortgagee should not be allowed to obtain any undue advantage by his mortgage except the amount of the principal, interest and costs due on his mortgage. It is not necessary to go into the cases on this point. In the present case, however, the learned Judge of the lower Appellate Court has held that the mortgage is an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act and that, therefore, no right of redemption subsists. I am not prepared, as at present advised, to agree with the view of the learned Judge that section 60 of the Transfer of Property Act does not apply to an anomalous mortgage. I am inclined to think that section 60 applies to all mortgages. But be that as it may, the question in this case is whether the learned Judge of the lower Appellate Court was right in coming to the conclusion that the mortgage was an anomalous mortgage. The document before us is stated to be a *kat kobala*, which I am told means a mortgage by way of conditional sale. A mortgage by way of conditional sale is clearly not an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act. The document itself seems to be an usufructuary mortgage within the definition contained in section 58 (*d*) of the Transfer of Property Act. In this case, the mortgagee was put into possession to receive the usufruct of the property in lieu of interest and, therefore, in that view the mortgage clearly comes within the meaning of section 58 (*d*). The contract that, if the mortgagor should fail to pay the rent to the landlord, the mortgagee should be entitled to enforce the *kat kobala* and that the *kat kobala* should be treated as a deed of absolute sale obviously is a clog on the equity of redemption. It is not necessary to go into the authorities on this point. They have been cited in the case of *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (1). We do not really want an authority that a condition of that nature does not nullify the rest of the deed, namely, that it is a mortgage and further that the mortgage provided that, when the principal money would be paid off in one lump sum, the mortgagee would return the property. The condition of forfeiture or the transaction becoming an absolute sale in the event of the mortgagor failing to pay the rent is clearly void. In that view, the learned Judge of the lower Appellate Court ought to have made an ordinary decree for redemption directing the usual account to be taken of what was due to the mortgagor on the footing of the mortgage security. The present appeal is, therefore, allowed and the case is remanded to the lower Appellate Court for the learned Judge there to take an account of what is due to the mortgagee on the footing of the security bond and upon ascertaining the amount due, he should fix a date within which the money ought to be paid and the redemption made; and on the plaintiff's failure to do that, he should direct that the plaintiff's right to redeem shall be extinguished. In taking the account, the learned Judge will also consider the other matter raised by the plaintiff, namely, whether the rent was paid out of the additional land made over to the mortgagee. The appellants will get their costs in this Court. The mortgagee will be entitled, according to the ordinary rule in a redemption suit, to add to their security the costs incurred by them in the Courts below.

SMITHER, J.—I agree.

*Appeal allowed; Case remanded.*

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## MADRAS HIGH COURT.

APPEAL SUIT No. 90 OF 1914.

November 15, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Srinivasa Aiyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

*versus*

SRI SRI SRI MEERJ SRI PUSAPATI VIZIARAMA GAJAPATHIRAJU MAHARAJAH MAUYA SULTAN BAHADUR, RAJAH OF VIZAYANAGARAM AND ANOTHER —PLAINTIFFS—RESPONDENTS.

*Allavion—Accretion, principle for, relating t*

SECRETARY OF STATE *v.* RAJAH OF VIZAYANAGARAM.

*Indian rivers*—Lankas, *formation of—Title—Derelict and alluvial lands—Bengal Regulation II of* 1825.

Land, to be an accretion, must, according to the Common Law, be formed by gradual, slow and imperceptible degrees. By 'imperceptible' is meant imperceptible in its progress, *i e*, step by step as the accretion is being formed and not imperceptible in the result, *i.e.*, after a long lapse of time. It is the manner of the formation, not the result, which decides whether the addition is an accretion or not. If the addition was by gradual and insensible degrees, it is an accretion, while if a considerable increase takes place at one time, it is not an accretion. The increase must be imperceptible to an ordinary person as the addition is being formed. [p. 899, col. 2; p. 900, col. 1.]

Natural silting up, if gradual and imperceptible, will give the land to the adjoining owner. [p. 900, col. 1.]

A perceptible addition made in the course of a single year during the annual rise of a river is a sudden increase and is not an accretion to the adjoining riparian land. [p. 902, col. 2.]

There is no reason for giving the mud and sand deposited in large quantities in the bed of a river, which belongs to the Crown in trust for the public, to the adjoining owner simply because the deposit is also adherent to the adjoining land, so long as such deposits are distinguishable from the adjoining land. The principle of identity is applicable only to derelict lands exposed by the sudden recession of the sea or change of a river's course. [p. 902, col. 2.]

In adopting the law as to alluvion in India the Courts should be guided by local physical conditions. The principle laid down in Bengal Regulation II of 1825 affords the best practical guide in applying the law of accretion to the case of large Indian rivers. Under that Regulation, all that is necessary is that the accretion should be by gradual alluvial process; it need not be imperceptible, and it need not be slow. [p. 903,col. 1.]

The fact that original boundary is known or ascertainable does not render the law of accretion inapplicable. [p. 904, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 63 of 1912.

Mr. *V. Ramesam*, Government Pleader, for the Appellant.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General) and Mr. *S. Desikachariar*, for the Respondents.

JUDGMENT.

AYLING, J.—In this case we have had the benefit of an exhaustive argument on both sides and are particularly indebted to the learned Government Pleader, Mr. V. Rameśam, for the pains he has taken in presenting the facts to us in the clearest and most intelligible light. I have also had the advantage of perusing the judgment which my learned brother is about to deliver, and can add nothing material to it. The evidence leaves no doubt in my mind that the lower Court's decision on the question of fact is correct. The nucleus of the suit *lanka* is, not an island formed vertically in the bed of the Godaveri, but an accretion to plaintiff's pre-existing Vootachiguru Lanka formed in 1883 and severed from the latter about four years later. I do not think we should be justified in refusing to recognise plaintiff's title to the land thus formed on the ground of the comparative rapidity with which the formation took place. No doubt the reported decisions of the English Courts would seem to indicate that they would refuse to treat such a formation as an accretion, if it occurred in an English river: an addition of over 600 acres in the course of a single flood season could not be described as slow and gradual according to the standard of additions by alluvion in English rivers. But there is nothing abnormal in such a phenomenon in Indian rivers: and although several cases have been quoted in which the Privy Council has dealt with claims to accretion by alluvion in Indian rivers, I find none in which this claim has been rejected merely on the ground of the extent of land thus newly formed and the shortness of the period occupied in formation. In the cases *Lopez* v. *Muddun Mohun Thakoor* (1) and *Hursuhai Singh* v. *Syud Loctf Ali Khan* (2) the lands claimed as accretions measured in round figures 2,500 and 5,000 acres respectively. The exact length of time occupied in formation does not appear, but it would seem to have been within a space of about fifteen years in each case. The claims by accretions were rejected solely on the principle of re-formation: and there is nothing in the judgments to suggest that apart from this, their Lordships would have hesitated to admit the claim by accretion. It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces: and the different condition of Indian and English rivers is such

(1) 13 M. I. A. 467; 14 W. R. (P. C.); 11 5 B. L R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

(2) 2 I. A. 28; 14 B. L. R. 268; 23 W. R. 8.

that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (3). Such a difference cannot be ignored in the application of the legal principles of alluvial accretion: and it seems to have been given effect to in Bengal Regulation II of 1825. The only requirement in section 4 of that enactment is that this accession should be gradual, not that it should be slow or imperceptible. Abnormal changes due to sudden alterations of course and violent avulsions are separately provided for; but all accessions by gradual alluvion are treated alike, irrespective of the rate of formation.

I must confess to some doubt as to the extent to which the rapidly changing character of the formations in Indian rivers should affect the principles of re-formation. The permanence of the formations by alluvial accretions seems to vary inversely with their rapidity: and the *lanka* formed in the course of a year or two is frequently destroyed in an equally short space of time. Whether the proprietor of such an evanescent property should be deemed to be entitled *ipso facto* to all subsequent formations over the same portion of the river bed, whatever their origin, seems to me open to question. The re-formation principle was certainly recognised and acted upon by the Privy Council in two of the cases cited above, but the circumstances were peculiar and its general applicability to cases like the one before us does not follow. Fortunately although a certain amount of argument was devoted to this point, it is not one which need be decided for the purpose of the present appeal.

I concur in the conclusions arrived at by my learned brother and would dismiss this appeal with costs.

SRINIVASA AIYANGAR, J.—This is a suit by the *zemindar* of Vizayanagaram against the Government for a declaration that a certain *lanka* formed in the bed of the Godaveri belongs to him as an accretion to his adjoining *lankas*. The defendant, the Government, denied that the suit *lanka* was an accretion in the legal sense of the term and also urged that even if the suit *lanka* was an accretion, it was not formed laterally as an adjunct to or in contiguity with any *lanka* belonging to the plaintiff, but was formed vertically as an island in the bed of the Godaveri. At the place where the suit land lies the Godaveri is both navigable and tidal and it is not disputed that the bed of the river at that place belongs to the Government. The *lanka* in dispute is now an island surrounded on all sides by the river. The Trial Judge decided that the *lanka* was formed by alluvion in contiguity with the plaintiff's land and was subsequently separated therefrom by the river and gave a decree to the plaintiff. The Government appeals.

In the Court below the main contest seems to have been raised on the question, whether the suit land was formed as an island surrounded on all sides by the waters of the Godaveri. In fact, the Trial Judge devotes practically the whole of his judgment to the consideration of this question. In this Court, more especially after we had intimated to the Government Pleader that we agreed with the lower Court that the suit *lanka* was originally formed in contiguity with the plaintiff's land, the main arguments addressed to us were on the second question, *viz.*, whether the suit *lanka* was an accretion in the technical sense of the term. The parties are not in agreement as to the time when the suit *lanka* was formed.

The materials for the determination of the questions in dispute here consist of the several maps or plans of the river at the place of dispute from time to time, the *amarakam* or rent roll accounts of the plaintiff which are exhibited as T series, and certain *muchilikas* executed in favour of the plaintiff for his *lankas* for some of the years between 1873 and 1905. The oral evidence in the case is not of much value.

[After reviewing the history of the *lanka* in dispute, his Lordship proceeded]:—

(3) 25 Ind. Cas. 467; 42 C. 489; 41 I. A. 221; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901 (P. C.).

It is clear from the foregoing review of the history of the formation of the suit *lanka* that the first question raised in this case, namely, whether the land in dispute was formed originally in the bed of the river as an island (*i.e.*), as a vertical formation, or as a lateral extension of the plaintiff's *lanka* or at least of the site of the plaintiff's *lanka* must be found for the plaintiff. It is also clear that the suit *lanka* was formed very rapidly and in some years during the annual rise very large additions were made, which could not but be perceptible as soon as the water subsided.

The further question is whether the plaintiff is entitled to the suit land as an accretion to his *lankas*. The learned Advocate-General strongly pressed on us that his original Betaru Lanka and the Thurpu Lanka, delivered in 1870, and the jutting out land called the Vuta Lanka and Chiguru Lanka on the south-eastern corner where the original Betaru Lanka and Thurpu Lanka joined, were really one *lanka* without there being any discriminating boundary between these portions, and was one big block of land by whatever name portions of the same may be described, and was subject to erosions or encroachments by the river and the additions formed were additions to the *lanka* as a whole and not to any particular portion of it. He laid stress on this matter as a basis for his contention that, however large in extent the additions may appear to be, as the formations were in contiguity with a *long riverine line*, they fall within the definition of accretions. The question then as a question of fact is whether the additions were additions made to a long coast line; I am inclined to think that the additions were to a somewhat narrow coast line of the land belonging to the plaintiff, that is, that the additions were in fact in or about the place and in extension of the Vuta Lanka and Chiguru Lanka which occupied the narrow promontory and the additions were not to a long coast line. In the course of the argument here and in the evidence before the lower Court the plaintiff, who in his plaint claimed the suit land as an accretion to his *lankas*, also put forward a case of re-formation in *situ* of his own *lanka*, as regards portions of the new formation. An examination of Exhibit 22, which for this purpose may be taken to be fairly accurate, shows that the re-formation at the site of lands which belonged to the plaintiff is only a very insignificant portion of the huge block of land which is now claimed by the plaintiff. At the same time, I accept the argument of the learned Advocate-General that it is not possible to say the exact degree of additions and erosions from time to time, though I think that in some years, at least, there have been very considerable additions, especially in the year 1883 when there was such a large addition as 76-7-7 *putties* amounting to about 610 acres in the course of a single year. It is also clear that out of that addition of 610 acres, a considerable portion must have been washed away between 1887 and 1888 and there must have been subsequent additions till about the date of the suit the whole island was over a thousand acres in extent. These being my conclusions on the facts of the case, it remains now to apply the law.

The law of accretion, which is now a part of the law of all civilised countries, seems to have had its origin in the civil law, though no doubt in the application of the principle the conditions prevailing in different countries have necessarily to be taken into account. French Code, sections 556 to 563, German Civil Law, Article 331, Schuster. It is now quite settled in England that land to be an accretion must be formed by gradual, slow and imperceptible degrees. By imperceptible is meant imperceptible in its progress, *i. e.*, step by step as the accretion is being formed, and not imperceptible in the result, *i. e.*, after a long lapse of time. It is scarcely necessary to refer to more than two cases, one the leading case of *King* v. *Lord Yarborough* (4), reported subnomine *King* v. *Lord Yarborough* (5), a dec ision of the House of Lords, and the other *Attorney-General* v. *M'Carthy* (6). It is the manner of the formation not the result which decides

(4) (1824) 3 B. & C. 91; 4 D. & R. 790; 107 E. R. 668; 27 R. R. 292.

(5) (1828) 2 Bligh (N. S.) 147; 1 Dow. & Cl. 178; 5 Bing. 163; 4 E. R. 1087; 31 R. R. 35.

(6) (1911) 2 Irish Rep. 260; 12 Ir. L. R. 339.

whether the addition is an accretion or not, and it was said that if the addition was by gradual and insensible degrees it is an accretion, while if a considerable increase takes place at one time it is not an accretion. *King* v. *Lord Yarborough* (4). In *Attorney-General* v. *M'Carthy* (6) Justice Gibson pointed out that a sudden accretion would not give the land to the owner of the adjoining land. He stated, however, the difficulty in the application of the doctrine in these terms: "What is the base to which the addition is to be made and what is to be the method of observation? Is the increase to be latent at the end of a week or of a month?" He answered the question by saying that it must be imperceptible to an ordinary person as the addition is being formed. In a still more recent case from the Colonies, Lord Shaw delivering the judgment of the Privy Council stated that the accretion should be natural and should be slow and gradual, so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs. And in another place he said that natural silting up, if gradual and imperceptible, will give the land to the adjoining owner. *Attorney-General for Nigeria* v. *Holt & Co.* (7). I do not know if it is necessary to refer to any other case in England as to the meaning of the words 'gradual, slow and imperceptible;' but I may as well refer to a few cases in England where the principle was applied in concrete instances. In *Attorney-General* v. *Chambers* (8) the Lord Chancellor, referring at page 69 to the evidence of witnesses for the Crown who said that the alluvial land had not been added to the main land gradually and imperceptibly but rapidly, observed as follows:—"If by the word 'rapidly' the witnesses mean perceptible, then the Crown and not the defendant will be entitled to these accretions, but if the witnesses merely mean that at the expiration of some period of time, they could perceive the changes which had taken place although they could not discern them in their progress then another important question may arise." In *Foster* v. *Wright* (9) Justice Lindley, as he then was, said. "'The change of the bed' of the river has been gradual and although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all except by comparing its position *of late years* with its position many years before." A case where it was decided that the accretion was not imperceptible and, therefore, did not belong to the adjoining owner may usefully be referred to, for the purpose of showing in what sense this phrase is understood in England. In *Attorney-General* v. *Reeve* (10) the evidence was that the accretion was going on for a long number of years and that it averaged about 30 feet a year. The accretion was perceptible in a month. During the interval between 1878 and the date of the action (which was about five years after) the accretion was 300 feet. There are some instructive observations in the course of the argument. Lord Colleridge in his judgment after referring to the Institutes, Bracton, and Lord Hale's book, and *King* v. *Lord Yarborough* (4), *Hull and Selby Railway, In re* (11) and *Attorney General* v. *Chambers* (8), as to the meaning of the word gradual and imperceptible, said that unless the evidence established that the increase was so insensible that it could not be determined even that the sea was there, the land would not belong to the adjoining owner. And referring to the evidence in that case said, "that this advance of the beach and receding of the line of ordinary high water mark could be plainly perceived from time to time as it went on, that when the wind was blowing strong from north-west to north with a high tide it was often visible from day to day and that the witness had frequently noticed during the prevelance of such winds that the line of

(7) (1915) A. C. 599; 84 L. J. P. C. 98.

(8) (1859) 4 De G. & J. 55; 4 De G. M. & G. 206; 5 Jur (N. S.) 745; 7 W. R. 404; 45 E. R. 22; 124 R. R. 149.

(9) (1879) 4 C. P. D. 438; 49 L. J. C. P. 97; 44 J. P. 7.

(10) (1885) 1 T. L. R. 675.

(11) (1839) 5 M. & W. 327; 8 L. J. Ex. 260; 52 R. R. 733; 151 E. R. 139.

ordinary high water mark receded some 10 or 12 feet in a single tide." If that test is applied to this case or the test as laid down by the Privy Council in *Attorney-General for Nigeria* v. *Holt & Co.*, (7), I am afraid it is not possible to say that the accretion was gradual, slow and imperceptible. But in England, they have not such large rivers as we have in India.

The formation of these *lankas* in the Godaveri was succinctly and accurately described by Mr. Mackenzie in a report made to the High Court in the case of *Ramalakshmamma* v. *Collector of Godaveri* (12), which was finally decided by the Privy Council in *Ramalakshmamma* v. *Collector of Godavari* (13). The river, which is subject to annual floods, deposits in each season a considerable quantity of silt in certain places thereby forming very large and extensive cultivable soil in the bed of the stream. The flood lasts between June and September, and as soon as the flood subsides the soil newly formed is quite perceptible and is easily distinguishable from the previous existing land. Sometimes of course these formations are made as islands in the midst of the waters and sometimes they are thrown up in contiguity with a pre existing *lanka* or the mainland. What happens underneath the water of course is imperceptible, but it is difficult to say that the formation is slow or imperceptible in its progress. If we apply, therefore, the test which is applied in England, there can scarcely be any doubt that *lankas* formed in the Godaveri are not accretions at all, but I doubt whether that is the principle which is applicable in India.

In America where some of the rivers are very large, where also similar formations known as batture are not uncommon, a somewhat different rule is applied. There also the law is stated in terms of the Common Law rule, they also rely on the Institutes of Gaius and Justinian, cite Bracton, Hale and Balckstone and purport to follow the leading decisions in England, but they understand 'imperceptible' as not perceivable *in any given moment of time*; and even large additions made rapidly by gradual alluvial process are considered accretions to the neighbouring land; but where the increase is sudden or instantaneous it is said it belongs to the sovereign. Of this rule Baron Pollock remarked: "It can hardly be possible that it can be perceptible each moment of time except in the case of a convulsion." *Mayor etc. of New Orleans* v. *United States* (14), where the words "slow and imperceptible" is omitted, *Hagan* v. *Campbell* (15), *St. Clair Co.* v. *Lovingston* (16) and note in 58 L. R. A. page 193. In *Jefferis* v. *East Omaha Land Co.* (17) Counsel in argument said that in the cases decided in the Supreme Court the changes were very rapid and yet the doctrine of accretion was enforced in them. I may refer for an application of this doctrine to a case reported as *Mulry* v. *Norton* (18).

In India there have been several cases decided by the Privy Council with reference to the law of accretion in Bengal. In one of the early cases in which the question was discussed, *Lopez* v. *Muddun Mohun Thakoor* (1), the test laid down was, in the language of the English Law, that the accretion should be gradual, slow and imperceptible and the reason of the law was said to be the necessity of the case and the difficulty of having to determine *year by year* to whom an inch or a foot or a yard belongs. There have been other cases in which the extent of land claimed was quite large, for instance in *Ritraj Kunwar* v. *Sarfaraz Kunwar* (19) where the land in dispute was over 2,000 acres in extent, and in *Jaggot Singh* v. *Brij Nath Kunwar* (20), where it was about 4,000 acres in extent. But in these two cases the land which was claimed was identifiable as the land of

(12) 5 M. L. J. 244.

(13) 22 M. 464; 1 Bom L. R. 606; 3 C. W. N. 777; 23 I. A 107; 7 Sar. P. C. J. 534; 8 Ind. Dec. (N. S.) 332 (P. C.),

(14) 10 Peters 662; 9 Law. Ed. 573.

(15) 33 Am. Dec. 267 at p. 271; 8 Porter 9.

(16) 23 Wall. 46; 90 U. S. XXIII 59.

(17) 134 U. S. 178; 33 Law. Ed. 872.

(18) 53 Am. Rep. 206; 100 N. Y. 426.

(19) 27 A. 655; 2 A. L. J. 623; 2 C. L. J. 185; 9 C. W. N. 889; 8 O. C. 293; 15 M. L. J. 349; 7 Bom. L. R. 872; 32 I. A. 165; 8 Sar. P. C. J. 873 (P. C.).

(20) 27 C. 768; 27 I. A. 81; 4 C. W. N. 555; 7 Sar P. C. J. 699; 14 Ind. Dec. (N. S.) 502 (P. C.),

another person; and it is to be observed that in both the cases the rule that to form an accretion by alluvion the addition must be by gradual, slow and imperceptible means was reiterated [see *Ritraj Kunwar* v. *Sarfaraz Kunwar* (19), per Sir Andrew Scoble, and *Jaggot Singh* v. *Brij Nath Kunwar* (20), per Lord Robertson]. The learned Advocate-General in one portion of his argument in fact contended that unless the added land is identifiable as the land of another, it belongs to the adjoining owner whether the same was formed gradually or slowly or suddenly or perceptibly, and relied on an extract from a judgment of the Supreme Court of Missouri printed in a note at page 321 of Farnham on Waters. I doubt if the passage supports the Advocate-General's position and in the absence of the full judgment it is impossible to say what was held in that case. If of course everything is an accretion within the meaning of the law which is not identifiable as another man's land, *i. e.*, in all cases where land is formed adherent to another man's land by deposits of sand or soil, however, large or sudden such deposits may be, *i. e.*, in all cases of alluvial deposits, the plaintiff would certainly be entitled to the suit property, for the mud in solution which is percipitated as the waters subside cannot be identified as another man's property; but it seems to me that that is not the law. It is certainly not the law in England, Stephen's Blackstone, Vol. I, page 339, *Hindson* v. *Ashby* (21), *Attorney-General* v. *Reeve* (10), and is contrary to the opinion of the Judicial Committee in *Nogender Chunder Ghose* v. *Mahomed Esoff* (22), where their Lordships draw the distinction between mere physical adhesion and accretion or *incrementum latens*; and as far as I understand it, it does not appear to be the law even in America. *Morris* v. *Brooke* (23). It is to be observed that the author Farnham himself states the law in terms of the common law rule and in a very considerable number of cases both in the Supreme Court of the United States and the States there is always a discussion as to the nature of the formation, namely, whether it was gradual or slow. If the only question was whether the land was identifiable as that of another, no question of gradual or slow increase can possibly arise in any case of alluvial deposit. See also *Secretary of State* v. *Kadrikutti* (24). In *Moharance Sibessury Dabee* v. *Lukhy Dabee* (25) and *Tarini Churn Sinha* v. *Watson & Co.* (26) the Calcutta High Court and in the recent case of *Srinath Roy* v. *Dinabandhu Sen* (3) the Privy Council had to consider the right of *jalkar* or fishery. Though it was not necessary for the purpose of these decisions to deal with the law of accretion, as it was held that the right of *jalkar* did not depend on the ownership of the soil and that the grantee can follow the river, there are valuable observations in them as to the right to the soil as affected by accretion or the converse process of recession. Lord Sumner delivering the judgment of the Privy Council said, that questions of alluvion would depend upon the rapidity of expansion, see page 232; and referring to the change in the course of the river in *Watson's* case (26), remarked that the change was a sudden one taking place in the case of a single year and not by imperceptible or slow encroachments. On reading these remarks, I am inclined to think that a perceptible addition made in the course of a single year during the annual rise of the river is a sudden increase and is not an accretion to the adjoining riparian land; and if the reason for the rule is as stated in *Lopez's* case (1), or founded on general security and convenience, as said in *Attorney-General for Nigeria* v. *Holt & Co.* (7), I can find no reason for giving the mud and sand deposited in large quantities in the bed of a river, which belongs to the Crown in trust for the public, to the adjoining owner simply because the deposit is also adherent to the adjoining land so long as such deposits are distinguishable from the adjoining land. The principle of identity is I think applicable only to derelict lands or lands exposed by the sudden recession of the sea or change of a river's course. If the principle of identity is to be applied to

(21) (1896) 2 Ch. 1; 65 L. J. Ch. 515; 74 L. T. 327; 45 W. R. 252; 60 J. P. 484.

(22) 10 B. L. R. 406 at p. 421; 18 W. R. 113; 3 Sar. P. C. J. 151 (P. C.).

(23) 53 Am. Rep, 215 foot-note.

(24) 13 M. 369; 4 Ind. Dec. (N. S.) 969.

(25) 1 W. R. 88.

(26) 17 C. 963; 8 Ind. Dec. (N. S.) 1188.

alluvial land, I can find no reason for giving land belonging to one, in this case the Crown, to the neighbouring owner, simply because the river throws a large quantity of mud on it so as to show it above the surface of water.

However that may be, the observations of Lord Sumner, pages 244, 245 of the report, in *Srinath Roy* v. *Dinabandhu Sen* (3) show that in adopting the law as to alluvion in India we should be guided by local physical conditions. I think the principles laid down in the Bengal Regulation, as observed by the Judicial Committee at *Ramalakshmamma* v. *Collector of Godavari* (13), afford the best practical guide in applying the law of accretion in the case of such large rivers as the Godaveri. Under that Regulation all that is necessary is that the accretion should be by gradual alluvial process; it need not be imperceptible, and it need not be slow. Applying this test to this case, as I have said already, it is not possible to say that the accretion here was not a gradual addition to the land of the plaintiff, though the extent of land added in any particular flood season may be quite perceptible and may easily be ascertainable. In *Ramalakshmamma* v. *Collector of Godavari* (13) the dispute related to a *lanka* formed in this very river; the extent of the *lanka* was about 300 acres which was formed in the course of about three years. Nobody ever suggested that the law of accretion did not apply to that case, though at page 459 their Lordships made some observations showing that an accretion must be by gradual, imperceptible deposits. In H (5), which again related to a *lanka* formed in the Godaveri, the original formation which appears to have come up above the water in a single year (1850) was 370 acres in extent. It was never suggested by the Government or its officers with reference to the disputes in connection with the suit *lanka* that it was not a gradual formation to which the law of accretion is applicable, till after the present suit was filed. The whole dispute, though it began in 1889, was a boundary dispute with reference to Larminie's line. No claim was made either by the Government or Kota *ryots* to any land to the west of that line, although the formation was a single whole which was growing by perceptible degrees from year to year. If the formation was not an accretion in the sense of a gradual formation it is really matter for surprise that Government should not have laid claim to the whole of the land and not merely to the eastern portion, as they did till the institution of this suit in 1909. It must be remembered that Mr. Morris, who decided the suit of 1867, referred to the decision of the Privy Council in *Doe d. Seebkristo* v. *East India Company* (27) and said that land formed by gradual accretion belongs to the owner of the adjacent soil. There was a survey of the Kotipalli village and the land to the west of Larminie's line, although it formed part of the present suit land, was measured and surveyed as belonging to the plaintiff. That was in 1895. It was said that this was only a river conservancy survey, and even if it was so, its value as evidence is not affected. The dispute again was the subject of a settlement by Mr. (now the Hon'ble Mr. Justice) Spencer in 1896. Then too no question was raised with regard to the right of the plaintiff to this land as an accretion to his original *lanka* but the only claim made and allowed in favour of the Kota *ryots* was to the northern portion of the land on the eastern side of Larminie's line. Even this was objected to by the plaintiff when some attempt was made to settle the question under the Boundaries Marks Act. While that matter was pending, there was a survey made of the whole of the *zemindari* at the request of the *zemindar* by the Government in 1904. Prior to that date in connection with the dispute proposed to be settled under the Boundaries Marks Act, Mr. Lakshmana Rao, agent of the plaintiff, had already filed plan Exhibit V which showed clearly that the disputed *lanka* was a very large formation and that the major portion of the *lanka* which had belonged to the plaintiff had been washed away. Although there was then this dispute between the parties, in the survey of 1904, Exhibit G, a considerable portion of the disputed *lanka* was measured as belonging to the plaintiff There again nobody ever suggested that this was not an accretion. Further the immediate cause of this suit was the levy of a so-called penal assessment

(27) 6 M. I. A. 267; 10 Moore P. C. 140; 1 Sar. P. C. J. 540; 19 E. R. 100; 110 R. R. 21.

by the Government and that assessment was with regard to lands east of Larminie's line. There again the Government never suggested that this was not an accretion in the sense of a gradual formation. It is only after the suit was filed with reference to the eastern portion that Government in their written statement for the first time stated that this was not an accretion and it was neither slow nor imperceptible. I am not certain that the Government Pleader argued that the formation was not even gradual, though he no doubt strongly pressed upon us that the whole or at least a large portion of the original formation was in one year and was not, therefore, slow or imperceptible. In these circumstances, more especially as it is possible for the plaintiff to contend, the learned Advocate-General did in fact raise that contention, that owing to the attitude of the Government he had lost evidence which he could have preserved, and in the doubtful state in which the matter is left, namely, whether the present suit land or *lanka* was originally formed in one particular year, though it was subject to rapid changes by erosions and large additions in subsequent years and if it was, whether it did not begin at the site of the plaintiff's Vutachigaru Lanka, I am not prepared to say that the law of accretion does not apply to this formation. I, therefore, hold, though not without hesitation, that the second point also should be decided in favour of the plaintiff.

It only remains to notice two other points raised by the Government Pleader for the first time in appeal. He contended that as the extent and boundaries of the plaintiff's *lankas* in the river were accurately ascertainable from the map or plan H 5, any lands subsequently formed even by gradual, slow and imperceptible alluvion in what was the bed of the river in 1870 belonged to the Crown; and relied chiefly on the observations of the Lord Chancellor in *Attorney General* v. *Chambers* (8). This question was elaborately considered in *Attorney-General* v. *M'Carthy* (6) referred to, and the conclusion reached that there was no such principle and the fact that the original boundary was known or ascertainable did not render the law of accretion inapplicable; and the observations of the Privy Council in *Attorney-General for Nigeria* v. *Holt & Co.* (7) are to the same effect. The surveys in this case were not within the category of the *agri limitati* of the Civil Law [*St. Clair Co.* v. *Lovingston* (16). Hunter's Roman Law, page 276 and 12 L. Q. R. 353 (?)]. This contention must, therefore, be disallowed.

The other point relates to a claim made now for the first time that the Government is in any event entitled to that portion of the land which is a re-formation on the site of the Kotoseri Lanka. No evidence was directed to the question and the Government Pleader relies entirely on his plan, Exhibit XXII, prepared and filed for the purpose of this litigation, to prove that there has been any re-formation at all on the site of the defendant's *lanka*. We cannot assume that Exhibit XXII is accurate for this purpose and if we allow this contention, it would be necessary to remand an issue for trial to the lower Court. We must decline to do more, especially as the land which the defendant can establish a title to, on this basis, was said to be very small. The appeal must be dismissed with costs.

*Appeal dismissed.*

V.R.P.

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2339 OF 1916.

April 19, 1917.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

CHHUNNU LAL—PLAINTIFF—APPELLANT

*versus*

THE BANK OF UPPER INDIA, LIMITED, DELHI—DEFENDANT—RESPONDENT.

*Companies Act (VII of 1913), s. 153—Scheme of composition, when takes effect—Declaration, suit for, that plaintiff's liability on pro-note has ceased—Frame of suit—Appeal—Court-fees on memorandum of appeal—Objection.*

Plaintiff had a deposit of Rs. 4,000 in the defendant Bank payable on the 10th October 1914. On the 3rd September 1914 he borrowed Rs. 2,000 at 12 per cent per annum on the security of his deposit and executed a pro-note for the amount. On the 8th October 1914 the Bank suspended payment, and on the 12th and 13th October the plaintiff wrote to the Bank to pay him the balance after deducting Rs. 2,000, and received a reply that as the Bank had stopped

CHHUNNU LAL *v.* BANK OF UPPER INDIA, LTD., INDIA.

business no action could be taken. The Bank started business again on the 1st July 1915 under a scheme sanctioned by the Allahabad High Court, by which debentures and preference shares were to be issued to all "fixed depositors" in lieu of their deposits. The plaintiff brought this suit for a declaration that his liability on the pro-note had come to an end and for an injunction that the Bank be directed to make entries in the books accordingly:

*Held*, (1) that the operation of the scheme sanctioned by the High Court did not date back to the time when the Bank suspended payment but that it affected only those persons who were creditors at the time when the sanction was accorded by the Court; [p. 906, cols. 1 & 2.]

(2) that at the latter date the plaintiff's debt had come to an end and he was a creditor to the extent of Rs 2,000 and that the arrangement must, therefore, be confined in its operation to his position as a creditor to that extent; [p. 906, col. 2.]

(3) that inasmuch as the Bank wanted the plaintiff to accept the position of a creditor to the extent of Rs. 4,000 and that of a debtor for Rs. 2,000 and the plaintiff repudiated his liability as such, urging that he was a creditor to the extent of Rs. 2,000, and was prepared to accept the terms of the scheme to that extent, no other remedy was open to him to have an adjudication upon his alleged liability as a debtor other than the action for declaration and injunction as brought by him and that he was, therefore, entitled to the relief claimed. [p. 906, col. 2.]

Where on an objection being taken as to the insufficiency of Court-fee on a memorandum of appeal it appeared that the Court-fee was exactly the same as that on the plaint and that the Trial Judge had on an objection by the defendant framed an issue on the point and decided it in favour of the plaintiff and the defendant had accepted the decision and stamped his own appeal in the lower Appellate Court accordingly:

*Held*, that under the circumstances the objection could not be entertained. [p. 905, col. 2.]

Second appeal from the decree of the District Judge, Delhi, dated the 7th July 1916, reversing that of the Subordinate Judge, second class, Delhi, dated the 27th April 1916, decreeing the claim.

Rai Sahib *Lala Moti Sagar*, for the Appellant.

The Hon'ble Mr. *E. W. Parker*, for the Respondent.

JUDGMENT.—The relevant facts of this case are as follows:—The plaintiff Chhunnu Lal had a deposit of Rs. 4,000 in the Bank of Upper India payable on the 10th October 1914. On the 3rd of September 1914 he borrowed a sum of Rs. 2,000 at 12 per cent. per annum on the security of the above deposit and executed a pro-note for the amount. On the 8th October 1914 the Bank suspended payment, and on the 12th and 13th October the plaintiff wrote to the Bank to pay him the balance after deducting Rs. 2,000, and received a reply that, as the Bank had stopped business, no action could be taken in pursuance of the request contained in the letters. It appears that on the 1st July 1915 the Bank started business again under a scheme sanctioned on the 2nd of June by the High Court of Judicature for the North Western Provinces under section 153 of the Indian Companies Act, VII of 1913, by which debentures and preference shares were to be issued to all 'fixed depositors' in lieu of their deposits.

The plaintiff's case is that on the 10th October 1914, when the deposit of Rs. 4,000 fell due, his liability on the pro-note came to an end, and that he became a creditor to the extent of the balance. In answer to this case it is contended on behalf of the Bank that the plaintiff is a creditor in respect of the entire amount of Rs. 4,000, that the loan taken by him on the pro-note has not been discharged, and that he is liable to pay the same with interest at the stipulated rate. To obtain an adjudication upon the rights *inter se* of the parties the plaintiff brought the present action for a declaration that his liability on the pro-note had come to an end, and for an injunction that the defendant Bank be directed to make entries in the books accordingly. The Court of First Instance decreed the claim, but the learned District Judge on appeal accepted the contention of the Bank and dismissed the suit. The plaintiff has come up to this Court on second appeal, and Mr. Parker for the respondent raises the preliminary objection that the Court-fee on the memorandum of appeal is insufficient. Now, the Court fee on the memorandum is exactly the same as that on the plaint, and it appears that the Trial Judge on an objection by the defendant framed an issue on the point and determined it in favour of the plaintiff. The defendant evidently accepted the decision, stamped his own appeal in the lower Appellate Court accordingly, and did not impeach the correctness of the finding before that Court. In these circumstances the preliminary objection cannot be entertained and must be overruled.

CHHUNNU LAL *v.* BANK OF UPPER INDIA, LTD., INDIA.

Upon the merits there can be no manner of doubt that on the 10th of October 1914, when the deposit matured, the defendant Bank was not entitled to call upon the plaintiff to pay the debt due on the pro-note, considering that it had already in its possession Rs. 4,000 belonging to the plaintiff and payable to him at once. As observed already the debt was secured on the deposit, and the plaintiff took the further precaution of writing to the Bank to appropriate part of the money, which had become due to him, to the debt due by him on the pro-note. Whether we apply the rule of set-off which finds expression in the Code of Civil Procedure [of which the application to companies in liquidation has been recognised in a Division Bench judgment of this Court reported as *Mehr Chand* v. *Amritsar Bank* (1)] or treat the case as one of payment, it is manifest and indeed it is not contested by the defendant, that apart from the scheme sanctioned by the High Court in June 1915, the Bank could not have successfully maintained a suit for the recovery of Rs. 2,000. It is further clear that if the plaintiff had, prior to the enforcement of the scheme in question, brought an action for the balance of the deposit after giving credit for Rs. 2,000, the Bank could not have offered any resistance to that suit and could not have claimed that the debt on the pro note had not been extinguished.

The question then arises whether the scheme or arrangement sanctioned by the High Court altered the jural relations of the parties in such a way as to revive the debt due by the defendant, which debt had to all intents and purposes ceased to exist. It is to be observed that the scheme applies only to the creditors and shareholders of the Bank, and this is clear from section 153 of the Indian Companies Act, which enacts that if a majority in number, representing three-fourths in value of the creditors, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors and also on the company. Now, it seems to us that the arrangement could affect only those persons who were creditors at the time when the sanction was accorded by the Court, or at the time when the application under section 153 was presented to the Court (if we apply the analogy of section 168 relating to the date of the commencement of the winding up by the Court). At the latter date the plaintiff's debt had come to an end, and he was a creditor to the extent of only Rs. 2,000, and the arrangement must be confined in its operation to his position as a creditor to that extent. We cannot accept the view that the operation of the scheme dates back to the time when the Bank suspended payment. There is nothing in the Indian Companies Act or in the order of the High Court which would support that contention, and on general principles it is clear that the liability could not be revived by any arrangement which came into operation subsequently. Whether the plaintiff is to be treated as a fixed depositor or a creditor of any other description is a matter which is not directly before us, and we are not called upon to pronounce any opinion thereupon.

As to the form of the suit, a perusal of the correspondence between the parties leaves no doubt that the Bank wanted the plaintiff to accept the position of a creditor in respect of Rs. 4,000 and that of a debtor for Rs. 2,000 and that the plaintiff wholly repudiated his liability as such. He maintained that he was a creditor to the extent of Rs. 2,000, and if he is to that extent prepared to accept the terms of the scheme, it is manifest that no remedy is open to him to have an adjudication upon his alleged liability as a debtor other than the action for declaration and injunction as brought by him. Indeed, the learned Advocate for the Bank is unable to suggest any other form of action or any other relief to which the plaintiff was entitled and which he has not claimed in the suit. We accordingly agree with the Subordinate Judge that no valid objection can be taken to the frame of the suit.

For the foregoing reasons we accept the appeal and reversing the decree of the lower Appellate Court restore that of the Court of First Instance with costs throughout.

*Appeal accepted.*

(1) 28 Ind. Cas. 975; 69 P. W. R. 1915; 89 P. L. R. 1915; 63 P. R. 1915.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 53 TO 58 OF 1916.

May 22, 1917.

*Present*:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Mullick.

KUNTI DAI—APPELLANT

*versus*

JHARU LAL DAS MAZUMDAR AND OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Part 1, Art. 3, applicability of—Possession, suit for, by tenant—Dispossession by landlord, not as such—Limitation.*

Per *Chamier, C. J.*—Article 3, Sch. III, Part I, Bengal Tenancy Act, applies only to a suit by a *raiyat* or under-*raiyat* against his landlord, including one or more of several landlords. If it is shown that the plaintiff *raiyat* is in fact a tenant of the defendant who dispossessed him in respect of the land claimed in the suit, the Article will apply. The reason or excuse given or supposed to have been given by the landlord for dispossessing his tenant appears to have no bearing on the enactment. [p. 907, col. 1.]

Per *Mullick, J.*—Whether the plaintiff admits the defendant to be his landlord or not or the defendant admits that the plaintiff is his *raiyat* or not, if in fact the relationship of landlord and tenant is found to exist then Article 3, Schedule III, Part I, Bengal Tenancy Act, will apply. [p. 909, col. 1.]

The policy of the Legislature since 1885 is to rigorously exclude all other Statutes of Limitation whenever it is possible to apply the special limitation provided by the Rent Acts. [p. 909, col. 2.]

Where a co-sharer landlord dispossessed a *raiyat* claiming the land as his *zerait* and in a suit for recovery of possession by the tenant brought more than two years after the date of dispossession it was found as a matter of fact that the land was really the *kast* of the tenant:

*Held*, that the suit was barred by limitation under Article 3, Schedule III, Part I, Bengal Tenancy Act, even though when dispossessing the tenant the landlord did not purport to act as landlord of the holding. [p. 908, col. 1; p. 909, col. 1.]

*Kamal Dhari Thakur* v. *Rameshwar Singh*, 19 Ind. Cas. 545; 17 C. W. N. 817; *Abhoy Churn Mookerjee* v. *Shaik Titu*, 2 C. W. N. 175; *Brojo Kishore Mahapatra* v. *Saraswati Dassi*, 6 C. W. N. 333; *Mahomed Khalil* v. *Hirendra Nath Bhattacharya*, 5 C. L. J. 650, commented upon and distinguished.

Letters Patent Appeals from decisions of Mr. Justice Atkinson, in Second Appeals Nos. 1400 to 1425, dated the 16th May 1916, reversing the decisions of the District Judge, Bhagalpur, dated the 10th February 1912, modifying those of the Munsif, Bhagalpur, dated the 2nd May, 1911.

Messrs. *Hasan Imam*, *Lalit Mohan Ghosh*, and *Ganga Dhar Das*, for the Appellants.

Messrs. *P. R. Das* and *Sailendra Nath Palit*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—These six appeals arise out of three suits brought by the respondents for possession of nine plots of land in villages Karharia, Bhooria, Mohiama and Salondha appertaining to *Touzi* No. 96, *Pargana* and District Bhagalpur. The respondents had in this *zemindari* a small share which passed at an execution sale in 1902 to one Srimati Jai Mangalbatti Misrain, who died since these suits were instituted and is represented before us by the appellant. For the sake of convenience I will treat the purchaser as the appellant and refer to her as such. It was found by the Court of First Appeal that the respondents were prior to the sale in possession of the nine plots in question in these appeals as *raiyats* and that they remained in possession of the plots till 1907, when they were dispossessed by the appellant. It appears that in settlement proceedings in 1906 the appellant claimed the nine plots as her *kamat* lands. The Settlement Authorities rejected her claim, but wrongly, as it has now been found, recorded the plots as *bakasht malik*. The appellant dispossessed the respondents of the plots in Salondha and Karharia in August and September 1907 and of the plots in Bhooria and Mahiama in October and November 1907. The present suits were instituted on November 15th, 1909, on the re-opening of the Courts after the annual vacation of one month. The Court of First Appeal allowed the claims to the plots in Bhooria and Mahiama but dismissed the claims to the plots in Salondha and Karharia on the ground that they were barred by limitation under Article 3, Schedule III, to the Bengal Tenancy Act. Both sides appealed and a learned Judge of this Court held that both sets of claims were within time. Hence these six appeals by the defendant or rather by her representative.

It was conceded before us that Appeals Nos. 55, 57, and 58 must be dismissed on the finding of the Court of First Appeal that the suits were brought within two years of the date on which the respondents were dispossessed of the plots in Bhooria and Mahiama.

KUNTI DAI v. JHARU LAL DAS.

The question for decision in the remaining three appeals, which relate to the plots in Karharia and Salondha, is whether the suits are governed by Article 3, Schedule III, to the Bengal Tenancy Act. That Article provides that the period of limitation for a suit "to recover possession of land claimed by the plaintiff as a *raiyat* or an under-*raiyat*" shall be two years from "the date of dispossession." It has been held in a large number of cases that Article 3 applies only to a suit by a *raiyat* or under-*raiyat* against his landlord, including one or more of several landlords. I accept that construction of the Article. So far it would appear that these suits are governed by this Article. But it is contended on behalf of the appellant that the Article applies only where the *raiyat* has been dispossessed by his landlord *acting as such*. In fact the argument went to this length that the Article applies only when the landlord says either expressly or impliedly to the *raiyat*, "I am your landlord, you are my tenant. You must vacate the land", and then turns the *raiyat* out wrongfully. If this contention is correct, Article 3 does not apply to the present cases for, although on the findings the appellant was one of the landlords of the respondents, she did not claim the plots in question as the landlord of any one and certainly did not admit that the respondents were or ever had been her tenants in respect of the plots. She claimed that the plots were her *kamat* land by reason of the fact that she had purchased the share to which according to her they were appurtenant or attached. I am not prepared to place such a narrow construction on Article 3. It appears to me that if it is shown that the plaintiff *raiyat* is in fact a tenant of the defendant who dispossessed him, in respect of the land claimed in the suit, then Article 3 applies to the suit. The object of that Article seems to be to provide a short period of limitation for a suit by a *raiyat* to recover a holding from which he has been dispossessed by his landlord. The reason or excuse, good, bad, or indifferent, given or supposed to have been given by the landlord for dispossessing his tenant appears to have no bearing on the enactment and much confusion must ensue if the applicability of the enactment is made to depend upon such considerations.

It has been held in several cases in the Calcutta High Court that where a landlord buys a *raiyat's* holding and as purchaser of the *raiyati* interest dispossesses that or another *raiyat*, Article 3 does not apply to a suit by the dispossessed *raiyat* to recover his holding [see *Kamal Dhari Thakur* v. *Rameshwar Singh* (1) and cases there cited] and some of the language used in the judgments in those cases supports the contention of the respondents in the cases now before us. But the actual decisions in those cases do not cover the present cases and I am not prepared to extend those decisions to the present cases.

In my opinion Article 3 applies to the cases now before us. I would allow Letters Patent Appeals Nos. 53, 54 and 56 and dismiss with costs of both hearings in this Court Second Appeals Nos. 1400, 2671 and 2672 of 1912. Letters Patent appeals Nos. 55, 57 and 58 should be dismissed with costs.

MULLICK, J.—I entirely concur with the judgment that has just been delivered. The period of one year allowed under section 20 of Act X of 1859 was extended by Act VIII (B. C.) of 1869 to two years and up to 1885 the law was understood to be that for actions in the nature of possessory suits between parties who are admitted to be landlord and tenant the period of limitation was two years, but that when the title of one party or the other was denied then the period was 12 years under the general law. Act VIII of 1885, however, effected a change and upon the analogy of the Central Provinces Rent Code enacted that an occupancy *raiyat* claiming to recover possession against his landlord must bring his suit within two years of the dispossession. It was held that this applied not only to possessory suits but also to suits where the title of the parties was challenged [see *Saraswati Dasi* v. *Horitarun Chuckerbutti* (2) and *Ramdhan Bhadro* v. *Ramkumar Dey* (3)]. The law was further amended in 1907 by

(1) 19 Ind. Cas. 545; 17 C. W. N. 817.
(2) 16 C. 741; 8 Ind. Dec (N. S) 490.
(3) 17 C. 926; 8 Ind. Dec. (N. S.) 1162.

bringing within the rule *raiyats* of all descriptions and under-*raiyats*, so that the law as I now understand it to be is that whether the plaintiff admits the defendant to be his landlord or not or the defendant admits that the plaintiff is his *raiyat* or not, if in fact the relationship of landlord and tenant is found to exist, then Schedule III of the Bengal Tenancy Act will apply. With regard to that class of cases which have sought to exclude from the operation of Schedule III ouster by a landlord acting under the authority of a Civil Court decree and in the capacity of an auction-purchaser, the principle on which they may be distinguished is that the facts in each of those cases show that the tenancy was at an end and that there was no relationship of landlord and tenant at the time of the ouster.

In my opinion all the cases on which the learned Counsel for the respondents has relied are susceptible of this distinction for instance in *Abhoy Churn Mookerjee* v. *Shaik Titu* (4) the defendants were co-sharer landlords who had in execution of a rent decree purchased the *jotes* of the plaintiffs; in *Brojo Kishore Mahapatra* v. *Sarasvati Dassi* (5) the landlords had purchased the interest of the tenant plaintiff in execution either of a rent or a simple money decree, in *Mahomed Khalil* v. *Hirendra Nath Bhattacharya* (6) the landlord was a purchaser in execution of a rent decree against the recorded tenant; and finally in *Kamal Dhari Thakur* v. *Rameshwar Singh* (1) the landlord defendant No. 1 had purchased in execution of a decree for rent and settled the holding with respondent No. 2.

In these cases the Court was possibly of opinion that the tenancy being at an end by the operation of a decree and delivery of possession, the plaintiffs would not have been suing as *raiyats*.

But in the cases before us the facts show that notwithstanding the denial of the landlords the tenancy did exist at the time of the ouster and, therefore, Schedule III of the Bengal Tenancy Act clearly applies. It is immaterial in my opinion that the landlords put their case too high at the outset in claiming that the lands were *zerait* and that no rights of tenancy could exist therein.

To hold otherwise would in my opinion be reading into Article 3 words that are not contained in the Statute.

On general grounds also I would hold that the policy of the Legislature since 1885 is to rigorously exclude all other Statutes of Limitation whenever it is possible to apply the special limitation provided by the Rent Acts. So it has been held that in districts where Act X of 1859 still applies, a *raiyat* who has been illegally ejected by his landlord must sue to recover possession within 1 year under sections 25 and 30 of the Act and is precluded from proceeding under section 9 of the Specific Relief Act in the Civil Court, *Jumla Singh* v. *E. G. Kingsley* (7).

*Appeals Nos.* 53, 54, 56 *decreed*;
*Appeals Nos.* 55, 57, 58 *dismissed*.

(4) 2 C. W. N. 175.
(5) 6 C. W. N. 333.
(6) 5 C. L. J. 650.
(7) 21 Ind. Cas. 224; 17 C. W. N. 1201.

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MADRAS HIGH COURT.

**FULL BENCH.**

SECOND CIVIL APPEAL No. 210 OF 1911.

February 17, 1916.

*Present*: - Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., and Mr. Justice Kumaraswami Sastri.

SESHACHALA CHETTY AND OTHERS—PLAINTIFFS NOS. 1 AND 3 to 6—APPELLANTS

*versus*

PARA CHINNASAMI AND OTHERS—DEFENDANTS NOS. 1 TO 3, 5, 7, 8, 9, 11, 12, 14 AND 15—RESPONDENTS.

Mirasi *rights, nature of*—Gramanattam, *rights in*—Poramboke *lands, rights of* mirasidars *in—Grant of house-site by Government in* mirasi *village—Ejectment of tenants in occupation of house-site, suit for, by* mirasidar.

Per *Wallis, C. J.*—In the absence of evidence of user there is no general presumption of the *mirasidars'* ownership of the *nattam*, but where user is shown the presumption of ownership readily arises. [p. 940, col. 2.]

The preferential right of the *mirasidars* to cultivable waste is not of itself a sufficient foundation for the general proposition that they are entitled to eject inhabitants of the village from portions of the unoccupied *nattam* granted to them by Government, though they may be entitled, as incidental to such right of preferential cultivation, to the allotment of sites on the unoccupied *nattam*, when necessary. [p. 940, col. 2.]

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

Before the advent of British rule and especially under the Muhammadan Government, unoccupied *nattam* was not generally recognised by Government as the private property of the *mirasidars*, nor has the latter's ownership been established subsequently either by Government recognition or by judicial decisions. [p. 940, cols. 1 & 2.]

Per *Ayling, J.*—Where in a *mirasi* village a person has been granted a portion of the *nattam poramboke* for use as house-site by a duly authorised Government officer, the *mirasidar* cannot by virtue of any right, privilege or title inherent in him as *mirasidar* disregard the grant of the house-site by such officer, and evict the grantee from possession. [p. 954, col. 1.]

This rule does not apply to cases in which a *mirasidar* has, prior to the grant by Government, already acquired a title to the particular site either by previous grant or prescription, and sues on such title. [p. 954, col. 1.]

The *mirasidars* of a particular village are not precluded from showing, if they can, that in that village they have acquired by prescription a title in the *nattam* generally as against Government, which would include the right claimed. But the mere fact that they are the *mirasidars* of the village neither carries with it such a right, nor does it even raise a presumption of the existence of such a right. [p. 954, col. 1.]

The incidents attaching to *mirasi* tenure may have a common origin in the status of the *mirasidar*, but none of them necessarily involves another, and they vary with the description of land to which they relate. Each requires to be separately established, and recognition by the State, whether express or implied, is an indispensable condition for the enforcement of each. [p. 942 col. 1.]

Per *Kumaraswami Sastri, J.*—In a *mirasi* village the rights of Government over waste (including *nattam* and *cheri*) are subject to the rights of the *mirasidars*. [p. 975, col. 1.]

The nature and extent of such rights are not uniform throughout the Presidency but vary, and the onus is on the *mirasidars* to prove that any specified incidents attach to *mirasi* rights in any particular district, there being no presumption that *gramanattam* is the exclusive property of the *mirasidars*. [p. 975, cols. 1 & 2.]

The rights of *mirasidars* over waste are not extinguished by the mere fact that the Government grants *pattas* to strangers. [p. 975, col. 2.]

Per *Sankaran Nair, J.* (in Order of Reference).—A *mirasidar*, so far as the Government is concerned, is the proprietor of the waste lands in the village. But he has not the right to convert immemorial waste, *i. e., anadi karambu* into cultivable land, without the consent of Government or of the non-*mirasidars* of the village. Whatever may be the rights of the *mirasidars*, the Government is not entitled to deal with immemorial waste or introduce other *pattadars*. [p. 925, col. 2.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 245 of 1908, preferred against the decree of the District Munsif, Poonamallee, in Original Suit No. 9 of 1905.

This second appeal coming on for hearing on the 4th December 1912 and the 27th and 28th August 1913, and having stood over for consideration till the 9th October 1913, the Court (Sankaran Nair and Sadasiva Aiyer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SANKARAN NAIR, J.—The question that arises for decision in second appeal has reference to the respective rights of the Government and the *mirasidars* in the waste lands, including house sites, in a *mirasi* village.

In the old village accounts and in the discussion on the question these lands are referred to under certain designations:—

*Poramboke.*—Includes the *nattam cheri, i.e.*, the residential quarters of the village, rivers, tanks, water courses, waters, roads, burning places.

*Tarisu.*—*Waste*, is of two kinds; *seykal karambu*—cultivable waste; *anadi karambu*—immemorial waste.

The suit was brought by the plaintiffs who claim as *mirasidars* owning two shares out of three in a village in the Chingleput District. They say that the land in dispute, which is a homestead, is their ancestral property held under them by the 13th defendant. They allege trespass on their land and seek to recover possession of it. On the allegations made by the defendants, persons in possession, that they held under Government, the Secretary of State was made the 15th defendant. In the written statement the Government admitted that the land forms part of the *gramanattam*, but contended that neither the plaintiffs nor their predecessors, who are the *mirasidars* of the village, have any proprietary right to the *gramanattam* and other *poramboke* lands in Government villages, and that they vest in the Government. On this the issue was framed, "whether the *mirasidars* of the plaint village have proprietary right in village sites and other *poramboke* lands?" Both the lower Courts have dismissed the plaintiffs' suit. This is an appeal from that decision. The lower Courts were of opinion that the claims of the *mirasidars* to waste lands have been finally negatived and the Government's title established by the judgments in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) and

(1) 26 M. 371.

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

*Secretary of State* v. *Manjeshwar Krishnayya* (2), and they accordingly considered only the question whether the plaintiffs have established a title by prescription against Government. They found the following facts proved. The plaintiffs purchased their *mirasi* property under Exhibit J, dated the 28th May 1891, from a previous *mirasidar*. The title deed conveyed to them the entire property in the land conveyed. It conveyed in terms the village site, *cheri* site, as well as wells, tank, pond, river channel, waste lands and all other rights and privileges pertaining thereto. Their predecessor purchased the property under Exhibit H (1887), which also conveyed all the waste lands, etc. Exhibit H makes reference to a deed of partition of 1853 and a prior document of July 1822 as title-deeds. The deed of partition was produced in Court, but as it was not produced at the proper time the Judges rejected it. The lower Courts attached no weight to Exhibits H and J, as the Government was not a party to them. It is also proved that in 1894 the land was actually cultivated under the plaintiffs. The lower Courts did not attach any weight to this circumstance, as at that time there was an application before the Collector by a Christian missionary for lands in the *mirasi* village and this cultivation was treated simply as an attempt to create evidence of enjoyment. But this fact does not deprive it of its value and shows that the plaintiffs did exercise an act of possession at that time when their title was disputed. Again, in 1902 the plaintiffs let a tenant (plaintiffs' witness No. 3) into possession. This was after the grant to the defendants by the Government. A thatched hut was put up for supplying liquor to the Pariahs residing there Exhibits E and G no doubt cannot be treated as evidence of title in these circumstances, but these seem to be certainly evidence of possession. It is also found that the plaintiffs cut branches of trees. This also is explained on the ground that it does not amount to an act of ownership but that it is a common privilege of *mirasidars*. There is no counter-evidence of possession or of title. Now, it seems clear on these facts that, though they might not be sufficient to support a title by prescription only, if the *mirasidars* are the owners of the lands including the waste in their village, they have proved such possession as the nature of the land admits of, and *prima facie*, therefore, they would be entitled to recover.

But it is argued that the *mirasidars* of a village have no right in waste lands or in the homestead, *nattams* or *cheries* included in the limits of the village. They might have certain privileges, but such privileges are put an end to when the Government interferes with the possession of such land. This is the plea that is upheld by the lower Courts and that is the question which arises for consideration in second appeal. The right that is claimed is on behalf of the village community, that is, of the *mirasidars*, as a body, each *mirasidar* having a share in the village. In determining this question, it is first necessary to bear in mind that a village was not a mere administrative unit.

We have now got ample informations about the village community in Mr. Huddlestone's Mirasi Papers (an abstract of it is given by Mr. Baden Powell in his Indian Village Community, pages 361 to 379), in the correspondence relating to the revision of village establishments, both official publications, and in the volumes of South Indian Inscriptions with reports, also being published by Government.

The following facts appear so far as the Tamil land is concerned. The country was divided into villages. A village, geographically considered, was a tract of country comprising some hundreds or thousands of acres of arable and waste lands; politically viewed, it resembled a corporation or township. It had its *nattam* plots of land set apart for house sites for caste Hindus, *cheries* for the labouring classes, and also portions set apart for other castes. It had its own officers or servants to collect the revenue payable to Government, to repress crime, to guard the crops, to preserve the boundaries, and the superintendent of the tanks and water courses to distribute the water therefrom for the purposes of agriculture. "Under this simple form of Municipal Government the inhabitants of the country have lived from time immemorial. The boundaries of the villages have been seldom altered and, though the villages themselves have been sometimes injured, and even desolated by

(2) 28 M. 257 at p. 267; 15 M. L. J. 147.

war, famine and disease, the same name, the same limits, the same interests, the same families have continued for ages. The inhabitants give themselves no trouble about the breaking up and division of kingdoms, whole villages remain entire, they care not to what power it is transferred or to what sovereign it devolves; its internal economy remains unchanged." This description, taken from the fifth Report of the Committee of the House of Commons, has become classic and is a true description of a typical village in southern India when the East India Company acquired it.

The ancient deeds of transfer of which we have copies fully bear out, like Exhibits H and J, the title of the members of the village community or *mirasidars* to the lands in the village. Many documents are published in the papers on the *mirasi* right with notes by Mr. Bayley and Mr. Huddlestone. In one deed, copy of which is printed at page 263, "the *uncultivated land* within the limits of our village" is granted by the *mirasidars* for being brought under cultivation. *Manai*, which means house site or *nattam*, *kollai*, which means homestead, and which is a small enclosure near the house, *paracheri* or the suburbs set apart for Pariahs, *pizhakkadai* (the backyard immediately adjoining the house), *mavadai maravadai*, meaning all kinds of game and wood land, all these are expressly granted. The notes by the experienced Revenue Officer who edited those papers and explained these terms are very instructive—see pages 262 to 342. Some of these were executed shortly before the East India Company acquired the government of the country but others were later. The deeds in the book on *mirasi* papers are confined to Madras and its suburbs. But the inscriptions which are now being published show that elsewhere in the Presidency it was the same. The volumes of South Indian Inscriptions supply ample information on the point. I will only refer to one or two by way of illustration. In the inscription which is printed at page 115 of Volume 2, part II, of the South Indian Inscriptions, we find among the properties sold the village site (*gramanattam*), the place used for the pasture of the cows (*gopracharabhumi*), *vellannattam*, the land which includes the land of the cultivator, ponds, channels hills, jungles and mounts; and the extent, according to the survey of these items, is given. It gives the trees over-ground and the wells under-ground with rights of alienation. In another grant we have *cornatham* (village site), *kulam* (pond), *vaikkal* (channel passing through the villages), the *paracheri*, *kammalacheri* and burning ground (*chudukadu*). I have selected these two inscriptions at random out of a mass of inscriptions which are printed in these volumes, which go to tell the same story, *i.e.*, in ancient days the grant conveyed the entire property in the village of every kind and form. These title-deeds, published in the Mirasi papers, and the deeds that come frequently before the Courts, refer to the eight incidents of ownership which are conveyed by them. They are explained in the Mirasi papers at page 205. *Pashana*, one of these eight incidents conveyed, means mountains, rocks and their contents, *i.e.*, mines and minerals and has always been understood to show that even waste lands were conveyed. See Sheristadar Sankarayya on this point at page 221. Some of these grants were made by the Rajahs themselves. Whenever the King wanted to bestow waste lands or any extent of land within the limits of a village, he purchased them from the *mirasidars*; otherwise, the donee obtained only the Government share. Sheristadar Sankarayya states that this has been the practice in the Shozha country in the villages of Needamangalam, Callanei and many others. See Mirasi Papers, page 220. The Inam Commissioner, whose proceedings form an enclosure to G. O. No. 2346 Revenue, dated the 23rd December 1861, stated that in Tanjore "when the Rajahs of the country granted *waste* lands in *inam*, they generally purchased or obtained in gift the *mirasi* right of the lands from the *mirasidars* and conferred it on the *inamdars*. Another arrangement sometimes made with the same object was to confer a portion of the *inam* on the *mirasidars* of the village in compensation for their rights over the waste land which was given in *inam*. This was done either by grants or subsequently by the grantees" This report is of special importance as it was made with a view to obtain the order of the Government as to how such lands are to be dealt with. This seems decisive. So far the documentary evidence.

But after a century of British Government,

these ancient deeds can only be relied upon to explain and support the rights of the village communities, where they have succeeded in preserving their rights. When the East India Company took possession of the country, the village communities were in a state of disintegration. Some villages were held as joint property, the entire produce being divided among the *mirasidars* in certain defined shares. In some other villages, all the lands under cultivation were divided, but the waste lands, etc., were held as common property. In certain other villages, the lands under cultivation and some arable waste were divided and the rest of the lands were held in common. The *ryotwari* settlement, which was introduced by the East India Company, was practically destructive of this communal holding of property. The Government as far as possible entered into direct relations with the individual proprietors. *Pattas* were issued to each *ryot* and the land which the *pattadar* was to cultivate in the ensuing year was entered therein, and if he was unwilling to cultivate any land, he had to surrender it to the Government. Again, the policy of the Government was to enter into direct relations with the actual cultivator. The rights of the *mirasidar*, therefore, as a middleman were recognised as little as possible. The village autonomy was thus destroyed. The old boundaries were lost; many villages were often clubbed into one. The old hereditary village officials became, or gave place to new, Government servants. The oppressive character of the revenue assessments in the early years of the last century, the comparative frequency of famines and seasons of scarcity led to the abandonment of villages. Consequently, it is now difficult to say whether there is any presumption of *mirasi* rights in any district or to what extent the village community have succeeded in preserving their rights. They survived, generally speaking, in those districts, Chingleput and Tanjore in particular, in which the Collectors respected ancient native rights, though from other districts also cases often come before the Courts in which the village community have successfully asserted their claims. The presumption will also vary with the kind of waste in dispute. I shall briefly refer to the recognised authorities. Mr. Ellis, who was a Collector whose opinion is referred to always with respect on this point, recognised the full ownership of the *mirasidars* in the lands of the village. According to him, when they cultivated the lands themselves, they paid the Government revenue. When any non-*mirasidar* cultivated, he paid Tunduvaram to the *mirasidar*. From him all the *mirasidars* received also certain fees. He was of opinion that the *mirasi* right also extended to waste. He distinguished between culturable waste land, that might be brought under cultivation, and immemorial waste, see page 184. He said that the *mirasidars* had as much right in the culturable waste as they had in the lands under cultivation paying revenue to Government. They might cultivate it or cut wood, but in the case of immemorial waste, though they had the right of cutting wood, grazing their cattle and quarrying, they had no right of cultivation and could not break up the pasturage or cut down productive trees without the consent of the Government. He also pointed out that *mirasi* right was saleable (when he wrote) and that such sales were of shares in the villages, Mirasi Papers, pages 205, 207. This was also the opinion of Sankarayya, who was for many years *sheristadar* in the *Huzur Kutchery* at Madras. Mr. Ellis was also of opinion that, if the *mirasidars* declined to take up culturable waste for cultivation or failed to make any arrangements for it, it was open to the *Circar* to give it to strangers for cultivation, though the *mirasi* right would not be thereby extinguished. The *mirasidar* would be entitled after any lapse of time to claim those lands himself. The other District Officers who were consulted agreed generally with these opinions, though there were differences between them in detail. The opinion of Mr. Ellis was first accepted by the Government of Madras and the Board of Revenue and was printed and circulated for the use of the service at large, see Mirasi Papers, page 344; but Sir Thomas Munro, who became the Governor of Madras afterwards, disagreed with it, and he recorded his opinion in his minute of the 31st December 1824, and in all the subsequent discussions the question has generally assumed the form, which of them is more reliable. Sir Thomas Munro wrote that the view taken by Mr. Ellis and others, that the *mirasi*-

*dar* of *wet* land was bound to pay rent only for what he cultivated, is wrong, and that, if he left any land uncultivated and the Government gave the land to another person for cultivation, the *mirasidar* had no right to exact from him the landlord's share or rent, though the *mirasidar* might have still the privilege for a long, though not clearly defined, term of years of recovering his land from the Government tenant on consenting to pay the rent. As regards the waste lands, he stated:

"The waste in *miras* villages in Arcot is supposed by Mr. Ellis to belong to the *mirasidar* jointly; and he supports his opinion by documents showing that, when a *mirasidar* sells his cultivated lands, he transfers by the same deed to the purchaser his right in the produce of the waste, the quarries, mines, fisheries, etc., within the limits of the village. But this appears to be a mere technical form, which can give no actual proprietary right in the waste. It is used in villages where there is no waste, as well as where there is, and may be used where there is no *miras*. It confers a right, but not the right of ownership, to the pasture of the waste lands, and the fishery of the tanks and *nullahs*, in common with the other *mirasidars* of the village. The same right exists everywhere. In those parts of the Deccan where *miras* is unknown, the *ryots* of every village reserve the fishery and pasture to themselves, and drive away the cattle of strangers, and derive just as much benefit from the waste as those of *miras* villages. Such a right seems to be a natural one everywhere, and it is accordingly assumed by the *ryots* of every village without its being supposed that any formal grant is necessary for the purpose." He added afterwards: "It has been supposed that in *miras* villages in Arcot, in the original compact between the *Circar* and the first settlers, the exclusive use of the waste was secured to those settlers: but it has already been shown that in all villages, whether *miras*, or not, the inhabitants reserve to themselves the exclusive use of the waste. But this right is good only against strangers, not against the *Circar*, which possesses, I think, by the usage of the country, the absolute right of disposing of the waste as it pleases, in villages which are *miras* as well as in those which are not."

Sir Thomas Munro is, no doubt, right in saying that the mere fact that the deeds of conveyance referred to the waste, quarries, mines and fisheries would not convey any title if the vendor was not entitled to them, but, where it is accompanied by the exercise of rights of ownership, then they form strong evidence of title. It is stated in the same extract that the *ryots* of every village reserved the rights of pasture and fishery to themselves; the right of exclusive enjoyment is, of course, one of the main incidents of ownership. Again Mr. Ellis states that the *mirasidar* used to exercise the right of quarrying. This is almost a conclusive test of ownership. Other acts of ownership will be referred to later. Sir Thomas Munro states, no doubt, that certain rights referred to by him were exercised and these deeds of conveyance executed in this form, not only by the *mirasidars* but also by those village communities where no *mirasi* right prevailed. That only shows that, after the village communities in non-*mirasi* villages lost certain rights, they still retained others with that form of conveyance; but, in so far as any rights have been asserted and exercised, these deeds support the view that they were based upon ancient usage. Sir Thomas Munro also says: "The *Circar* from ancient times has everywhere, even in Arcot as well as in other Provinces, granted waste in *inam* free of every rent or claim, public or private, and appears in all such grants to have considered the waste as being exclusively its own property." It is undoubtedly the fact that there are many ancient grants by rulers conveying waste in *inam*, etc., and they show *prima facie* that the waste was Government property at the time of the grant. A large number will be found in the South Indian Inscriptions and a few in the Mirasi Papers. But Sir Thomas Munro seems to have been unaware of the fact that, when in ancient times the *Circar* granted waste in *inam* free of every rent or claim generally, it was after purchasing the property from the *mirasidar*. We cannot ignore the statements on this point of Sankarayya or the *Inam* Commissioner, to which I have referred. This suggests an inference, as I have pointed out, exactly contrary to that drawn by Munro. Further the fact that Government granted the waste lands to village communities, shows not only the title

of the latter to the waste lands but raises a presumption of a lost grant in every case of village community in possession of waste. So, if I had to form an opinion as between Sir Thomas Munro and Mr. Ellis at this distance of time, I should hesitate very much to accept his (Sir Thomas Munro's) view in opposition to that of Mr. Ellis and the other District Officers. But it appears to me that the question is concluded by authority, and that Sir Thomas Munro's view has been considered and authoritatively rejected by the Civil Courts and also by the Government. His opinion was recorded in 1824. The question soon came up for consideration before the Civil Court. As between the Government and the *mirasidars*, the nature of the *mirasi* right was considered in Cause No. 90 of 1836 in the *Zillah* Court of Chingleput and in appeal from that decision. The plaintiffs therein claimed to be the *mirasidars* of the village, and their case was that there were 164 and odd *cawnies* of uncultivated land in the village, out of which the Collector, the 1st defendant, granted under a *cowle* to the plaintiffs 40 *cawnies*, and by another *cowle* to others, who did not belong to the village, 80 *cawnies*. The plaintiffs, being unwilling that persons who had no *mirasi* in the village should have possession of any part of the waste land, offered to take the whole of the 164 and odd *cawnies* and give security for the revenue. The Collector, however, refused to do so and gave a portion of the land to the seventh and other defendants. The plaintiffs denied the right of the Collector to give away such land. The Collector contended that the land was waste, and that he had the power of granting *cowle* to any person who was willing to undertake to bring it under cultivation. On this question, this is the finding of the Judge:—

"From the evidence in this case, it is quite evident that the plaintiffs alone are the *mirasidars*, and that the 7th defendant and others have no *mirasi* right whatever in the village. That the *mirasidars* alone have a right to sell and mortgage *varapat* land, and that to every *mirasi* share there is a certain portion of waste land attached, but the particular parts of the waste land which belong to each individual *mirasi* share is not actually known because those waste lands are seldom if ever divided, are facts which have been established by the evidence of witnesses in numberless cases before this Court; and *as no one ever attempted to dispute the inherent right of mirasidars to the waste land*, it is evident that, without the consent of the proprietors of the soil, the Collector has no authority to deliver any part of these lands to other persons." Papers on Mirasi Right, page 461.

There was an appeal from that decree to the Provincial Court, and the Collector relied, amongst other grounds, on the opinion of Sir Thomas Munro, already referred to, that "the right of the *mirasidars* to the waste was good only so far as to preclude strangers from grazing and exercising other rights of common in the village, but that the *Circar* possessed by the usage, of the country, the absolute right of disposing of the waste as it pleases in villages which are *mirasi*, as well as in those which are not." See page 465, Mirasi Papers. The Appellate Court upheld the right of the *mirasidars* to the village waste. The following is the material portion of the judgment. See pages 466-467:—

"The first point which calls for notice in the argument of the appellant, is the objection taken to that part of the *Zillah* Judge's decree which asserts that 'the right of the *mirasidars* to the immemorial waste lands has never been disputed;' this averment of the *Zillah* Judge appears in entire accordance with the law of *mirasi* as laid down by Mr. Ellis, while the contrary position of the appellant that in fact 'the immemorial waste is the absolute property of the *Circar*', is not only incompatible with his views, but also incompatible with the possession on the part of the *mirasidar* of any property in the soil whatever. Mr. Ellis says: '*Mirasi* right, wherever it exists, certainly extends to waste lands.' 'In the *anadi karambu* or immemorial waste though the *mirasidars* possess the exclusive right of cutting firewood, working quarries etc., they have no right of *cultivation*, much less can they claim to break up common used for pasturage, or to cut down productive trees, etc.' '*Mirasi* right is confined to *the use* of these as they exist; no alteration can be made with respect to them by the *mirasidar*. I mean that they have no inherent right to do so. With the consent of the *Circar*, any beneficial change in the appropriation of lands may take place, and a correspondent alteration

may be made in the Tarapadi accounts; thus, if part of the *anadi karambu* lands be reclaimed, or a road in the *poramboke* be stopped up and cultivated, the extent must be transferred from this head to that of *virapat*' (*varapat* lands under wet cultivation paying revenue). The restriction contained in the foregoing has no reference whatever to a limitation of right (as property), but to the power of its conversion except for beneficial purposes, the Government having a voice in the case of such conversion, being equally interested as the *mirasidars* in its effects. If a *mirasidar* be so reduced in circumstances as not to be able to bring under cultivation his share of the *varapat*, or if he should have abandoned agriculture for other pursuits, it is incumbent on him to provide for its culture by granting to *payakaries* such terms as will induce them to bestow on it the advantages of their stock and labours. If he do not do so the State has then a right to employ *payakaries* either for the current year, or for a fixed, not an indefinite, number of years, and perhaps to resume his *mirasi swatantrams* in proportion to the extent of land he has neglected to cultivate. The *mirasi* tenure seems almost indefeasible, every possible allowance and expedient having been in practice to prevent its alienation from the original possessor. B. Sankarayya, whose views of *mirasi* are recorded with those of Mr. Ellis, says, 'As waste lands are included in the *gramanattam*, all such lands have been considered to appertain exclusively to the *mirasidars*.' The same authority, speaking of the right of the *Circar* to provide for the revenue where the *mirasidar* makes default, says, 'If, therefore, the *mirasidars* fail to cultivate, and loss thence accrues to the State, the *Circar* enjoys and exercises the right to cause the lands to be cultivated and to issue *coules* for the purpose'. 'Although many authorities concur on this point, I have not met with one which vests in the *Circar* power over *mirasi* lands further than is necessary for the temporary protection of the revenue, in default of its being provided through the means of the *mirasidar*; nor have I found any authority which distinguishes the right over waste (as property) and cultivable land, except in the purpose of their respective application. Every village has a certain portion of waste land attached to it, which neither the *mirasidar* nor the Government can break up unless for mutual benefit. *Mirasi* is founded on immemorial usage, from which neither the Government nor the *ryot* has power to depart in any respect unless for a beneficial change:' pages 466, 467, Papers on Mirasi Right" and the conclusions are stated in the following terms: 'The document granted by the Collector and which is denominated a *cowle*, is an entire annihilation of the right of the plaintiffs. It conveys the lands in perpetuity to *payakaries* without respect to the *mirasidar's* claim; it assumes the right of soil to be in the Government, instead of the *mirasidar;* and it does not even recognise *mirasi* as a distinction, much less *its claims* The circumstances which would have justified even temporary alienation of the land by the Collector to the *payakaries*, are all wanting in the case The act was not necessary as a protection of the revenue, as the plaintiffs offered security for its full payment whether they cultivated the land or not. Their offer (Document No. 50) is dated 20th May 1835, the *cowle* to the 7th and 9th defendants is dated 15th June of the same year. If the waste in question were convertible into cultivable land, it is quite clear from the authorities quoted that, on its conversion from the *anadi karambu* to *varapat*, it ought to have been entered as such, in the Terapadi accounts of the village, and then divided among the *mirasidars* according to the manner in which the rest of the village was shared among them."

I have referred to this judgment at some length, not only because it deals fully with the question, but discards the opinion of Sir Thomas Munro when it was specially relied upon—see the memorandum of appeal—and adopts the views of Mr. Ellis. (Papers on Mirasi Right, page 462). The Court of Directors accepted this ruling. While the question was pending before the Provincial Court, they stated the rule to be that, whenever the waste lands of a *mirasi* village were proposed to be given to any other than the *mirasidars* the proposal should, in the first instance, be communicated to them, to whom, in the event of their being willing to cultivate or to give security for the revenue assessable on the lands, the preference should be given.

They added, "We consider that the Government has a clear right to the revenue to be derived from the conversion of waste lands into arable." It will be noticed here that the only claim asserted on behalf of the Government was to the revenue of the lands, and that, if security was given for the payment of the revenue, then no right of interference was claimed.

The Court of Directors claimed only that right in dealing with waste lands in revenue interests which was claimed by Munro in wet lands. It would have been otherwise, of course, if the Government had claimed the proprietorship of the waste lands. After the decision was given, they re-iterated this opinion in 1844, and they added, "The question still remains undecided, whether Government possesses the right, in the event of the *mirasidar* refusing to cultivate or to give security for the revenue, to alienate waste lands in *mirasi* villages to *paracoody* cultivators." It will be noticed that the decision of the Provincial Court above referred to only justified a temporary alienation of lands by the Collector as protection of the revenue as in cases of land under cultivation, and it did not recognize any right when the plaintiffs offered security for its payment, whether they 'cultivated the land or not'.

In the next case that may be referred to, Appeal Suit No. 100 of 1849 in the Civil Court of Chingleput, it was decided that the *mirasidars* have no right to levy *swatantrams* or fees from *payakaries* who do not hold from them, but who have at their own expense brought immemorial waste into cultivation under *cowle* granted by the *Circar*. It is stated by the Judge who decided that case, that this point had been frequently decided in the negative, to which observation, there is a note appended by the Member of the Board of Revenue who published that judgment that "it would have been better had the Civil Judge quoted the cases;" but, whether the Judge was right or not, he does not decide the question under consideration, because it may be that the owner of the land has no right to receive *swatantrams* from trespassers. He may eject them or get mesne profits, but the fees he may not be entitled to get. Papers on Mirasi Right, page 484.

Whenever the question was brought before the Courts, the ownership of the *mirasidar* has been consistently upheld. In the case which is referred to in the Mirasi Papers, page 487, the Sudder Court says in 1849, "The *mirasidars* are the acknowledged hereditary proprietors of the soil," and it upholds their claim to recover property against the person in possession who was a *pattadar* himself paying revenue to Government. In page 119, Sudder Decisions of 1850, where the defendants held on *pattas* issued by the Collector of the District, the law was thus laid down by the Sudder Court, "The Court of Sudder Adalat are also further of opinion that the law as laid down by the Civil Judge, relative to the Government officers having authority unreservedly to dispose of any lands situated in a *mirasi* village that may be left waste for a period of years, is erroneous, no such right being claimed by the Government by whom the prescriptive rights and privileges of the *mirasidars* are upheld." In a case reported in the Sudder Court Decisions of 1854, page 140, the Sudder Court recognised the proprietary right of the *mirasidars* and their right to possession on such basis.

This was in 1854. These decisions, it appears to me, are in conformity with the orders of the Court of Directors, which recognise the ownership of the *mirasidars* and the right of Government to give the land to strangers when it becomes necessary in revenue interests to do so, a right claimed equally with reference to wet lands.

When the Survey and Settlement of the Presidency was undertaken, the Court of Directors on the 17th December 1856 directed the Madras Government to act in accordance with their previous declarations already referred to—see page 556, Mirasi Papers. When a *mirasidar* in Tanjore, dissatisfied with the local authorities, civil and criminal, ventured to submit a memorial to the Court of Directors, the Madras Government recognised his claim to the waste land, dissented from the Board's view that it was open to Government to give the land to whomever they liked, and held "that the best authorities were agreed that in *mirasi* villages the *miras* extended to waste as well as to arable land—" 22nd December 1855,

Even in non-*mirasi* villages the Court of Directors would not assert Government ownership. Their conclusion is stated in Government Order No. 667 of the 27th May 1856: "The waste land in this country, in the villages of the plains at least, is certainly not the property of Government or the State, in the absolute sense in which the unoccupied land in the United States and some of the British Colonies is so. The village communities claim an interest in it and that interest has been universally admitted, though not accurately defined. To put up the waste to sale, entirely ignoring that prior right of the village communities, would be to introduce a totally new practice; and it would certainly be regarded by the common feeling of the country as an invasion of existing rights." See also G. O. of 5th June 1857.

In Madras itself the Collector reported in 1855, "the *mirasidars* have been in the habit of selling the waste lands of this Collectorate and claiming *mirasi* in them," and in that year the Revenue Officials denied their right only to immemorial waste, a claim, however, which they gave up on the opinion of the Advocate-General that it was unsupportable. See page 511, Mirasi Papers. Finally there is a decision in 1862. The Sudder laid down, "Adverting to the admitted fact that Tolavoor is a *mirasi* village, it follows as a necessary corollary from this judgment that the defendants are themselves *mirasidars*, and that they possess a right to all the privileges incident to a proprietary right of this character including the title to a share of *samudayam* or common lands". (See page 51, Decisions of Sudder Court, Madras, 1862).

These decisions, it appears to me, are binding upon us, and they fully recognise the ownership of the *mirasidars* in all the lands in the *mirasi* village including the waste. They recognise also the right of the Government, in cases where the *mirasidars* refused to cultivate the lands, waste or under cultivation, to let them to another for temporary cultivation. Whether in such cases the *mirasidar* retained his *mirasi* right, either to recover *swatantrams* of his from the tenant let in by the Government or to turn him out, was a question apparently not settled.

In 1864 the Revenue Recovery Act (Act II of 1864) was passed. Under this Act it has been finally decided that the Government have not the right to assign the waste land to a person for cultivation on the ground that the owner of the land does not cultivate it or pay revenue which the new *pattadar* offers to pay to Government. In *Secretary of State* v. *Ashtamurthi* (3), in fact, the argument advanced was that, as the State is entitled to a share of produce in every cultivated land, and if the land that is now waste is given to a new *pattadar* for cultivation the Government would derive its shares of the produce, the true owner cannot be allowed to defeat that alleged right of the Government to get the share by refusing to cultivate it himself and not allowing Government to give it to another. This argument was rejected, and it was held that the Government had no right to let in a new *pattadar* into possession, and that, if such *pattadar* was let in, the true owner might turn him out and obtain possession, and, therefore, that, if the land was sold for revenue which might not have been paid by the new *pattadar*, the purchaser would get no interest in the property. This decision has been repeatedly followed and is considered to have finally settled the question. That they have no such right to deal with ordinary *ryotwari* land under cultivation is now settled. The only remedy is sale for arrears of revenue. All the decisions, therefore, prior to 1864, which I have noticed and which recognized the right in the Government to put a new *pattadar* into possession if the *mirasidar* let the land waste, must be disregarded after the passing of Act II of 1864, if a *mirasidar* is the true owner of the land; and the decisions to which I have referred leave no room for doubt that he was recognised as true owner, and the right of Government was recognised by the decisions and by the Court of Directors only as a right for the protection of the revenue and not as ownership of the land.

In considering what took place subsequently we need, therefore, trouble ourselves only with the question of ownership of

(3) 13 M. 89; 4 Ind. Dec. (N. S.) 772.

the *mirasidar*. In 1870 the Government in its G. O. No. 793, dated the 1st June 1870, put forward their claim to appropriate immemorial waste lands in *mirasi* villages for State purposes without reference to the *mirasidars*. From this it was held to follow that the claim for compensation for *poramboke* lands also was untenable.

In 1872 the whole question was again referred to the Collectors for report with reference to the *gramanattam* in non-*mirasi* villages as well as in *mirasi* villages. On a consideration of the reports received from all the Collectors, the Board of Revenue stated their opinion in these terms:—"The true view of the case is that *gramanattam* is the communal property of the villagers, and that the Collector can only interfere with a view to benefit the community and when his action is consistent with the common law. To alter this state of things a special enactment would be necessary. No authoritative enunciation of a principle would suffice. Such a law would confiscate private property, and the end would not be such as to justify the means." The Government, however, were not prepared to go so far as the Board of Revenue in declaring *gramanattam* to be the communal property of the villagers. The Government said: "By immemorial usage a portion of every village is assigned rent free as a site for the dwellings of the villagers; but, as the old *hukumnamahs* show, the enjoyment of it is subject to regulation by the Government." This is in accordance with the common law of the land, under which the Government is only entitled to a share of the produce and, therefore, not entitled to levy any tax in land not capable of yielding any produce. With reference to *mirasi* villages, they said, "In purely *mirasi* villages, where the entire area belongs to the *mirasidars*, the *gramanattam*, no doubt, appertains to them equally with the other *poramboke*, but these cases are exceptional." They accordingly directed the Board to issue instructions to that effect. Accordingly the Board issued Standing Order No. 39 in March 1873 (see page 58 of the Maclean's Standing Orders of the Board of Revenue). It would be noticed that this was a final declaration made to the public that, so far as the *zemindari* and *mirasi* villages are concerned, the Government have no concern with them and they do not assert any ownership in them. With reference to non-*mirasi* villages they had only the power of control which was no doubt necessary in the public interests. In 1875-76 when the question of the Chingleput Revenue Settlement was under consideration, the Board in their Proceedings No. 1415, dated the 25th May 1875, pointed out, "The system is strongly rooted in law and immemorial custom. It is there, and must be regarded in many respects neither more nor less than a great but necessary evil. It is of great antiquity, is dearly cherished and has existed with more or less vitality, notwithstanding many years of persistent efforts to crush it." The admission of persistent efforts during many years to crush the *mirasi* system and its survival notwithstanding is significant. In 1876 the settlement rules were promulgated. The Government by these settlement rules recognised, in accordance with the views above stated, the claim of the *mirasidars* to a *swatantram* of two annas in the rupee of the Government assessment, and the fee calculated at this rate was entered in the settlement register, except as regards certain lands to which it is now unnecessary to refer. The nature of the settlement, the rates conceded to the *mirasidars* and the title of the *mirasidar* as the owner of the land were clearly set forth in the descriptive memoirs that accompanied each settlement register.

The Settlement Officer states in his report that the *mirasidars* agreed to abandon their obstructive tactics in the future, as they fully expected in return to receive their *swatantrams* from the Government *karnam*, who would collect them, and that the Government held out such hopes to them. But after the settlement was over, the Government said that if any such expectation were held out to the *mirasidars* it was unauthorized. (See G. O. No. 2868 Revenue, dated the 19th October 1909). However, the claim to *swatantrams* was recognised; only the Government refused to collect the fees for paying it over to them. This recognition is continued up to date—see Board's Standing Order No. 15, paragraph 28 at page 29, and

Order No. 2868, Revenue, dated the 19th October 1900. A few years after, however, the Government came to the conclusion that the claim of the *mirasidar* to the *gramanattam* must be resisted, and, as a first step towards it, they resolved to abolish the system of double entry, which showed the name of the occupant and also the name of the *mirasidars* as the owner of such land, as otherwise it would appear that the Government acquiesced in the claim of the *mirasidars*. The double entry was accordingly stopped sometime before 1890. In 1892 and 1894 the Government resolved definitely to deny the *mirasidars'* claim to the waste lands in the village, including *gramanattam*, except to the *swatantram* and to a preferential right to cultivation, and they have maintained that attitude ever since. In the meantime, the question often came before the Courts. In *Sakkaji Rau* v. *Latchmana Gaundan* (4), the plaintiff, as the sole *mirasidar*, sued the defendant, who was let into possession by a Revenue Officer, to recover possession of that property and arrears of *thunduthirva* at a certain rate. The Munsif refused to eject the defendant, but passed a decree for arrears of *thunduvaram*. On appeal, the District Judge held that, by omitting to take a revenue engagement for the lands, the plaintiff had relinquished his *mirasi* right in them, and reversed the decree in his favour for *thunduthirva*. The High Court at first held that, while the omission of the *mirasidar* to cultivate might authorize the Revenue Authorities to introduce a cultivator, it did not further prejudice the prescriptive rights of the *mirasidar*, and such rights would not be lost by the *mirasidar* declining to receive a *patta* for the lands. A review of the judgment was allowed and the case was re-argued. It may be noticed that there was no appeal before the High Court by the *mirasidar* against the dismissal of the claim for the recovery of the land. The question that was argued in second appeal was confined to his right to receive the dues from the cultivators who held under *pattas* from the Government, and the High Court held that in such cases, wherever the right was denied, there should be an enquiry whether by custom it prevailed on the estate or similar estates in the neighbourhood. It accordingly remitted issues for the trial of that question. On the point before us, as to his right to recover possession of the land, this decision is not an authority. The suggestion that the refusal of the *mirasidar* to cultivate the waste, which was till then not paying any revenue, might justify the revenue officials in introducing a stranger, can no longer be accepted see *Secretary of State* v. *Ashtamurthi* (3). The case, however, lays down the following proposition:—That it is unsafe to infer that, although tenures resembling one another in their general features are met with in many Provinces, these incidents are identical in different Provinces or in the same Province. The political circumstances have more or less affected tenures. It must not, therefore, be assumed that the incidents of the *mirasi* tenure are everywhere alike. The learned Judges expressed their dissent from the ruling of the District Court, that, if any *ryot* accepted a *patta* from the Government of land in which another person has *mirasi* right, the latter right is lost. It was pointed out that there had been no law depriving the *mirasidars* of any privileges they might have customarily enjoyed, and that the intention of the Government was to respect the privileges of landholders of all classes. This was the judgment of a Full Bench.

In Original Suit No. 128 of 1882* on the

(4) 2 M. 149; 4 Ind. Jur. 560; 1 Ind. Dec. (N. S.) 375 (F. B.).

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* MADRAS HIGH COURT.
ORIGINAL SUIT NO. 128 OF 1882.
April 24, 1883.
*Present*:—Sir Charles Arthur Turner, KT.,
Chief Justice.
COSAPPATTAH APPAVOO GRAMANY TODDY,
SHOPKEEPER RESIDING AT NO. 25
IN PADAVATTAH AMMAN KOIL STREET
AT COSAPATTAH WITHIN THE
LOCAL LIMITS OF MADRAS—PLAINTIFF
*versus*
THE RIGHT HON'BLE THE SECRETARY OF STAE FOR
INDIA IN COUNCIL—DEFENDANT.

Mr. *Spring Branson*, Counsel, for the Plaintiff.

The Advocate-General and Mr. *Grant*, for the Defendant.

JUDGMENT.—The plaintiff in this suit alleged to have purchased from the *mirasidars* of Vyasarpadi

Original Side, known as the Vyasarpadi case, Sir Charles Turner, who took part in the Full Bench judgment, came to the conclusion, that the plaintiff in that suit, who

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a piece of waste land within the limits of their *mirasi* estate, and erected a house on a part of it and made a garden. He complains that the Government on 26th April 1881 entered on the and and destroyed the house and garden and ejected him from possession and he claims to recover the property and compensation. For the defence it was pleaded that the suit was barred by limitation, that the land was not the property of the plaintiff's vendors but of the Government and that the damages claimed were excessive.

The plea of limitation was not pressed at the hearing and I can find nothing to support it. The first question to be considered in this suit is whether by the Customary Law *mirasidars* have any title to the waste lands within the area of the *mirasi* estate.

It has always appeared to me that the *mirasi* tenure of Madras, Chingleput and Tanjore originally differed little from the *zemindari* tenure which obtains generally in Northern India. In the disturbances which preceded the introduction of British rule the rights of the *mirasidars* though to a certain extent recognised were not always respected, and when enquiries were made with a view of ascertaining precisely the incidents of the tenure, the replies received though agreeing in many principal features differed in details. Nothing was done to secure either an accurate record of the rights of the *mirasidars* in each village (as was attempted if not effected in Northern India on the occasion of settlement) nor was any general rule introduced to remove the uncertainty in which the enquiries instituted by the Government had left the matter.

The introduction of a revenue system which required payment of revenue for cultivated land and enabled the person accepting an engagement to relinquish that engagement in respect of any part of the lands he had either no means or no inclination to cultivate, added to the confusion of rights.

The question constantly occurring was the right of the *mirasidar* to waste. The better opinion appeared to be that he had a right to the waste even though he paid no revenue for it, but if he omitted to cultivate what was cultivable or to provide for its cultivation by *paicares* the Government might issue *pattas* to strangers for its cultivation. There resulted a long struggle between the *mirasidars* and the Government, the former unable to cultivate and unwilling to pay assessment on much of the land over which they claimed rights and on the other hand resisting the introduction of strangers.

When *pattas* were granted to strangers, the *mirasi* right was not altogether lost and in some villages the *mirasidars* succeeded in obtaining from the *ryots* introduced by Government recognition of their interests in the soil by the payment of small cesses.

In the Bengal Presidency this question had received a satisfactory solution by legislation. Regulation VII of 1822, section 8, enacted that where the waste land belonging to or adjoining any *Mehal* (Revenue paying estate) was very extensive so as to exceed the quantity required for pasture or otherwise usefully appropriated, the Revenue Officers were empowered to grant leases for the same to any person who might be willing to undertake the cultivation on perpetuity or for such period as the Government should determine, and assign to the *zemindars* or other persons who might establish the right of propriety in the lands so granted an allowance equivalent to 10 per cent. on the amount payable to Government by the lessees in lieu of or bar of all claims to or in the land so granted and of such perquisites or privileges as they might appear by the custom of the country entitled to receive. Such an enactment in Madras coupled with a survey and ascertainment of the limits of the *mirasi* estates would have put an end to much of the prevailing uncertainty as to rights and have secured at once the interests of the Government and the *mirasidars*.

From the authorities I have consulted in this and other cases which have come before the Court, I hold that the *mirasidars* have in this part of the Presidency a certain property in the waste and that property enables them to dispose of the occupancy of the lands subject of course to the payment of Revenue, and that this property is not necessarily lost by non-payment of revenue. I need not refer to any further authority than the replies made by Mr. Ellis and Mr. Sankariah who was for many years *sheristadar* in the *Huzur Chutchery* of Madras. Mr. Ellis was of opinion that *mirasi* right wherever it exists certainly extends to waste. He distinguished between cultivable waste and immemorial waste. He considered they held the former as they held the tax paying lands of the village and might cultivate it or let it. But that in the immemorial waste, though they had the right of cutting wood and quarrying (which is generally regarded as an indication of ownership), they had no right of cultivation and could not break up pasturage nor cut down productive trees such as palmyras and cocoanuts. Mr. Ellis' opinion as to immemorial waste would properly have been more accurate if he had confined it to waste adjoining *mirasi* lands over which the *mirasidar* had merely such qualified rights as are not uncommonly enjoyed by the owners of village lands adjoining immemorial pasture or wood lands. Mr. Sankaria was of opinion that the *mirasidars* were entitled to all waste lands included in the *gramantharam* or register of the lands of the village, and he mentioned that when the Government was desirous of giving to any one in rent-free tenure either a *mirasi* village or the waste lands or any extent of ground within the limits of the village the value of the proprietary right therein should be paid to the *mirasidars* and that if the proprietary right was not so purchased, the holder of the grant was entitled only to the Government revenue.

had purchased a piece of immemorial waste land within the limits of Madras City from the *mirasidars* of Vyasarpadi, was entitled to it as against the Government, who destroyed his house and garden and ejected him. There was no appeal against that decision. It is a decision directly in point. He says in that judgment, "The first question to be considered in this suit is, whether by the Customary Law, *mirasidars* have any title to the waste lands within the area of the *miras* estate"; and he decided that question in the affirmative. He said: "From the authorities I have consulted in this and other cases which have come before the Court, I hold that *mirasidars* have, in this part of the Presidency, certain property in the waste, and that property enables them to dispose of the occupancy of the lands, subject, of course, to the payment of revenue, and this property is not necessarily lost by non-payment of revenue. I need not refer to any further authority than the replies made by Mr. Ellis and Mr. Sankarayya."

In Original Suit No. 136 of 1889 on the file of the Chingleput District Munsif's Court, a *mirasidar* sued for the value of certain bamboo trees taken away by certain coolies under the orders of the Sub-Collector. The land on which the trees stood was *gramanattam poramboke* (*Punjah Mungal Vadi*). The right of the Government was negatived and the decree passed in favour of the plaintiffs was confirmed on appeal by the District Court. There was no second appeal.

In Original Suit No. 33 of 1894 on the file of the District Munsif of Trivellore, the plaintiff contended that the land in question was his backyard, which he was entitled to enjoy rent free, and that the defendant, the Collector, had no right to levy assessment on it. The defendants denied the plaintiff's claim as *mirasidar*. The District Munsif, after taking evidence of usage, in an exhaustive judgment upheld the *mirasidar's* claim, though his contention to hold it free of rent was disallowed.

The next case that may be referred to is the one relied on by the lower Courts *i.e.*, *Sivantha Naicken* v *Nattu Ranga Chari* (1). There the dispute was between the *mirasidars* and the *shrotriemdars* and the

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He added that the sale could not be made without the consent of the *mirasidar* who was at liberty to refuse the price offered or to stipulate for a grant of other lands in exchange.

Mr. Ellis reported that *mirasi* right had always been and was when he wrote saleable in Madras and such a sale generally was made of certain shares in the villages but sales of plots were also made free of the *mirasi* rights. Mirasi Papers, pages 205, 207.

That the village Vyasarpadi was a *mirasi* village is shown by its inclusion in a list given by Mr Ellis (Mirasi Papers, page 192), where it is designated Vyasarpadi and is described as held by three *mirasidars*. The plaintiff has proved that he has purchased from the persons who for upwards of 50 years have been regarded as the representatives of the three *mirasidars*. It has been proved that the plaintiff's vendors or the persons whom they represent from time to time have made sales of land to private purchasers and that they sold about 20 *cawnies* of lands in the village for upwards of Rs. 15,500 to the Government for the construction of the Madras Railway, and the evidence is uncontradicted that they had previously sold to Government other lands for the location of persons engaged in making tents for the Government.—The hamlet is now called Chucklerpalayam and land for the Nellore road It was also shown that the sale-deeds have not been produced to contradict the evidence that they had sold land to Government for the purposes of the powder factory for the Esplanade and for a powder store.

The plaintiff has further proved that the land in suit lies within the reputed boundaries of the village and that the *mirasidars* have sold soil from the land.

On the other hand the evidence for the defence amounts to no more than this, that the *mirasidars* have not paid revenue for the land, that some officers have regarded the lands as Government land and that while certificates have been issued to purchasers of plots in some cases, in other cases they have been refused by the Deputy Collector of the Municipality. I find that the plaintiff has proved a sufficient title to enable him to maintain the suit. It was agreed at the trial that the possession of the Government should not be disturbed but that I should estimate the value of the lands, the buildings and garden and compensation for compulsory purchase and that if I held the plaintiff entitled to recover, he should obtain a decree for the same to which I find him entitled and for the costs of suit. I found the value of the land to be Rs. 100, the value of improvements including the house.....Rs. 500, and compensation for compulsory sale.....Rs. 90, and I understood the parties accepted these figures A decree will, therefore, pass for the plaintiff for Rs. 690, with interest at 6 per cent. from 20th April 1881 to the date on which possession was taken and for the costs of suit with interest on costs at the rate of 6 per cent. from the date of decree.

question was, whether as *mirasidars* they were entitled to the compensation for waste lands taken up by Government for public purposes, or, whether the *shrotriemdars* were so entitled. The Judges of the High Court held that the *mirasidars* were not entitled to it. It was proved in that case that the *shrotriemdars* had leased portions of waste lands from time to time to the *mirasidars* of the village and sometimes also to strangers, without giving the *mirasidars* a share of the rent or other compensation. There was also an admission by one of the *mirasidars* that they did belong to the *shrotriemdars*. I have already pointed out that, before the Government granted waste lands in *inam*, they often purchased the waste lands from the *mirasidars*. Accordingly, where it is shown that the *shrotriemdar*, as grantee of Government, exercised all the rights which would be exercised by the *mirasidars*, if they were entitled to them, the presumption would only be that the Government purchased those rights from the *mirasidars* and granted them to the *shrotriemdar*. The case, therefore, can only be taken to decide that in that particular village the so-called *mirasidars* had not any *mirasi* claims. It is true that there are a few observations against the ownership of the *mirasidars* in that judgment, which have been relied upon by the lower Courts. But it may be pointed out that, if those learned Judges meant to say that any rights which the *mirasidars* had were extinguished when the Government dealt with the lands, their judgment would be opposed to the Full Bench decision in *Sakkaji Rau* v. *Latchmana Gaundan* (4) to which I have already made reference. When they observe that no compensation for immemorial waste was recognised by Government, they ignore the facts found in Sir C. Turner's judgment. They do not refer to the fact that the Government were ordered to pay compensation by him, and as stated by the Advocate-General in his opinion already referred to, the Courts compelled the Government to pay for land taken up in 1803. When they say that the claim of the *mirasidars* only extends to grazing, etc., they go beyond the admission of Government of the right to *swatantrams*. They refer to the opinion of the Revenue Board as extracted in *Sakkaji Rau* v. *Latchmana Gaundan* (4) as an authority. If they had referred to the original, they would have discovered that the Revenue Board considered Mr. Ellis to be of the same view as themselves. It is, however, an opinion which is of not greater weight than the decisions and opinions of Government and the Court of Directors before and after. I think it is unnecessary to dwell further upon this case, as it has been considered in a more recent case by a Bench, of which one of the learned Judges, Mr. Justice Benson, who decided *Sivantha Naicken* v. *Nattu Ranga Chari* (1), was a member. In *Natesa Gramani* v. *Venkatarama Reddi* (5), the question arose between the *zemindar* and the *mirasidars*. Both the Revenue Court which tried the case and the District Court in appeal found that in the Chingleput District waste lands were generally the property of the *mirasidars*, and that the water in such *porambokes* was also their property. The fact that the Government was not a party does not deprive the decision of its probative force. With regard to the case of *Sivantha Naicken* v. *Nattu Ranga Chari* (1), it was pointed out that the decision proceeded, as I have mentioned already, on the facts proved as to that particular village. The decision, therefore, in *Sivantha Naicken* v. *Nattu Ranga Chari* (1), on which the lower Courts relied, can no longer be treated as an authority on behalf of the Government. A decision by Benson and Bhashyam Iyengar, JJ., was relied upon. It does not refer to a *mirasi* village, and even in the village in question it does not show any Government ownership, nor anything more than that the Government have the right to regulate the allotment of house sites among the members of the village. The decision is not against the exclusive right of the village to waste lands against outsiders, even though claiming under Government, nor does the decision in *Secretary of State* v. *Manjeshwar Krishnayya* (2) refer to *mirasi* rights. It refers to *kumaki* rights. There is, no doubt, an observation in that judgment that the "right of the Government to the waste lands has now, after protracted contest, been established against *mirasidars*" (page 282). I am not aware of any decision to this effect other than that in *Sivantha Naicken* v. *Nattu Ranga Chari* (1), which I have referred to. It is said in the judgment that, under the Hindu Law, the immemorial

(5) 30 M. 510; 17 M. L. J. 518; 2 M. L. T. 455.

waste belongs to the Crown. If this refers to the waste in the village, the ancient deeds, the fact that the Rajas had to purchase the *mirasi* claims before granting *inams*, the constitution of the village Government and the usage proved beyond doubt show that this opinion cannot apply to *mirasi* villages. It is, therefore, unnecessary to consider how far the general statement as to ancient Hindu Law can be supported. The question has been discussed by various authorities and by Sir Charles Turner in his minute on the land tenures of Malabar. Manu does not recognise it. He places uncultivated land in the same category as wild game, as the ancient deeds to which I have referred show, and his text refers to the origin of individual out of communal ownership. The only Indian writer I know of, who supports that view, is Jagannath Tarcapanchanana, who wrote in Bengal and of the state of things there. It is enough to state that, according to him, the *ryot* is only an annual tenant, even of lands under cultivation. Megasthenes also states that no private person is allowed to own land. On the other hand besides the reasons I have set out in my judgment, the limitation of the King's claim to only a share of the produce of the land under cultivation, the numerous *inam* grants, the undoubted fact that the King received no revenue (as imported by the word itself) from *agraharams*, entire villages owned by *Brahmins*, in which their full ownership was recognised, and was not entitled to receive anything from them according to Manu, the improbability of such claims in cases of *Brahmins* or military colonists have to be considered. It is, on the other hand, equally clear that, when the Hindu Law was once displaced by the Mahomedan Government, the Mahomedan Chiefs, and, in imitation of them, the Hindu Rulers also, deprived so far as they could the ancient proprietors of their property in land. I make these observations only to show that I should not be supposed to accept this opinion, and that, if necessary, the question requires further consideration. But, so far as *mirasi* villages are concerned, we may proceed upon facts, not theories. Munro's opinion is also relied upon. I have already discussed as to the value to be attached to it, see also Baden Powell on Village Communities, page 179. The rest of the judgment deals with Canara and proceeds partly upon the assumption of Muhammadan Law having been in force there.

From the above review, it appears to me that the following facts are clear. The opinion of Sir Thomas Munro against the right of the *mirasidars* and in favour of the Government claim was authoritatively rejected when it was relied on before the Civil Court, and that of Mr. Ellis in favour of the *mirasidars'* claims accepted. Sir Thomas Munro's opinion was also not acted upon by the Court of Directors. Even in the cases of non-*mirasi* villages it was not accepted by them. The only right which the Court of Directors insisted upon and which the decisions recognised, was the right to protect the Government revenue and to take the lands away from the *mirasidars*, the owners of the lands, and grant them to others, if they refused to receive *pattas* for cultivation. Such rights, as I have pointed out, can no longer be recognised under Act II of 1864, as explained by the decision in *Secretary of State* v. *Ashtamurthi* (3). The Government asserted their right of ownership in 1870, but no new grounds were alleged, or, if alleged, what those grounds are, does not appear in any of the Government proceedings. In 1872, with reference to *gramanattams*, a fuller enquiry was made and it was expressly decided that they belonged to the *mirasidars*. In the case of non-*mirasi* villages the right to allot sites among the villagers of the community alone was assumed. No ownership was asserted even in non-*mirasi* villages. In 1876, at the time of the Chingleput settlement, they conceded the claim of the *mirasidars* to *swatantram*. This was done at a time when the Government had not receded from the position they had taken up in 1872, of full recognition of *mirasi* ownership. *Swatantram* was evidently intended as payment of owner's dues. The Government records contained the entry of *mirasidars'* ownership. Then they again asserted, about and after 1890, their right to the waste lands and to *gramanattam*. Besides repeating Sir Thomas Munro's statement (without any reference to the various decisions and the opinions of the Court of Directors) we have got no new facts or arguments. The real reason for

putting forward this claim appears in what was stated by the Board of Revenue in their proceedings No. 1547, dated the 7th July 1886. They state "The claim now under consideration, which is a claim that, if admitted, will enable *mirasidars* in all *mirasi* villages to do what they like with *nattam* lands and checkmate Government by refusing to the *payakaries*, who have been thrust upon them by Government, houses in the village site, must be resisted as anachronistic and inconsistent with the welfare of Government and its subjects. If resisted, it will probably be asserted in a Court of Law, but even if it is, the Board do not think that any Court will hold that the right of the *mirasidars* over *gramanattam* is absolute. The utmost they will get is probably a right subject to the communal right of the villagers." That these rights of the *mirasidars* are inconsistent with the welfare of the people generally, may probably be true. But a Court of Law cannot, on that account, disregard a legal claim. The first step was taken by Government by altering the 'double' entry system, which recognised *mirasi* ownership. But the Government conceded the *mirasidars*' right to *swatantrams*. It was originally claimed and allowed, as I pointed out, in recognition of ownership. If, after the alteration in the Government records, the recognition was continued on any other basis, it has not been explained, and, in the absence of any explanation, it is a standing recognition of the right. While the Government have thus been vacillating in their views and putting forward their claims on different grounds, which deprive their pretentions of the weight otherwise due, the Courts have been consistently upholding the *mirasidars*' ownership. They have recognised their right to turn out the persons who were in possession of house sites. They have recognised their right to turn out the persons who were in possession of lands. It is true that to many of these suits the Government were not parties. But, as pointed out, it does not make them any the less binding authorities. Again, whenever the *mirasidars* and the Government were brought face to face in a Court of Law, their (the *mirasidars*') ownership has been recognised. No decision has been referred to in which the Government have succeeded in a Court of Law in asserting their claim to the ownership of these lands against the *mirasidars*; above all the *mirasi* right has survived a century of persistent effort to crush it. I am, therefore, of opinion that a *mirasidar* is, so far as the Government is concerned, the proprietor of the waste lands in the village. Whether he has the right to convert immemorial waste, that is, *anadi karambu*, into cultivable land and without the consent of Government or of the non-*mirasidars* of the village, is not a question that arises in this case; on that point, the authorities are all against the claim of the *mirasidars*, and, in my opinion, they are right. It is unnecessary now to give my reasons. But whatever may be the rights of the *mirasidars*, it is quite clear to me that the Government are not entitled to deal with the immemorial waste or introduce other *pattadars*. Nor must I be assumed to decide in this case that the non-*mirasi* residents of a village have not the right to take up cultivable waste for cultivation on undertaking to pay the *mirasidars* the *thunduvarams* and the other customary fees. That question does not arise for decision. The defendants in possession of the land do not set up their right as residents of the village to live on the plaint land. It may be that, though the *mirasidars* are the owners of the village waste lands and house sites, that claim is subject to the claim of the labourers and the residents in the village, and that, if the *mirasidars* happen to turn out a labourer from his homestead, they are bound to give him other house-sites. The records seem to support this view; and whether these rights have disappeared, it is not now necessary for me to determine, as the contending defendants rely solely upon the title created by Government grant. The facts found by the lower Courts show that the plaintiffs have asserted their *mirasi* claims all through, and there is such evidence of possession as the nature of the land admits of. In the circumstances, I would allow the claim of the plaintiffs, reverse the decrees of the Courts below and pass a decree for possession.

But, as my learned brother is of opinion that the *mirasi* rights have now been lost by proceedings of Government and decisions of Courts, we refer to the Full Bench the following question:—

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

Whether, in a *mirasi* village, the *mirasidar* is entitled to recover possession of a house-site held under a *patta* from Government.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They are the *mirasidars* of the village of Mannur in the Chingleput District, owning two out of three *pangus* in that village. The site in disptue is a backyard site and has been classed in the revenue accounts as the village residential *gramanatham*. It is in one account called *cherinatham*, which evidently means that it was intended to be occupied as residential quarters by Pariahs. The plaintiffs' case is that as *mirasidars* they were absolute owners (see paragraph 5 of the plaint) of the plaint residential *manai* backyard, that they had been in possession of the site till October 1903, and that the defendants Nos. 1 to 7, who are Pariahs, took wrongful possession of the site in October 1903. Hence the suit for ejecting the defendants and for other reliefs. The defendants' case is that the *cherinatham* in the village (of which *cherinatham* the plaint site is a portion) does not belong to the *mirasidars*, that it belongs to Government, that the Government was entitled to grant the site to those applicants who wanted the site for purposes of residence, and that the defendants Nos. 1 to 12 were such grantees from Government in separate portions. The defendants also denied the plaintiffs' having had possession of the plaint site at any time. The lower Courts dismissed the plaintiffs' suit with costs. The reasons for their decision might be shortly stated thus:—

(*a*) The legal presumption is that land of the kind in question belongs to Government, and any rights that the *mirasidars* may have, are liable to be extinguished by the Government alienating the land.

(*b*) The documents A, B, C, D, E, H and J and the oral evidence on the plaintiffs' side do not establish the plaintiffs' title and do not prove that the plaintiffs exercised any acts showing their full ownership over the land. The oral evidence merely shows that some pretence of cultivation was made by the plaintiffs just about the time when the Government granted the site to the Pariah defendants in 1895, within twelve years before the suit (which was instituted in 1905). The plaintiffs probably also exercised the usual privilege of the *mirasidars*, of removing a few branches of the trees growing upon the plaint site (Exhibit PP).

The question of possession and enjoyment is a question of fact, and I am not prepared to differ from the concurrent findings of the lower Courts, that the plaintiffs had no such adverse enjoyment of full ownership right as against the Government before 1803 as would extinguish the rights of Government (if Government possessed those rights) to grant the land to the applicants on *darkhast*. The site was a vacant waste site till January 1905 (see Exhibit IX). The documents A to E, H and J have been fully considered by the District Munsif, Mr. S. Authinarayana Aiyar. He finds Exhibit A to be probably a forgery. He finds Exhibits B and C are not proved to relate to the plaint land, and holds that Exhibits E and G came into existence after the Rev. Clayton had requested the Collector to extend the *paracheri* and are, therefore, of little value. As regards H and J, which are dated the 6th June 1887 and 28th May 1891, and which are transactions in which *mirasidars* have asserted their right to the site, along with the other lands in the village, they are also of small value, though I cannot wholly reject them in the consideration of the evidence. I think, therefore, the opinion of the lower Courts, that the above documents and the oral evidence do not prove the plaintiffs' title, must be accepted in second appeal. The only remaining question for consideration is, whether, as *mirasidars* of the plaint village, in the Chingleput District, the plaintiffs had full ownership title in the plaint site and, in consequence of such full title, the Government owned no such right in the site as could enable the Government to grant the same on *darkhast* to others. Full and lengthy arguments have been addressed to us on the question of the nature and extent of *mirasi* rights. Most of the public records and the earlier judicial pronouncements on the question of *mirasi* rights are found entered in

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

Huddlestone's Mirasi Rights. I think, however, that reference to these old documents can only be a matter of academic interest at present. There has not been much continuity of policy or consistency in the declarations or policy by the Government till about 1875. But, from about forty years ago, the Government have consistently been claiming that they have got a paramount right over *cherinatham* sites and other communal lands even in *mirasi* villages and that they were entitled to grant them to applicants, so as to extinguish the rights and privileges (if any) of *mirasidars* in any such site. *Mirasi* right seems to have prevailed, formerly in the Chingleput, Arcot, Tanjore, Trichinopoly and Tinnevelly Districts. So far as the Tanjore, Trichinopoly and Tinnevelly Districts are concerned, the Government ceased to call most of the *ryotwari* holders of land in those Districts as *mirasidars* several years ago, and they are now called merely *ryots*. Most of the bigger *ryots* who call themselves still in documents as *mirasidars*, especially in *panguvali* villages, have long ceased to claim any rights in immemorial wastes and communal lands, and the Government has been, it is well known, exercising full rights as owner in respect of such lands without serious objection for several years past. It is only in the Chingleput District that the question is being raised from time to time, even in comparatively recent dates. I think we are bound by the later pronouncements of this High Court as regards the nature of *mirasi* rights in the Chingleput District, and I, therefore, do not propose to consider the cases which had been decided before the Full Bench decision reported as *Sakkaji Rau* v. *Latchmana Gaundan* (4). The judgment in that case goes pretty fully into the history of the question of *mirasi* rights. The appeal in that case was twice heard (the second time on review). It is clear from that decision that the extent of the *mirasi* right in one village was not the same as that of the *mirasi* right in another village even in the same district. The opinion of Sir Thomas Munro is entitled to very great weight in connection with land tenures. In his minute of the 31st December 1824, Sir Thomas Munro expressed his belief that, by the usage of the country, the Government possessed the absolute right of disposing of the waste as it pleased in villages which were *mirasi* as well as in those which were not. On the 24th July 1839, Mr. Freese, the Collector of Chingleput, asked for an expression of the views of the Board as to the rights of the *mirasidars* and especially, whether they had the right to sell *poramboke* and immemorial waste, and thought that, "as regards *poramboke* and immemorial waste, their rights extended no further than to the privilege of grazing their cattle on them when waste and receiving the '*coopatums*' when cultivated". The Board replied to Mr. Freese that "the *mirasidars* could not sell immemorial waste, but that their rights were confined to grazing and cutting firewood and similar common privileges, but that *these must give way to any proposition ensuring the extension and realisation of the public revenue.*" In 1841 the Provincial Court ruled that "the *mirasidar* was entitled to engage for the cultivation of waste in preference to a stranger." In 1875 the Government passed proceedings that if an immemorial waste is given to others than *mirasidars*, the grantee should pay the usual *swatantram* to the *mirasidars* and the *mirasidars* had no other rights. By the decision in the above case in *Sakkaji Rau* v. *Latchmana Gaundan* (4) it was held that, as regards even the rights to the *swatantrams*, when strangers are introduced by Government as cultivators of waste lands, the *mirasidars* should, in each case, prove the existence of such rights and there could be no presumption that they are entitled to such *swatantrams*. As I understand the Full Bench judgment in *Sakkaji Rau* v. *Latchmana Gaundan* (4), it established the rights of Government to let immemorial waste lands over the heads of *mirasidars* to others, reserving only the right in the *mirasidars* to get *swatantrams* from persons let in by Government, provided the *mirasidars* could establish by evidence the existence of a custom to get *swatantrams*, the decision reserving also the privilege of the *mirasidars* to cut branches from trees on immemorial waste lands, etc., and to cut firewood, etc., so long as the lands remained such waste. I need hardly say that, as regards *communal poramboke* lands, the rights of Government cannot be less extensive than their rights in immemorial wastes. I shall now at once come down to the case of *Sivantha Naicken* v. *Nattu Ranga Chari* (1), merely remarking by the way that no case decided by the High

Court has been quoted before us between the case of *Sakkaji Rau* v. *Latchmana Gaundan* (4) and *Sivantha Naicken* v. *Nattu Ranga Chari* (1), which is in conflict with the decision in *Sakkaji Rau* v. *Latchmana Gaundan* (4). One case decided by the Trivellore District Munsif has been quoted to us. The learned District Munsif who decided that case, was the late lamented Mr. *V. Swaminatha Aiyar*. His judgment, I need not say, is a very able and learned one. In that case, however, it was found as a fact that the *natham* sites then in dispute had been in the actual occupation of the *mirasidar* and his ancestors for more than sixty years before suit. See page 25 of the printed papers, lines 3 to 6. With respect to the judgment, Exhibit N, therefore, I need only say that the Full Bench decision in *Sakkaji Rau* v. *Latchmana Gaundan* (4) must be followed by us in preference to Exhibit N, even if the observations in Exhibit N were not *obiter*. Coming then to *Sivantha Naicken* v. *Nattu Ranga Chari* (1), that case was decided by Mr. Justice Davies and Mr. Justice Benson, two very learned Judges who had much revenue experience in the early days of their service. The learned Judges say in that case that the rights of *mirasidars* to immemorial waste, apart from their preferential right to cultivate, appear to be confined to grazing, cutting firewood and similar common privileges, as stated by the Board of Revenue in the passage in this Court's judgment in *Sakkaji Rau* v. *Latchmana Gaundan* (4), but *those rights were liable to be extinguished by the Government alienating the land.* This decision is an authority directly in point. In *Secretary of State* v. *Manjeshwar Krishnayya* (2) it was held that even in South Canara, as regards which District Sir Thomas Munro used the expression that "all land is private land," the general presumption is that forest and immemorial waste land is the property of the Government. The three learned Judges forming the Full Bench, namely the learned Chief Justice, Davies, J., and Benson, J., quote with approval the minute of Sir Thomas Munro of the 31st December 1824, penned by him as Governor of Madras and already referred to by me. The learned Judges say that when Sir Thomas Munro's experience reached its ripest maturity, he held that the waste lands in *mirasi* villages in Arcot did not belong to the *mirasidars* as Mr. Ellis thought, and that the *Circar*, from ancient times, has everywhere even in Arcot as well as other Provinces granted waste in *inam* free of every rent or claim, public or private, and it appeared in all such grants to have considered the waste as being exclusively its own property. And his opinion is again quoted that "In all villages, whether *miras* or not, the inhabitants reserve to themselves the exclusive use of the waste. *But this right is good only against strangers, not against the Cirkar (Sirkar) which possessed, I think, by the usage of the country, the absolute right of disposing of the waste as it pleases in villages which are* miras *as well as in those which are not.*" "The State might grant those waste lands on such terms as it deemed fit and found practicable". I think this Full Bench case of *Secretary of State* v. *Manjeshwar Krishnayya* (2) also establishes the Government's paramount right over waste and communal land so as to extinguish all rights and privileges (if any) of the *mirasidars* in such lands. See also *Subbaraya* v. *Krishnappa* (6), decided by Collins, C. J., and Parker, J., in which it was held that the principle to start from is that "waste lands belong to the State." I am, therefore, of opinion that it is now too late to set up in any village in the Madras Province that the Government has no right to grant residential sites called *gramakantham* or *gramanatham* or *cherinatham* to applicants, so as to extinguish the rights (if any) of persons calling themselves *mirasidars*. It has been held in several cases that the word "ownership," when applied to land, is a term of very loose signification in India. The Government is styled by some authorities as the only owner of all lands in India. Other authorities say that Government is entitled only to impose a land tax and that the ownership in cultivated lands vests in private persons. Some writers treat *zemindars* as owners of the *zemindari* lands, while others consider *zemindars* as merely farmers of revenue, entitled to get the customary rent, the cultivators of the soil being the real owners of the land and not merely lessees under the *zemindar* owners. All these fights are mostly disputes about words. The substance of the question

(6) 12 M. 422; 4 Ind. Dec. (N. S.) 643.

in the present suit is whether the Government has the right to grant communal residential sites in *mirasi* villages to applicants for such sites, so as to extinguish the privileges of *mirasidars*, and, whether you call this right as flowing from its *ownership* of the sites or from its *paramount sovereign right* to make such grants, is not, in my opinion, of any practical importance.

I think that this question ought to be decided in favour of Government on the principle of *stare decicis*. There can be no doubt that in 1872, the then Government (the *personnel* of the Government usually changing every five years) thought that the *mirasidars* in purely *mirasi* villages were the owners of even the *natham poramboke* lands in the villages. In the Government Order No. 1684 of that year, the Government say: "In purely *mirasi* villages, where the entire area belongs to the *mirasidars* the *gramanatham*, no doubt, appertains to them equally with the other *poramboke*, but these cases are exceptional." But in 1886, the Government found that they had ignored their own prerogative too much, and, when the Revenue Board pointed it out, the Government approved of the Board's opinion. After the date of this Government Order of July 1886, there were the Board's proceedings of September 1887, and they include a very frank letter of Mr. Johnson. Mr. Johnson says:—"The *mirasi* bugbear is destined gradually to die a natural death if left to the ordinary operations of time." Between 1872 and 1886 we had the case of *Sakkaji Rau* v. *Latchmana Gaundan* (4), (it must have been decided about 1880) which recognized the Government's paramount prerogative. As I said already, the *mirasi* bugbear seems to have died a natural death (using the words of Mr. Johnson) in all the other Districts except Chingleput. In Chingleput the *preferential* right of the *mirasidars* as a legal right to get *darkhast* grant from the Government for immemorial waste and his right to *swatantrams* (calculated as a fraction of the assessment) when such immemorial waste was allotted to any other person than the *mirasidars*, these two rights seem to have been recognised till recently and hence the efforts of the *mirasidars* to claim full ownership rights have not ceased even after *Sivantha Naicken* v. *Nattu Ranga Chari* (1). As said in the letter of the Special Settlement Officer, Mr. G A. D. Stuart, "the possession of special privileges by particular classes is an anachronism at the present day and the *mirasi* system is destined to go the way of all anachronisms. Even in the thirty years since the last settlement, *mirasi* right seems to have died out altogether in many villages. It is still fairly vigorous, however, in many places, but patience and time are all that are necessary to see the end of it."

In 1890, the Government passed Revenue Proceedings No. 704, dated the 3rd September. In paragraph 5 of that letter they say, "It is true that in 1872, the Government declared that in the exceptional case of purely *mirasi* villages, where the entire area belonged to the *mirasidars*, the village site would also appertain to the same body, but the opinion expressed was stronger in appearance than in reality, for it formed part of an argument contesting the view of the Board that village site was the communal property of the villagers and did not appertain to Government. *In any case, His Excellency the Governor in Council is not now prepared to subscribe to the above dictum*, and it is observed that when, in 1886, the Board challenged the correctness of the Order of 1872, the Government allowed the challenge to pass unnoticed. The said order has thus practically become a dead letter in so far as it acknowledges the claims of *mirasidars* to village sites, and in the revised edition of the Standing Orders the words 'mirasi villages' have been omitted from Standing Order No. 37 (formerly No. 39)." I think that, except in the matter of preferential claims to grants on *darkhast* of immemorial waste and except as regards the right to claim *swatantrams* and the right to gather leaves and firewood from trees growing on waste and *poramboke* lands not yet granted by Government, it is inexpedient to revive these *mirasi* claims, which were in various stages of disintegration before 1890, and which were never recognised by Government after 1890. I should like to hold that such claims must be taken to have been finally killed by the case of *Sivantha Naicken* v. *Nattu Ranga Chari* (1). It is better to treat the present litigation as "the last flickering up of a dying fire" and as the final ineffective

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

"expiring gasp of protest" of the *mirasi* right fighting in its last ditch. (Preferential claims, however, of *mirasidars* to occupy waste lands in their villages for cultivation and, in Chingleput, to levy a fee from non-*mirasidars* who may take up land for cultivation have been recognised by Government even in September 1892. See Proceedings No. 1010A—Government of Madras, paragraph 4.) Those two rights and the other rights mentioned in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) may be still considered to be alive and all the other rights as dead. It is true that till 1886, the opinion of Mr. Ellis about *mirasi* rights was treated as more in accordance with the Customary Law than the opinion of Sir Thomas Munro. It is also true that the High Court of Madras was considered by the Government to have so far committed themselves to opinions in favour of the *mirasidars* that it was safer not to contest the matter by a frontal attack in the High Court itself, but to have it fought out in the District Courts. As I have already said, however, the case of *Sakkaji Rau* v. *Latchmana Gaundan* (4), which was decided about 1880 by the Madras High Court, did not unconditionally recognise the *mirasidars'* right, but held that the *mirasidars* should prove even the customary right to *swatantrams* where it is denied. There can be no doubt that, till 1886, the inclination of the High Court was to hold that *mirasidars* had ownership rights in immemorial wastes and in *natham* sites also. But the Revenue Board and the Government from 1886 were determined, by all legitimate means, to establish the paramount rights of Government to grant *natham poramboke* sites, and also to deny all other rights claimed by the *mirasidars*, except the right of preference when grants to immemorial wastes are made and to obtain *swatantrams* if grants are made to others than *mirasidars*, and similar rights. It must be admitted that this resolve of the Board of Revenue and of the Government, *so far as natham sites are concerned*, was arrived at, not for the purpose of obtaining more revenue or other pecuniary benefit, but in the interests of the public, especially of the depressed classes. As my learned brother has put it in his judgment, "That these rights of the *mirasidars* are inconsistent with the welfare of the people may probably be true." Subsequent to 1886, we have got at least two judgments of this High Court, one being the case of *Sivantha Naicken* v. *Nattu Ranga Chari* (1) and the other of *Secretary of State* v. *Manjeshwar Krishnayya* (2), which two decisions, it seems to me, clearly follow the opinion of Sir Thomas Munro in preference to the opinion of Mr. Ellis. The observation in *Secretary of State* v. *Manjeshwar Krishnayya* (2) (which is a Full Bench case decided by the Chief Justice and Justices Davies and Benson) is that "the right of the Government to waste land has now, after protracted contest, been established against the *mirasidars*." This seems to indicate that the decisions till 1886, which favoured the *mirasidars*, were given during the first stages of the contest, and that the final battles had gone in favour of the Government. As remarked by my learned brother in his judgment, it may be that this observation rests upon the results of a comparatively fewer number of cases decided by the High Court after 1886 than the number of cases decided before 1886 which held the other view. In the case of *Natesa Gramani* v. *Venkatarama Reddi* (5) the contest was between the *zemindar* and the *mirasidars* and the paramount right of the Government as ruling authority was not in contest. As between the *zemindar* and the *mirasidars*, the evidence in that particular case seems to have (in the opinion of several lower Courts) established the rights of the *mirasidars* in *poramboke* lands and the High Court was "not prepared to interfere with the finding of fact at which all the lower Courts have arrived at." The judgment in *Natesa Gramani* v. *Venkatarama Reddi* (5) (to which Benson, J., was a party) does not dissent from the observations in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) and *Secretary of State* v. *Manjeshwar Krishnayya* (2), (to which decisions also, Benson, J., was a party) but, *so far as the relative rights of the zemindar* and *mirasidars were concerned*, *Sivantha Naicken* v. *Nattu Ranga Chari* (1) decided in one way on the evidence in that case, and *Natesa Gramani* v. *Venkatarama Reddi* (5) decided the other way. I find myself unable to hold that *Natesa Gramani* v. *Venkatarama Reddi* (5) has, in any way, weakened the authority of *Sivantha Naicken* v. *Nattu Ranga Chari* (1) or the Full Bench decision in *Secretary of State* v. *Manjeshwar Krishnayya* (2). Under these circumstances, I do not see my way to hold that the *mirasidars* have got higher rights than are

recognised in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) and *Secretary of State* v. *Manjeshwar Krishnayya* (2), without practically overruling those decisions. My learned brother's inclination being against the opinion expressed in those two decisions, and as the question is a very important one, I concur with him in referring the question of the extent of the *mirasidars'* rights to *natham poramboke* sites to a Full Bench.

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This second appeal came on for hearing as per above order on the 16th, 17th, 18th, 19th, 20th and 23rd August 1915 before the Full Bench.

The Hon'ble Mr. *S. Srinivasa Aiyengar* (Advocate General) and Mr. *A. Swaminatha Aiyar*, for the Appellants Nos. 2—5.—The tract of country which lay between the North and South Pennar was known as Thondai-mandalam and comprised Chingleput and the two Arcots, North and South. The *mirasi* rights recognised by the Hindu and Muhammadan Kings before the British occupation were of two descriptions, *viz.*, *pashankarai* and *arudikarai*. Under the former right, the whole village was held in common and mesne profits were divided by the villagers. Under the latter right, all the properties were held finally and completely under a system of severalty. All the lands that were not cultivated were treated as *samudayam* or common property. There were two kinds of tenants in such *mirasi* villages, and they were called *parakudis* and *ulkudis*. *Parakudis* were residents of other villages holding lands under *mirasidars* on rent and *ulkudis* were those who had settled down in *mirasi* villages and who had been there for generations and had acquired occupancy rights.

The extracts read by me give a clear indication of the fact that village communities did exist as factors even as late as 1820, and that those institutions were not mere myths.

Sir Thomas Munro's minute dealt with the economic side of the problem relating to *mirasi* rights, and not with the legal side of it. Privileges as regards waste lands were not peculiar to *mirasi* villages and even Sir Thomas Munro admitted the fact that the *samudayam* tenure existed, and that was conclusive of the fact that village settlements did continue even after British occupation. Sir Thomas Munro's minute dealt with the question more with a view to securing the right of Government to revenue in *mirasi* villages, but in the present appeal, they had not to deal with the question of revenue. The *mirasidars* in this case were only concerned with the question as to whether Government could deprive *mirasidars* of their right to immemorial waste. Government had admitted the claim of the *mirasidars* to such right, though there was a tendency displayed in the later orders to resist that claim.

Mr. *Nugent Grant* (Government Pleader), for Respondent No. 15.—The general proposition is that ownership in the soil is vested in Government and Act III of 1905 (Land Encroachments Act) is conclusive proof of the fact. Government, no doubt, recognised that *mirasidars* had certain privileges, the main privileges being preference to cultivation. The presumption under the Common Law was that Government was the owner of the soil in all *gramanattams*. *Madathapu Ramaya* v. *Secretary of State* (7) and *Putloor Boyanna* v. *Golusu Asethu* (8) support this proposition. *Subbaraya* v. *Krishnappa* (6) also lays down that with regard to waste lands, the presumption is that *poramboke* lands generally are the property of Government. *Secretary of State* v. *Manjeshwar Krishnayya* (2) accepted the view of Sir Thomas Munro that the property in waste lands in *mirasi* as well as non-*mirasi* villages belonged to Government.

The onus was on the plaintiff (*mirasidar*) to show that he was the owner of the village sites in *mirasi* villages, and that he had either by grant or other means acquired a title as against Government. So far as the question of grant was concerned, there was nothing on record in the present case to show that any grant existed. It was the plaintiff who ought to satisfy the Court that there had been a course of proceeding or action with regard to particular property or particular right which could have only come into existence by any grant. As

(7) 27 M. 386.
(8) 24 Ind. Cas. 735; 16 M. L. T. 48.

regards the village site in the present case there was nothing to show that for a course of years the plaintiff had been exercising any acts of ownership. The plaintiff simply asked the Court to hold that, because the property in question formed part of a *mirasi* village, he had a right to that property. There were no instances on record to show that the increase of privileges on the part of *mirasidars* in regard to quarrying, fishery, pasturage or minerals had ever existed, and even if such privileges had existed in the remote past, they must be held to have since fallen into disuse. The attitude of Government had been to give *mirasidars* preferential right to waste. *Mirasidars* had also preferential right over strangers for *pattahs* in respect of cultivable waste; and as regards immemorial waste, *mirasidars* had no better right than that of pasturage and taking firewood, and those were ordinary privileges which attached to them as much as they attached to every other village community in a *ryotwari* tract. The plaintiff's case was that every property in a *mirasi* village belonged to *mirasidars*; but as regards immemorial waste, it was shown that the property did not belong to *mirasidars*. Sankaran Nair, J., started with the assumption that a right to excavation was indicative of ownership, but the past history of *mirasi* tenure did not warrant that assumption.

The proceedings of the Board of Revenue and minutes of the Court of Directors show that nowhere in those references had Government ever admitted the rights of *mirasidars* to be anything better than the rights of the ordinary *ryots*. Such of the rights as were conceded to *mirasidars* accrued by virtue of their position as headmen and nothing more. The Board of Revenue was decidedly of opinion that *mirasidars* had no right to sell or mortgage *porambokes* or immemorial wastes. The decision of Mr. Lewin of the Provincial Court that the property in immemorial waste belonged to *mirasidars* was not supported by any authority other than that of Mr. Ellis and Mr. Sankara Aiyar. The attitude of Government of that time was that Government should take the consent of *mirasidars* before giving immemorial waste lands to strangers for cultivation. Mr. Lewin's judgment was based on a mistake of fact and in that circumstance that judgment was erroneous.

The property in *gramanattams* absolutely belonged to Government and no *mirasidar* was entitled either by custom or otherwise to any rights over them except those which Government had chosen to bestow upon them. The effect of the Government orders issued from time to time on the subject of *mirasi* tenure was that Government recognised certain privileges of *mirasidars* in respect of village sites and that Government were willing to preserve those rights to them. If the property in village sites absolutely belonged to Government, there was no justification for holding that Government had ever waived their right to prevent *mirasidars* from alienating or otherwise disposing of village sites for purposes other than those which had been originally intended.

*Fakir Muhammad* v. *Tirumala Chariar* (9) was opposed to the view that immemorial waste was the property of the *mirasidars*.

No issue was raised in the lower Courts as to custom, but the argument in the Division Bench of the High Court was based largely on custom. The general issue as to whether *mirasidars* had a proprietary right in *gramanattams* or other *poramboke* lands was much wider of the plea raised in the case. If their Lordships came to a decision as to the proprietary right of *mirasidars* in respect of soil in village sites, that decision might be held to apply to other rights of *mirasidars* in *mirasi* villages. A decision sought to be obtained with regard to certain rights in a particular District might be subsequently sought to be made applicable to similar rights in other Districts. In a Government Order issued in 1872, Government no doubt recognised proprietary right of *mirasidars* over *gramanattams*, but that recognition was not conclusive admission as against Government, though it might be treated as evidence against the Government. Government issued that order on flimsy materials.

(9) 1 M. 205; 1 Ind. Jur. 299; 1 M. L. R. 319; 1 Ind. Dec. (N. S.) 136.

*Mirasidars* had certain powers of superintendence over the villages conferred upon them by Government and those powers were now made a foundation of their claim to ownership in village sites.

OPINION.

WALLIS, C. J.—The question referred to us is, whether in a *mirasi* village the *mirasidar* is entitled to recover possession of a house site held under a *patta* from Government: and, to show what it involves, it may be well to state at once the circumstances in which it arises in the case under appeal. On the 16th November 1894, Mr. George Stuart Forbes, Acting Collector of Chingleput, passed orders on certain petitions praying for an extension of the *cheri nuttam*, or part of the village sites reserved for Pariah, in the village of Mannur in the Saidapet *Taluk* not far from Madras. He began by observing that out of the whole Survey No. 14 A of 23 acres which was classed as village site, 97 cents, or nearly one acre, identical with Survey No. 45 in the *paimash* or old survey, was shown in the *paimash* accounts as "Cherial Pizhakkadai" or reserved for Pariahs. There had, he went on to say, been no erection on this site by any *mirasidar* since the date of the *paimash* (apparently about 1845) and the only building on it was an *arrack* shop. He did not interfere with this, but stated that the rest of the plot was available for sites in extension of the *paracheri* or Pariahs' quarters, and directed it to be laid out in streets and house sites in such a manner as to facilitate sanitation and the convenience of the residents. As regards any claims from *mirasidars*, he merely observed that "the short usurpation by the *mirasidars* in recent times, which is supported by the entry in the Adangal of Seshachellam Chetty (plaintiff) and others,' is invalid and cannot be recognized." The Adangal (Exhibit G) is described as the village account of lands held in the village according to Survey numbers. The *paimash* register only contained the names of actual occupiers of sites in the *nattam* as appears from Exhibit X, but in 1886 it came to light that at some time or other the names of the *mirasidars* had been inserted in the Adangal as well as the names of the actual occupiers, which alone appeared in the *paimash* register, and had also been inserted as owners of the unoccupied sites as regards which no names appeared in the *paimash* register; and this was apparently what Mr. Forbes was alluding to in speaking of the recent usurpation. Exhibits I to VIII are applications for sites put in immediately after the Collector's order by residents in the *paracheri* which, the endorsements show, were granted or refused according to the merits. This was in 1894 and early in 1895, and the present suit was not brought until January 1905, ten years later. The plaint alleges that the plot was the property of the plaintiffs and that they constructed and rented to the 13th defendant a leaf-roofed shop marked *B* in the annexed plan; that the defendants on 17th October 1903 took wrongful possession of the plot and erected the shed marked *C*; and the defendants Nos. 1 to 12 with the 13th defendant afterwards dismantled the shop *B* and erected the sheds *D* and *E*. Defendants Nos. 1 to 12 pleaded that the site was not the property of the plaintiffs but of Government who had granted the sites thereon. They alleged that the building *C* (a mission hall) and *E* (a sundries bazaar) had always been in existence and that *D* had been erected three or four months previously as the shop *B* was in a ruined state. The 13th defendant pleaded that he was only a servant of the owner of the toddy shop, and the latter was added as 14th defendant but remained *ex parte*. The District Munsif at first dismissed the suit on the ground that the Secretary of State in Council was not a party, but on appeal the plaintiffs undertook to make him a party, and this having been done, the Collector filed a written statement on his behalf as 15th defendant in which he alleged that the plaintiffs have not and never had any title to the property, and never occupied it in a manner inconsistent with the rights of Government, and that Government had exercised rights of ownership over it to the knowledge of the *mirasidars*. The entries in the village accounts for some years by officers who were themselves *mirasidars* were, it was alleged, only paper entries and did not affect the proprietary right of Government. In his judgment the

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

District Munsif observed that in the Settlement Register, Exhibit F (1875), the names of the 1st plaintiff and the other *mirasidars* were not entered against Survey No. 14 A, the village site, and thenceforward they had never taken any steps to assert the right to the land and have it included in their *pangu* lands. The District Judge took the same view and observed that the plaintiffs had never cultivated the land, and had put up the thatched hut B in 1902 long after Government had assigned the sites. They accordingly dismissed the suit, but held it was not barred as it was instituted within 12 years of the grants made under Mr. Forbes's orders at the end of 1894. The result of the findings would, therefore, appear to be that the site in question was waste land over which the plaintiffs never exercised any rights of ownership until some years after it had been allotted by Government in extension of the *cheri* or Pariahs' quarters.

The Privy Council have very recently pointed out in *Secretary of State* v. *Boi Rajbai* (10) that, as regards lands such as these which have been ceded by native rulers, the only enforceable rights are those conferred by the Crown by express or implied agreement or by legislation; but in order rightly to appreciate the action of the Crown or Government, it is necessary to know something of the pre-existing state of things. We have not been referred to any critical discussion of the legendary settlement of Thondamandalam, as this part of the country was called, by 300,000 Vellalas from the west coast of India which is referred to in the judgment of Sankaran Nair, J., and had been dismissed as fabulous by Sir Thomas Munro in his well-known minute. What we do know is that this District was the seat of an ancient civilisation, and that Kanchi or Coonjeevaram was the capital of the Pallava dynasty who flourished until their overthrow by the Cholas about the end of the 9th century; and that it was afterwards one of the principal cities in the Chola Kingdom, which again was absorbed in the Vijianagar Empire in the 15th century. That Empire had fallen into decay, when in the middle of the 17th century one of its nominal dependants granted the East India Company four *mirasi* villages on which Fort St. George and the adjoining White and Black Towns, as they were then called, were erected. To these was added, some years later, the *shrotriem* village of Triplicane; and after the advent of the Muhammadans three more *mirasi* villages, which are now included in the Municipal limits of Madras, were granted in 1694 during the reign of Aurangzib. Further grants were made early in the 18th century of villages with what are now within the Municipal limits and beyond, and finally the whole District of Chingleput as it now is was assigned by the Nabab of Carnatic to the Company in return for their services against his enemies and became known as the *jaghir*. It was subsequently laid waste by Hyder in his invasion of the Carnatic, and it was only some years after 1784, when peace was restored, that the question with which we are now concerned came to the front in connection with the proposed introduction of a Permanent Settlement on the lines on which Lord Cornwallis had carried out the Permanent Settlement of Bengal, and it became necessary to investigate the position and rights of the *mirasidars* in relation to the land. If they were the real owners of the land it could not be parcelled out among *zemindars* under Regulation XXV of 1802 which reproduced the Bengal Regulation of 1793; and later, when the idea of a Permanent Settlement was given up and the system of *ryotwari* settlement with the individual cultivator was coming into favour, this alleged ownership of the *mirasidars* was again an obstacle to the introduction of settlement with the actual cultivators. The result of the controversy in the early years of last century was that the settlement was made with the *mirasidars* and not with *zemindars* or with the actual cultivators; but many questions such as those with which we are dealing were left outstanding and lapse of time has not made it any easier to settle them, in spite of the lengthy discussions which are to be found in the Mirasi Papers which go down to 1864 and in the further papers which have been specially printed for this case.

(10) 30 Ind. Cas. 303; 42 I. A. 229; 23 C. L. J. 1; 19 C. W. N. 1087; 13 A. L. J. 953; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 730; 39 B. 625.

SESHACHALA CHETTY *v.* PARA CHINNASAMI.

It is unnecessary to go into old controversies as to ownership of land in India as to whether, as has been sometimes held, the State was the owner of all land which it had not actually alienated and the cultivators were merely tenants under it, or whether the cultivators are the owners subject to the right of the State to share in the produce, or whether, as James Mill thought (Fifth Report, Ed. Higginbotham, page 816), Government and the cultivators should be regarded as "joint tenants", by which he probably meant co-owners. In 1796 (M. P. 26) the Madras Government went so far as to assert it to be the great feature in all the Governments of India that the Sovereign is the lord of the soil. As regards waste lands at any rate, it seems clear, as held in *Secretary of State* v. *Manjeshwar Krishnayya* (2), that by the Muhammadans waste lands in conquered countries were always held to be the property of the State. It may be taken then that the principle to start with generally is that in India waste or unoccupied lands at any rate belong to the State, and the Madras Legislature has in Madras Act III of 1905, which is modelled on Bombay Act V of 1879, given statutory force to this rule which had previously been held applicable to lands of this character.

The question then is, whether unoccupied lands in *mirasi* villages in this District, and more especially the unoccupied lands set apart for house sites in the villages, form an exception to the general rule and were recognised as private property when or after the British Government succeeded to the previous rulers. The distinctive thing about the district is the persistence until very recent times of the system of joint cultivation of the village lands by the village community of *mirasidars*, the actual cultivation being done by a dependent population working under them. This is a stage of agricultural development through which various peoples have passed and of which traces are to be found in England, Germany and Russia, both European and Asiatic, and even in Japan (see Lewinski's Origin of Property, London, Constable and Co. 1913), but it by no means necessarily connotes the ownership by the cultivators of the adjoining waste or unoccupied lands, or implies that the cultivators have greater rights in respect to them than inhabitants of other villages in the neighbourhood where the system does not prevail, as was pointed by Sir Thomas Munro. The right of the State to admit cultivators to uncultivated land for the purpose of realizing its revenue, which is a necessary incident of the immemorial revenue system and is recognized in the recently published Arthasastra of Kautilya dating from 300 B. C., Bk. 2, C. 1, section 47, necessarily involves the right of the State to provide such cultivators with sites as the *nattam*. Nor is it a necessary inference that the village community owned all the land within the boundaries of the village, for as observed by Mr. Hodgson in the report on the Survey of Dindigul (1) note (Fifth Report: Edition Higginbotham Co., at page 607), "the whole lands of a Province in India, whether cultivable, arable, waste, jungle or hills, have been from time immemorial apportioned to a particular village so that all lands are within the known boundaries of some village. The total area of all villages forms the whole landed surface of that particular Province". And there is satisfactory evidence, as appears from Mr. S. Krishnaswami Aiyangar's Ancient India and Mr. Vincent Smith's Early History of India, 3rd Edition, 1913, that under the Cholas the lands and cultivation were carefully surveyed and holdings registered at least a century before our Domesday Survey.

It is perhaps hardly safe to make any positive assertion about the ownership of the *nattam* and other unoccupied lands in periods so remote as to which the evidence is so scanty, but the great irrigation works and temples which have come down to us from this period and were probably produced by forced labour point to active intervention and control by the State and do not support the conclusion that the village cultivators, whether cultivating jointly or individually, were regarded as the owners of land which they had not reclaimed to cultivation in the absence of evidence of user or recognition.

As evidence of recognition it is said by Sankariah in the Mirasi Papers that former rulers were in the habit of purchasing lands from the villagers to present them

to temples and in the three volumes of Dr. Hultzsch's South Indian Inscriptions there are inscriptions nearly a thousand years old that appear to bear this out, but it does not appear that the lands so acquired were waste.

Nor is such a view supported by what we know of the history of the *mirasi* villages now included in the municipal limits of Madras which, as already mentioned, were acquired in the 17th century and the years immediately following long before the present controversy arose. The three bulky volumes, recently brought out by Col. Love for the Government of India under the title of "Vestiges of Old Madras," contain a digest of all that is to be found in the records about the city from its foundation down to the end of the 18th century; and it is remarkable that they do not appear to support the claim of the *mirasidars* to the waste lands of the villages. Such references as there are seem to show that the Madras Government treated all waste lands as at its disposal and the claim would appear not to have been disputed. See Volume I, pages 170, 579-80; Vol. II page 127 and pages 193 and 194. In Volume II, page 505, under the year 1763, we find mention of numerous leases granted by the Company of large areas for the erection of the garden houses that form a feature of the city; and Mr. Ellis' answer in the Mirasi Papers to the 9th question put to him suggests that, when he wrote in 1814, a great part of the village lands had been converted into gardens in this way; and in the suit in the Supreme Court in 1808, which will be referred to later, Sir Thomas Strange, C. J., stated that the only cases as regards *mirasi* villages which came before the Mayor's Court in the 18th century dealt with another question.

The fact relied on by Sankaran Nair, J., that in the conveyances of the 18th and early 19th centuries, which are collected in the Mirasi Papers, the transferor purports to convey not only his cultivable lands but also all his rights in the *nattam* and the waste lands which had not been divided, and in fact deals with them as the subject of co-ownership-is of course to be considered, but as against the State which was the other party interested, such claims appear not to be entitled to much weight except in so far as they are supported by actual user or recognition.

Coming now to the views expressed by Mr. Place and later by Mr. Ellis, Collector of Madras, and his *sheristadar* Sankariah in answer to the questions put by the Board of Revenue in 1814 (Mirasi Papers, page 155), though they were no doubt well warranted in championing the *mirasidars* and asserting their proprietary interests against proposals to ignore them either in favour of *zemindars* or of the actual cultivators, it by no means follows that the *mirasidars* were the owners of the waste lands in the village as well as of the lands they had reclaimed to cultivation. Sankariah, a successful official of those days, who, as was pointed out by my learned brother in the course of the argument, was almost certainly a *mirasidar* himself, no doubt says distinctly that they owned the waste, but Mr. Ellis speaks only to a restricted right of user falling short of full ownership.

Eventually even as regards cultivable waste the *mirasidars'* ownership has not been fully established, and though they had and still have a preferential right to such lands, yet on failure to cultivate them they are liable to have cultivators put in by Government. Mr. Ellis and Sankariah no doubt claim that they were entitled to be restored within 105 years on making compensation, but that claim has not been substantiated. No doubt their claim to receive *swatantrams*, or payments from the newly admitted cultivators, is evidence of their claim to ownership of the waste which they had reclaimed to cultivation; but, according to the decision of the Full Bench in *Sakkaji Rau* v. *Latchmana Gaundan* (4), such *swatantrams* are not generally payable but only on proof of custom. Further Mr. Ellis' views have never won complete acceptance. In 1822 (Mirasi Papers, page 423), the Court of Directors found fault with the Madras Government for having printed and circulated to the Service the answers of Mr. Ellis, as a question of this kind should be decided not upon one man's opinions alone but upon a consideration of all the evidence which could be obtained. They considered the course adopted would to a great degree have the effect of imposing upon the Service

the opinions of Mr. Ellis as the authoritative conclusion of Government. The Government in reply disclaimed any such intention, and we find the Board of Revenue treating the question of the extent of the *mirasidars'* rights in waste lands as an open one and framing a fresh series of questions for Collectors on the subject (Mirasi Papers, page 427) on the 11th December 1823. The Government of Sir Thomas Munro did not pass any orders on these proceedings so that fresh queries were never sent to Collectors; and on 31st December 1824, Sir Thomas Munro wrote his well-known minute on the state of the country and the condition of the people, in which speaking with his wide experience gained by him as a Settlement Officer in various districts of Southern India as to the system prevailing under the Vijianagar and Muhammadan rulers he incidentally contested nearly all Mr. Ellis' opinions and conclusions. Selections from the minutes of Sir Thomas Munro, Ed. Arbuthnot, Madras. Ed. Higginbotham, 1886, page 228. The question discussed by Sir Thomas Munro no doubt related to the cultivable waste rather than to waste which was excluded from cultivation either as unfit or as reserved for other purposes; but there can be no doubt that he would have expressed himself as strongly as regards the ownership of waste excluded from cultivation.

The *paimash* survey and accounts of the district appear from the District Manual to date from the years immediately following, and the extract from the *paimash* accounts, Exhibit X, exhibited in this case and dating it is said from 1845, shows that, while the name of the owner is given in the case of each occupied site in the *nattam*, no name is entered against the unoccupied portion, which goes to show that the private ownership of the unoccupied *nattam* was not then recognised. In 1839, the Board (Mirasi Papers, page 452) expressed the opinion "that as regards immemorial waste the rights of the *mirasidars* are confined to the pasturing of their cattle, the cutting of firewood, etc., and similar common privileges, but these must always give way to any proposition ensuring the extension and realisation of the public revenue." The passage is important as it was cited by the Full Bench in *Sakkaji Rau* v. *Latchmana Gaundan* (4) and adopted as laying down the true rule in *Sivartha Naicken* v. *Nattu Ranga Chari* (1).

We are not, however, immediately concerned in this case with the general question of the ownership of waste lands but with the ownership of part of the village *nattam* or village site. The *nattam* or area reserved for house sites is a feature of every village, *zemindari*, *ryotwari*, and *mirasi* alike, and consists of unassessed land set apart for the erection of houses and for the adjoining backyards. In Dr. Hultzsch's South Indian Inscriptions, Volume II, part 1, No. 4, we find the *ur-nattam* and *paracheri*, or Pariahs' quarters, enumerated with tanks and burying grounds as free from assessment, and there are other inscriptions of the same kind showing that a portion of the site was set apart for Pariahs or untouchables from very early times. So far as the inscriptions enable us to judge, the affairs of the villages appear to have been managed by *sabhas* or assemblies of leading men in the villages, who were probably left to allot house sites as the occasion arose without interference. Such a power of allotment would not connote ownership, but might of course give rise to it if it led to the sites being dealt with as private property and sold or leased as such.

As regards waste lands generally, the Mirasi Papers contain discussions as to whether the *mirasidars* were entitled to compensation for waste lands acquired for public purposes, and that such claims were in some instances admitted appears not only from the instances given but also from the fact mentioned in the Chingleput District Manual and also by Mr. Stuart in his report in 1909 that Government in 1870 decided to refuse any longer to pay compensation for such lands. The case which subsequently came before Sir Charles Turner will be considered later. As regards the *nattam* itself in 1856 (M. P. 358, 553) the question was the subject of a strong divergence of views between the Board of Revenue and the Government of the day which favoured the *mirasidar's* claims and went so far as to dispossess in his favour a stranger whom the *mirasidar* had sued unsuccessfully in the Civil Courts The papers were sent Home, but the Court of Directors in their reply did not commit themselves to one view or the other.

In 1869 Government framed *darkhast*

rules (as to applications for grants of land) in the District in which the prior claims of the *mirasidars* were recognised. Rule 13, however, provided that tanks, threshing floors, burying grounds, etc., should not be given away on *darkhast* and concluded, "applications for *gramanattams* or village sites shall not be entertained." In 1872 as appears from G. O., dated 16th December 1872, No. 1684, the Board called for returns from Collectors as to the practice in their districts of giving *gramanattam* land as house sites to persons who were neither *pattadars* nor actual cultivators; and the answer from Chingleput was it was granted to all applicants on a fixed scale. This goes to show that the *mirasidars* were, to say at least, not then very conscious of their rights now claimed for them. Commenting on the answers returned, the Board put forward the view that the *gramanattam* in villages is the communal property of the villagers, a position which may be taken up with regard to non-*mirasi* as well as to *mirasi* villages. But the Government of the day were not prepared to go so far, as they were of opinion that the old *hookamnamahs* showed that enjoyment of the *gramanattam* was subject to regulation by Government. These *hookamnamahs* no doubt related to non-*mirasi* villages, for as already observed, whatever the ownership of the *nattam*, the *mirasidars* were probably left to allot sites in the *nattam* according to requirements and this was probably not interfered with by the Muhammadan Rulers, who generally rented the villages to the *mirasidars* themselves at a fixed rental, except in so far as they may have granted villages in *inam*. The District Manual contains a long list of *inams*, but there are no particulars of the dates or terms of the grants. In passing orders on this occasion asserting the title of Government in the *nattam* in ordinary villages Government made an exception in favour of purely *mirasi* villages, where they said "the *gramanattam* no doubt appertains to the *mirasidars* equally with the other *poramboke*." Accordingly they issued rules on the subject excepting *zemindari* and *mirasi* villages and villages which were private property, although the Collector's answer showed that the grants of the *nattam* had been made by the Government without opposition in Chingleput. Two years later, however, when the Settlement of Chingleput was effected, an entry was made in the Settlement register of each village (*cf.* Exhibit F) that in the *gramanattam* no new enclosure was to be made or new building erected without permission in future, which shows that the *nattam* was not then treated as completely at the disposal of the *mirasidars*. The G. O., dated 18th August 1886, No. 724 Revenue, contains a Board's proceeding rejecting the claim of the *mirasidar* to control the *cherinattam* in which the claims of the *mirasidars* are vigorously attacked on much the same grounds as have been urged before us, and Government did not interfere with the Board's decision but recorded the proceedings without remark. In 1890 Government followed this up by directing that in the Adangal accounts, where in addition to the name of the occupier, the name of the *mirasidar* was found, it should no longer be recorded. The *paimash* register, Exhibit X, in this case only gives the names of the owners of sites in actual occupation and does not show any owner against No. 45, the suit land, but merely describes it as the backyard of the *cherimen*. At some subsequent period the names of the *mirasidars* were entered as owners in the Adangal account, not only of unoccupied sites like this, but also of the occupied sites. It was alleged that this had been done surreptitiously to create evidence of ownership and the *mirasidars'* names were struck out in cases where there was an occupier, but apparently were left in when the site was unoccupied. In these circumstances I cannot give the entries in the Adangal accounts the weight that might otherwise attach to them. The question came up again in 1892, when Government expressed themselves more guardedly, observing "the question of the ownership of Pariah house sites is one of legal right and if the *mirasidars* have it they can only be expropriated by compensation." Lastly we have the report of the Special Settlement Officer, Mr. Stuart, in G. O. 2868, dated 19th October 1909, which shows that where the *mirasi* right is in the hands of a few, the claim to the village site is still often kept alive and used for the purpose of keeping the rest of the population in subjection, and that in other

cases no attempt is made to enforce it.

Coming now to the decisions of the Courts —the judgment of Sir Thomas Strange in 1808 in the Thondiarpet case (Mirasi Papers, page 127) shows that the right of the *mirasidars* to the village site was proved in that case by abundant oral evidence to the satisfaction of the Chief Justice, who, however, observed that it did not appear and was not material in which respect, if any, the *mirasidars* were subject to the intervention of Government except for the *Sircar* share. The principle which was laid down and on which the judgment proceeded was that the nature of the *mirasi* right was to be ascertained by user; and that still appears to me to be the governing test. In 1841 (M. P., 462) we have the judgment of Mr. Lewin in the Provincial Court of Chingleput in a suit to which Government was a party and did not appeal, in which as to cultivable waste the law was taken from Mr. Ellis' answers and Government were held to have no right to issue *cowles* of lands in *mirasi* villages which the *mirasidars* were willing to cultivate. This does not really amount to more than a recognition of the *mirasidars'* preferential right to cultivate, and must now be read with the subsequent Full Bench decision in *Sakkaji Rau* v. *Latchmana Gaundan* (4). The judgment in 1849 of the Sudder Adalut in Special Appeal No. 108 of 1844 (M. P., 483) is more directly in point, as it recognised the *mirasidars* as the hereditary proprietors of the soil including the *nattam*, and laid down that if a *purakudi* ceased to cultivate, he became a *casawargam* and liable to pay rent for his backyard to the *mirasidar* who clearly had the right of ejection. The judgment in Special Appeal No. 186 of 1859 (M. P. 485) was also in a suit in which the *mirasidar* was held entitled to evict the *casawargam* tenant from a house site which had been in his occupation for a great number of years on paying compensation for the buildings he had suffered the defendants to construct and occupy. The fact that these two cases are from Kumbakonam does not detract from their weight, as the rights of the *mirasidars* were fuller in Chingleput than in Tanjore. Coming now to the year 1882, in that year Sir Charles Turner, C. J., in a suit* to which Government was a party, upheld the right of the *mirasidars* to compensation for a piece of waste land in the village of Vyasarpadi on the authority of Mr. Ellis and Mr. Sankariah, and there was no appeal from his decision. There was also a decree of the District Munsif of Trivellore in Original Suit No. 31 of 1894, in which the right of the *mirasidar* to the *nattam* was asserted, though it was at the same time held that the *mirasidar* was liable to be assessed for cultivation on the *nattam*. There was no appeal, and the papers suggest that Government was not anxious to bring the question before the higher Courts in the hope apparently that the *mirasidars'* claims would die out of themselves. In *Sivantha Naicken* v. *Nattu Ranga Chari* (1) Davies and Benson, JJ., in second appeal refused to interfere with the finding of the lower Courts that the *shrotriemdar* in that case, who stood in the place of Government, and not the *mirasidars* of the village, were entitled to the compensation for a piece of waste land in a *mirasi* village compulsorily acquired. There was evidence of user in the particular case, but the learned Judges laid down generally that "the rights of the *mirasidars* over immemorial waste (apart from their preferential right to cultivate) appear to be confined to grazing, cutting firewood and similar common privileges as stated by the Board of Revenue in 1839 in the passage already quoted in this Court's judgment in *Sakkaji Rau* v. *Latchmana Gaundan* (4), but those rights were liable to be extinguished by the Government alienating the land" This passage does not, however, deal directly with the ownership of the *nattam*. In the South Canara forest case, *Secretary of State* v. *Manjeshwar Krishnayya* (2), Benson, J., delivering the judgment of the Full Bench again laid down that both under the Hindu and Muhammadan Governments waste lands belonged to the State, and observed incidentally that the right of Government to the waste lands had now, after protracted contest, been established as against the *mirasidars* on the East Coast, but this point did not arise for decision. We have also been referred to the decision of Benson, J., and myself and in *Natesa Gramani* v. *Venkatarama Reddi* (5), where we upheld the finding of the two lower Courts on the evidence that a certain tank in a *shrotriem mirasi* village belonged

*See 40 Ind. Cas. 920*n*—*Ed.*

to the *mirasidars* and not to the *shrotriemdar*, or Government assignee. I do not think that Benson, J., who wrote the judgment, intended to lay down anything inconsistent with the opinions expressed by him in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) and *Secretary of State* v. *Manjeshwar Krishnayya* (2). The decision in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) was explained as having proceeded on the facts proved as to the particular village, and not as laying down as matter of law that *poramboke* lands in *mirasi* villages must necessarily be the property of the *zemindar*, that is to say, of Government or its assignee.

I have now dealt with the most important aspects of the question, and it only remains for me to formulate my conclusions in this important and difficult case. The village *nattam* is land in the village set apart from time immemorial for house sites and cannot be used for any other purpose so long as it retains its character as *nattam*. On the evidence with which I have dealt I am not satisfied that before the advent of British rule and especially under the Muhammadan Government unoccupied *nattam* was generally recognised by Government as the private property of the *mirasidars*, though no doubt where, as was frequently the case, they were themselves the renters of the village, the control would remain in their hands, and they may in individual cases have exercised rights of ownership over it.

The next question is—has the *mirasidars'* ownership been established subsequently either by Government recognition or by judicial decisions in the proceedings and cases to which I have referred. As regards recognition, it cannot be said that the Board of Directors, or their successor, the Secretary of State, have ever recognized the *mirasidars* as owners of the *nattam*, and the varying views of successive Governments in Madras on a subject which has never ceased to be controversial do not appear to me to establish any general right based on recognition.

As regards the cases, some of the early decisions are not reconcilable with the observations in recent cases such as *Sivantha Naicken* v. *Nattu Ranga Chari* (1) and *Secretary of State* v. *Manjeshwar Krishnayya* (2) and, if I may say so with respect, appear to proceed on an unreserved acceptance of the views of Mr. Ellis and Sankariah, which appears to me to be an unsatisfactory basis. Even the unreported judgment of Sir Charles Turner is open to this observation. The question is one of great difficulty owing to the unsatisfactory character of the materials on which we have to base our judgment; but on the whole after the fullest consideration of the case in all the aspects that have been presented to us, I do not think that these materials warrant us in laying down the broad proposition that unoccupied *nattam* in this District is the private property of the *mirasidars*, and I am of opinion that the question should rather be decided on the evidence in each case and with special reference to user, which will probably not be found to be uniform. This was to some extent the test recognised in *Natesa Gramani* v. *Venkatarama Reddi* (5), one of the latest decisions, and a similar course was adopted by Sir Charles Turner and the other members of the Full Bench who decided *Sakkaji Rau* v. *Latchmana Gaundan* (4) as to the *mirasidars'* claim to *swantantrams*, which in effect involved their claim to ownership of the cultivable waste, that is to say, of the land in the village which they had presumably reclaimed to cultivation but had ceased to cultivate a claim which was at least as strong as the present claim to the unoccupied *nattam*. In this case, as in that, user must in my opinion be the governing consideration.

I may add that the preferential right of the *mirasidars* to cultivable waste, which is now well established, does not appear to me to be of itself a sufficient foundation for the general proposition that they are entitled to eject inhabitants of the village from portions of the unoccupied *nattam* granted to them by Government, though they may be entitled, as incidental to such right of preferential cultivation, to the allotment of sites on the unoccupied *nattam*, when necessary.

In the result I am of opinion that there is no general presumption of the *mirasidars'* ownership of the *nattam* in the absence of evidence of user, but that where user is shown, the presumption of ownership readily arises.

AYLING, J.—The question propounded for us to answer is as follows:—

"Whether, in a *mirasi* village, the *mirasidar* is entitled to recover possession of a

house site held under a *patta* from Government."

Slightly amplified I take its meaning to be this:—

Where in a *mirasi* village a person has been granted a portion of the *nattam poramboke* for use as house site by a duly authorised Government Officer, can the *mirasidar by virtue of any right, privilege or title inherent in him as mirasidar* disregard the grant of the house site by such officer, and evict the grantee from possession?

In the plaint the suit property is claimed by plaintiffs as absolute owners. How far this claim was intended to be based on the adverse individual enjoyment which has been found against by both the lower Courts is not clear: but I do dot think it has been seriously argued by the learned Vakil who represented them in this Court that their interest in the property amounted to absolute ownership, *i. e.*, ownership without restriction as to the way in which the property should be utilized. Such a claim would in effect only be supported on the theory that every inch of land within the boundaries of a *mirasi* village was equally and entirely the property of the *mirasidar*—subject only to liability to pay land revenue to the *Circar*. It is quite certain that no such claim has ever been recognised by Government or the Courts, even if it was ever advanced. It is not disputed that the right of the *mirasidar* to deal with various kinds of land in his village is clogged with various restrictions. This is clear even from the authority most relied on by appellants: *vide* Mr. Ellis' Report at page 184 of the Mirasi Papers. Tanks, roads, threshing floors and other descriptions of *poramboke* lands, not excepting the *nattam* or house site *poramboke* with which we are immediately concerned, can only be utilised for the purpose indicated by the description of each: while it is admitted that cultivable land can under certain circumstances be assigned by Government to a non-*mirasidar* and it has been held in *Fakir Muhammad* v. *Tirumala Chariar* (9) that a *mirasidar* cannot without the permission of Government break up immemorial waste and bring it under cultivation. Obviously then "*mirasi*" does not imply any general rule of complete ownership over all the lands of the village: and what we have to consider is whether this power to evict under the circumstances contemplated by the reference is an incident of *mirasi* and whether it has been recognised by Government. That the latter is a necessary condition of enforcibility has been laid down in the most trenchant terms by their Lordships of the Privy Council in a very recent case, *Secretary of State* v. *Bai Rajbai* (10). They say:—"Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports, it is essential to consider what was the precise relation in which the *kasbatis* stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the Tribunals of their new Sovereign, of which they were thereafter possessed. The relation in which they stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new *regime* the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign, by agreement, expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new Sovereign has recognised these *ante*-cession rights of the *kasbatis*, and has elected or agreed to be bound by them, that the consideration of the existence, nature or extent of these rights become relevant subjects for enquiry in this case."

Whatever view is taken of the origin of *mirasi* tenure (which is entirely a matter of speculation) and the privileges it confers, there are undoubtedly certain incidents, which have been claimed as attaching to it from ancient times, and have to some extent been recognised. They are:—

(*a*) The right to hold his *maniam* lands free of all payment of land revenue.

(*b*) The right to hold his *patta* lands in absolute ownership subject to the payment of such assessment as the State may impose.

(*c*) A preferential right to cultivation of all lands, which have been brought under, but have gone out of cultivation (*seykal karambu*).

(*d*) The right to certain fees (*tunduvaram*) on lands granted for cultivation to non-*mirasi* cultivators (*payakaris*).

(*e*) Certain rights over immemorial waste.

(*f*) Certain rights over lands set apart for various communal or public purposes; *e.g.*, tanks, village sites, threshing floors, etc.

Now all these rights may have a common origin in the status of the *mirasidar*: but none of them necessarily involves another, and, as will be seen, they vary with the description of the land to which they relate. Each, as it seems to me, requires to be separately established: and recognition by the State, whether express or implied, is an indispensable condition for the enforcement of each. It may be argued that the existence or recognition of one renders probable the existence or recognition of another: and this indirect evidence will be dealt with later. But it seems to me more convenient to start with the direct evidence regarding the peculiar incident with which we are concerned—that is, the rights of the *mirasidar* as such over the village *nattam*.

"*Nattam*" is a particular variety of *poramboke* land. *Poramboke* is defined in Wilson's Glossary thus: "Such portions of an estate or village lands liable to revenue as do not admit of cultivation, and are, therefore, exempt from the assessment, as sterile, or waste land, rock, water, wilderness, site of dwellings and the like: also common land near a town: any place situated out of or beyond certain limits".

*Nattam* is the "site of dwellings" above referred to. It does not admit of cultivation and is exempt from assessment, not because it is unfit by nature for the plough (it is frequently cultivated licitly and illicitly), but because it is required and set apart for an indispensable purpose—the building of houses for the various members of the village community. Wherever the ownership or *quasi*-ownership lies, this overriding limitation is respected by both parties. The *mirasidars* do not claim to be entitled to bring *nattam* under cultivation except in the limited and special way incidental to the backyard of a house: and Government do not claim the right of granting it on *patta* for cultivation purposes subject to the payment of assessment. Such a course is in fact expressly forbidden in the Board's Standing Orders.

In fact the dispute between Government and the *mirasidars* as regards *nattam* practically amounts to this: in whom rests the right and duty of apportioning the unoccupied "*nattam*" so as to ensure its utilisation for the appointed purpose?

Now in deciding this question the plaintiffs, who are the parties seeking relief in this case, wish to override the general presumption of the Common Law of India that the ownership of all unoccupied land vests in Government. If authority be needed in support of this presumption, I may cite *Subbaraya* v. *Krishnappa* (6), *Secretary of State* v. *Manjeshwar Krishnayya* (2), *Madathapu Ramaya* v. *Secretary of State* (7) and *Bhaskarappa* v. *Collector of North Kanara* (11). In *Madathapu Ramaya* v. *Secretary of State* (7) Bhashyam Aiyangar, J., says at page 393 that presumably the free-hold in the soil of *gramanattam* or village site is in Government. He was of course speaking of an ordinary *ryotwari* village where no *mirasi* claims can be set up, but there is no doubt that the presumption of Government ownership applies to *nattam* lands in ordinary *ryotwari* villages, the ownership being subject to the important limitation above referred to. Even in this latter respect, it is not denied that where the *nattam* in an ordinary *ryotwari* village is in excess of what is reasonably required, Government may transfer a portion to "*ayan*" (assessed) and grant it on *darkhast*. I mention this specific reference to *nattam* in view of the possible suggestion that the presumption is inapplicable to *poramboke* lands.

The right of Government to allot *nattam* in ordinary villages has in fact never to my knowledge been questioned: and an elaborate series of rules has been framed for the guidance of Revenue Officers (*vide* B. S. O. 21).

(11) 3 B. 452 at p. 583 *et seq*; 2 Ind. Dec. (N. S.) 301

The presumption has now been embodied in section 2 of Act III of 1905, and it is very remarkable that there is no mention of *mirasidars* among the numerous classes whose rights are specifically excepted. There is no reason to suppose that the Act was intended to put an end to any existing right: and the *mirasidar* might probably shelter himself behind the clause "all customary rights legally subsisting." But the section is important both as embodying the presumption in an enactment and as indicating that in 1905 at any rate the Legislature treated the peculiar rights claimed by *mirasidars* as on a different footing from those of *jenmis* and *wargdars* who are both recognised by name. The *mirasidar* has to show that his right is a "customary right legally subsisting."

This presumably involves proof of recognition by the British Government, which, as already indicated, is necessary to establish the right as legally enforceable.

As regards the recognition of *mirasi* rights by the State, the burden of proof undoubtedly rests on appellants: *vide Secretary of State* v. *Bai Rajbai* (10) above quoted.

It may not be out of place to refer to one other point in this connection. If the *mirasidars* are legally entitled to the right they now claim, it is of course the duty of the Courts to enforce it, irrespective of all considerations of expediency. But where it is clear that the right claimed tends to the prejudice of a purpose to which the property is admittedly dedicated, I think it is the duty of a Court to require very strict proof before giving a decree in its favour. In the present case, no one has ventured to suggest that the enforcement of the *mirasidars'* claims over *nattam* would not be gravely prejudicial to the village community generally.

Sankaran Nair, J., freely admits as much, and throws out a suggestion calculated to ameliorate the rigour of *mirasi* control. He says:—

"It may be that, though the *mirasidars* are the owners of the village waste lands and house sites, that claim is subject to the claim of the labourers and the residents in the village, and that, if the *mirasidars* happen to turn out a labourer from his homestead they are bound to give him other house sites."

But this liability is not recognised by the *mirasidar*: and is quite incompatible with his claim not only as put forward in the plaint, but as argued in Court before us. The B. S. O. provides a simple procedure whereby any resident of the village can obtain an allotment of vacant *nattam* for the purpose of constructing a homestead. The recognition of the *mirasidar's* claims would place the entire control of this unoccupied *nattam* in the hands of a small corporation frequently consisting of two or three individuals (three in the present case) or even a single person. How potent an instrument of oppression this may be needs no demonstration. It is so even now, when the *mirasidars'* claim has not been declared by the Courts, and the labouring classes have the support of Government in resisting it. In the latest survey of the condition of the District Mr. G. A. D. Stuart writes (section 12):—

"In Ekabhogum villages the *mirasidars* still use their claim to village site as a weapon against refractory sub-tenants or labourers, in the manner described by Mr. Mullaly in 1890. A typical instance will be found in village No. 15, Kannivakam, in the Chingleput Taluk. Here there are two *mirasidars*, both absentees, living in Madras. The wet lands are poor and are assessed at Rs. 2 and Rs. 2-8-0, but the resident sub-tenants have to pay Rs. 12 an acre rent to *mirasidars*. Their holdings are altered as often as possible so that they have lost all occupancy right. Their houses are mostly built on a piece of *patta* land and they have to pay rent to the *mirasidar* for each house site. There is plenty of vacant land on the *poramboke* village site, but the *mirasidars* have "forbidden" the sub-tenants to build their houses there. I explained to the sub-tenants that the *mirasidars* have no right to forbid them to use the village site, but they explained that, if they ventured to disobey, their cattle would be impounded. This is a form of oppression which is also mentioned by Mr. Mullaly. In this village all the waste land on which the cattle graze has been taken up and now stands in the *patta* of the *mirasidar*, so that the sub tenants are entirely in the hands of the *mirasidars* in this respect."

The recognition of this claim by the Courts would enable *mirasidars*, wherever they chose to unite, to practically banish

from the village any person who incurred their displeasure, and would go far to reduce the labouring classes to the state of serfdom, from which they have been slowly emerging.

I proceed to consider the evidence directly bearing on the existence and nature of the *mirasidar's* rights over "*nattam*" and the recognition of these rights by Government. Existence and recognition are, of course, different things; but the evidence regarding both has to be dealt with together, inasmuch as appellants depend largely on alleged admissions by Government to establish the existence of the rights they claim.

I may say at once that up to a comparatively late period (about 1870) there is very little indeed either in the Exhibits in the case, or in the Mirasi Papers to which we have been referred or in the decisions of the Courts dealing with the point.

The minds of Mr. Place, Mr. Ellis, *Sheristadar* Sankarayya and Sir Thomas Munro were all concentrated on something entirely different—the question of the rights of the *mirasidars* in cultivable land. In the last years of the 18th and the first quarter of the 19th century this was a burning question. A reference to the minutes of consultation dated the 8th January 1796 shows that at that time, Government took a very extreme view of the relative positions of themselves and the *ryots* (including *mirasidars*). They say: "Though the inhabitants of each village may, from generation to generation, have cultivated the lands adjoining to it, yet the original compact is not changed by residence: they can establish no more 'rights of inheritance in respect to the soils' than tenancy upon an estate in England can establish a right to the land by hereditary residence, although the liberal custom of English landlords has generally given a preference to the ancient inhabitants, where a reasonable rent has been acquiesced in." "The *mirasi* inhabitants then bear the same relation as the other inhabitants to Government; and both of them establish by hereditary residence in a village *not* a *right but* a *preference* to the cultivation of the soils, the proprietary right to which is exclusively vested in the *Circar*."

These were the views that Mr. Place, and to some extent Messrs. Ellis and Sankarayya were combating in the memoranda and reports on which reliance is placed by Mr. Srinivasa Aiyangar: and although it is needless to say that Sir Thomas Munro in 1824 took a much more liberal and enlightened view of the matter, yet he was primarily concerned with the difficulties which the advocates of the *mirasidars* threw in the way of the introduction of the *ryotwari* system as regards cultivable land. In almost every passage in which these writers refer to waste, they clearly have in mind either land which has been cultivated and abandoned (*seykal karumbu*) or land which though never cultivated is fit for cultivation or could readily be made so, and to the cultivation of which by some person or other there is no objection on public or communal grounds (*annadhi karambu*). It has been argued before us that waste lands include all *poramboke* lands: and no doubt if waste is interpreted in the widest sense as meaning simply uncultivated, this is so. But in practice *tarisu* (waste) and *poramboke* are understood to be two different things—as authority for which statement I need go no further than the opening sentences of the referring judgment of Sankaran Nair, J., in this very case. I may, however, also refer to the foot-note on page 185 of the Mirasi Papers, which gives an exhaustive classification of all sorts of land according to the *tirapudi* accounts, which were maintained in those early days of the British *Raj*: and to the very clear and detailed explanation furnished in sections 69-71 of the minutes of the Board of Revenue, dated the 5th January 1818 (*vide* pages 373-4 of the Mirasi Papers).

Wherever either Place, Ellis, Sankarayya, Sir Thomas Munro, the Board of Revenue or Government use the term waste as including *poramboke*, they are careful to make their meaning clear: *e.g.*, the answers of Ellis and Sankarayya to the second question propounded by the Board (page 184 and 219, Mirasi Papers). Mr. Ellis in a single passage (page 357 *id.*) uses the word *tarisu* in a special and peculiar sense indicating land which is neither *annadhi karambu* or *seykal karambu*, but "entirely barren and uncultivable." This "*tarisu*", he says, should like *poramboke* be deducted totally from the assessable lands of the village. He obviously has in mind

such lands as are from their very nature hopeless for cultivation purposes, *e. g.*, stretches of bare rock, which are now usually classed as "*Parai poramboke.*" Having cleared such cases out of his way, he proceeds to formulate his proposal regarding the question then at issue, *i. e.*, the treatment of cultivable lands.

I shall deal *seriatim* with the rare instances in which these early authorities refer to *mirasi* rights as applicable to *poramboke* land, including *nattam*

Mr. Place's final report, which has been much quoted by appellants, leaves the question entirely untouched. His conclusions in sections 703 and 704 (pages 68 9, Mirasi Papers) are on the face of it concerned solely with cultivable land capable of paying revenue to the State.

Messrs. Ellis and Sankarayya, however, writing in and confronted with the question "Does *mirasi* right extend to waste land?" do refer to *poramboke* lands.

Mr. Ellis says (*vide* pages 184-5, Mirasi Papers): "In the *terapadi* accounts the lands are distributed according to their several (23) descriptions, either waste or cultivated, and the *mirasidars* must enjoy them as thus entered; on the *nattam* they must build their houses and nowhere else, they cannot cultivate or appropriate it to any other purpose; in the *poramboke* they have no right to fill up tanks, stop water-courses or obstruct roads; and so in other (24) descriptions of land, *mirasi* right is confined to the *use* of these as they exist. No alteration can be made with respect to them by the *mirasidars*; I mean that they have no inherent right to do so, but with the consent of the *Sircar* any beneficial change in the appropriation of lands may take place, and a correspondent alteration must be made in the *terapadi* accounts—thus, if part of the *anadhi carumbu* lands be reclaimed, or a road in the *poramboke* be stopped up and cultivated, the extent must be transferred from this head to that of *varapet.*"

This seems to me to simply recognise the *mirasidars'* right of enjoyment of (*e. g.*) *nattam* for building purposes. It is obviously incompatible with any claim of full ownership; and I do not find anything to support the idea that their right of enjoyment extends to the exclusion of of non-*mirasidars* from *nattam* which *mirasidars* do not require for their own personal use.

*Sheristadar* Sankarayya's answer to the same question is printed at page 219. He lumps all *porambokes* (including *nattam*) in with *tarisu* lands and says they are enjoyed either jointly or severally by the *mirasidars*. Appellants are entitled, I think, to quote this as an authority in support of their claim. The *sheristadar* goes further than any one else in his advocacy of *mirasi* rights; but I am not satisfied that we should be justified in treating him as an authority of the first rank: and he does not seem to have been so regarded by his superiors at the time, with the exception of Mr. Ellis himself.

How far the Board of Revenue were inclined to admit the *mirasidars'* rights in *nattam* is clear from section 70 of their minutes dated the 5th January 1818 (*vide* page 374, Mirasi Papers):—

"The *poramboke*, or land incapable of cultivation, consists of rocks, public roads, the beds of rivers, tanks, and water-courses, the public ground in which the bodies of the dead are burnt or interred, the *puracheri* of suburbs of the village occupied by the huts of Pariah slaves and other outcastes, the lands on which the different village temples stand, and the site of the village itself, called in Tamil the *nattam*. It is in this last place that the houses of the landlord *mirasidars* are invariably to be found; for here, and nowhere else, are they permitted to build their houses. Various other pure tribes, such as Brahmins, weavers, merchants and others, are admitted to dwell in this place, and all, therefore, who reside in it are not *mirasidars*; but all the *mirasidars* have houses, or at least sites for their houses, in the *nattam*. Indeed their title to erect their dwellings on that particular spot and their right to control the affairs of the village *pagoda*, and to appropriate the produce of quarries mines or fisheries are the chief privileges they possess in the *poramboke*, which, as here described, being incapable of being cultivated, is not liable to any tax."

The right now claimed certainly cannot be read into the privileges herein enumerated. They are stated to have a right of control

over the affairs of the village *pagoda*, but not over the *nattam*. The latter is expressly stated not to be in their exclusive occupation. They are stated to have a right to erect their dwellings on that particular spot, to which might fairly be added as an inferential corollary "in preference to other people"; but there is nothing to suggest a right to exclude others from portions of the *nattam* not required for their own use.

These are the views of the Board of Revenue and I can find nothing to indicate that Government, still less the Directors, ever troubled their heads about the matter. There is a single passage in the minutes of consultation, dated the 11th February 1856 (page 534, Mirasi Papers), in which Government remarks that Mr. Ellis shows that "the *mirasi* interest in land of different descriptions varies much—the highest degree of it being found in the case of the *varapat* and cultivable waste *the lowest in the poramboke*". I shall show later the utmost limits claimed for *mirasi* rights in cultivable waste do not extend to the policy of the dog in the manger which it is now sought to put in force as regards "*nattam*."

Sir Thomas Munro in his famous minute of 1824, of course, took a very strong view against the *mirasi* claims in cultivable waste: but he does not touch on the subject of the *mirasidars'* interest in *nattam*, though it is not difficult to see what his views would have been, had he had occasion to express them.

In the whole of these official reports, minutes and proceedings up to 1870 on the *mirasi* question, I can find nothing amounting to a recognition on the part of Government of any title in *mirasidars* to monopoly or exclusive control of the *nattam*. The views expressed on other *mirasi* incidents, which I shall come to later, certainly incline one to the opinion that had the claim been brought to their notice, they would *not* have recognised it. The most that can possibly be said is that there is no record of any repudiation of it, and whether this amounts to much or little depends largely on the practice actually obtaining in the villages. This brings us to the papers connected with the order of Government dated 16th December 1872, at which time the question first really came up for consideration. I shall return later to a few isolated instances in which specific disputes as to *nattam* had come before the Courts, the Board or Government previously. They do not seem to me very helpful.

The order of Government No. 1684, dated 16th December 1872, has been strongly relied on by appellants, and is undoubtedly a piece of evidence entitled to very serious consideration. In the course of it, the Government remark, "in purely *mirasi* villages, where the entire area belongs to the *mirasidars*, the *gramanattam* no doubt appertains to them equally with the other *porambokes*" and the Board of Revenue is instructed to exempt *zemindari* and *mirasi* villages and villages which are private property from the rules they were about to formulate regulating the grant of *nattam* land for house sites. An excepting clause was actually introduced accordingly in the Board's Standing Order and was not removed till 14 years later. These proceedings, according to appellants, constituted a distinct recognition by Government of the right for which they are now contending, and are, as their learned Vakil would put it, conclusive of the case.

A careful examination of the connected papers appears to me to considerably reduce the importance to be attached to this alleged recognition. It appears that in 1870 the question of the practice obtaining regarding the disposal of *nattam* land by Revenue Officers was brought to the notice of the Board of Revenue on a reference from the Coimbatore District. Reports were called for from all Collectors and these are summarised in the Board's Proceedings. For our purpose it is most important to note that it appears that in Chingleput *nattam* land was granted to *all* applicants on a fixed scale. This scale doubtless refers to the extent allotted, and strongly suggests that in this respect, regard was paid to whether the applicant was a *pattadar* or not, and to the assessment paid by him. This distinction is embodied in the existing rules (*vide* B. S. O. No. 21), and has probably always been observed wherever rules have been formulated. But there is no mention in

Chingleput of any preference to *pattadars*, as in the adjoining districts of south and north Arcot; and it can only be understood that the village or Revenue Officers granted *nattam* land for house sites to all applicants at their discretion subject to this fixed scale without reference to any special claim of the *mirasidars* as such. The Board of Revenue proceeds to consider these reports and to formulate and submit for the approval of Government certain general rules applicable throughout the Presidency. It would appear that in some parts at any rate Revenue Officers had been unduly and unnecessarily interfering in *gramanattam* questions; and that it had become desirable to reduce this interference to proper limits. The Board remark:—

"The true view of the case is that *gramanattam* is the communal property of the villagers, and that the Collector can only interfere with a view to benefit the community, and when his action is consistent with the Common Law."

Much stress is naturally laid by the appellants on the phrase "communal property". It was at once repudiated by Government, who in their order substitute the following definition:—

"By immemorial usage a portion of every village is assigned rent free as a site for the dwellings of the villagers; but as the old *hukumnamahs* show the enjoyment of it is subject to regulation by the Government."

As a matter of fact, it is clear that the difference between the Board and Government was merely one of words. The action which the Board proposed for its officers as "consistent with the Common Law" involved precisely the same powers as Government claim at the present day. Its proposed rule I runs:—

"Unclaimed portions of the village site may be granted to any one resident or about to become resident in the village on a fixed scale, which must be laid down by the Collector of each district once for all."

Government approved of this; and added a more drastic provision insisting on the land being built on within a fixed time.

So far the papers are not only useless to appellants, but tell very strongly against them on the most important point of the custom, which had previously been obtaining. But in generally approving the Board's proposals, Government, as already stated, went out of its way to place *mirasi* villages on a separate footing. Why they did so it is impossible to say. The special case of *mirasi* villages was not raised by the Board, and it does not appear that any special representations had been made by *mirasidars*. If it is to be taken as meaning that in a *mirasi* village the entire area belongs to the *mirasidars*, this view is so utterly opposed to every pronouncement of Government before and since, that it is difficult to treat this isolated dictum unsupported by any reason as a considered and binding expression of policy. If it is merely meant that the *mirasidars* had rights in *nattam* just as they had in other *porambokes*, each after its kind, this is in accordance with section 69 of the Board of Revenue's Minutes of 5th January 1818 already alluded to; but it does not necessarily involve the idea of exclusive rights. Practically all that one can say is that in 1872 Government declined to sanction the application to *mirasi* villages of the village site rules approved for non-*mirasi* villages; and that if the *mirasi* claim now under consideration had been placed before Government as then constituted, it might or might not have been recognised in full, but it would in all probability have received favourable consideration and recognition to some extent at least. Government issued no specific orders regarding *nattams* in *mirasi* villages; but it is very doubtful whether they meant to abdicate entirely the control which had, on the very papers before them, been exercised up till then, so far as appears, without objection.

At any rate less than three years later when Chingleput District was settled, the Settlement Register of this very village (Exhibit F), which must be taken as issued by the authority of Government, contains a note with regard to building site (*nattam*) that "no new enclosure is to be made or new building erected without permission in future." It is difficult to reconcile this with the view which

the learned Vakil put forward regarding the order of 1872.

I may mention here that although the purport of the latter order was, as already stated, embodied in the Board's Standing Order, yet it does not appear to have attracted the attention of the parties interested or to have had any practical effect on the situation. (*vide* section 8 of the Board's Prceedings No. 362, dated 24th June 1890, referred to below).

The next landmark is 1886, when the whole question in much the same form as that in which it now presents itself, came before the Board of Revenue in connection with an appeal presented by the *mirasidars* of Nemelicheri against a certain order of Mr. C. A. Galton, then Collector of Chingleput. The Board says in its Resolution No. 1547, dated 7th July 1886: "This is an appeal which raises the question of the right of *mirasidars* (in Chingleput) to the ownership and the full control of the *gramanattam* or village site. It appears that the *mirasidars* of Nemelicheri asserted this right over the land in the *parachery* of their village and did so by ploughing up part of it, by erecting huts without the permission of anybody and by ousting a Pariah who had occupied a house in the *parachery* for forty years. In their petition the *mirasidars* assert an absolute right of property in the *parachery* land or *cheri nattam* and a right to oust their farm labourers or apparently any Pariah from it.

2. The evidence they have produced makes it certain that they have claimed and probable (but only probable) that they have possessed this right in past times, but they cannot show that it has ever been admitted by Government."

The Board dismissed the *mirasidars'* appeal, but in view of the importance of the subject, reported the whole matter to Government, drawing particular attention to the G. O. of 1872, and the probability of a civil suit following on the dismissal of the appeal. The Board expressed a strong opinion that the Collector must be supported in asserting the right of Government to deal with the *nattam* and negatived the claim of the *mirasidars* to exercise right of ownership over any part of it.

Government, having had the matter thus placed fairly and squarely before them, simply recorded the papers; from which it can only be inferred that they agreed with the Board and were prepared to face the threatened suit. Had they taken a different view, they would certainly have issued orders to admit the *mirasidars'* claim, and so save litigation. No suit was apparently ever filed.

These papers clearly show that, whatever view the Government of 1872 might have been induced to take, the Government of 1886 did not recognise the *mirasidars'* claim.

The next batch of records to which our attention is drawn is that connected with G. O. No. 704, Rev., dated 3rd September 1890. In this order Government in the most explicit terms declines to recognise the *mirasidars'* special claim to *nattam*, and repudiates the view which it seemed to have taken in 1872. The G. O. says:—

"It is true that in 1872 the Government declared that in the exceptional case of purely *mirasi* villages, where the entire area belonged to the *mirasidars*, the village site would also appertain to the same body, but the opinion expressed was stronger in appearance than in reality, for it formed part of an argument, contesting the view of the Board that village site was the communal property of the villages and did not appertain to Government. In any case His Excellency the Governor in-Council is not now prepared to subscribe to the above dictum. And it is observed that when in 1886, the Board challenged the correctness of the order of 1872 the Government allowed the challenge to pass unnoticed. The said order has thus practically become a dead letter, in so far as it acknowledges the claims of *mirasidars* to village sites, and in the revised edition of the Standing Orders the words '*mirasi* villages' have been omitted from Standing Order No. 37 (formerly No. 39)."

It has been argued before us that the double entry system regarding house sites which prevailed in the village accounts of some, but not all, of the villages of the Chingleput District is itself evidence of recognition of the *mirasidars'* claim. This matter is fully considered by the Board and

Government in these papers. I have no hesitation whatever in rejecting this argument. There is nothing to contradict Mr. Mullaly's statement that the practice was unauthorised by Government or any responsible officer and it was discontinued, as soon as it was brought to notice, and attention drawn to the fact that it might be construed into an admission of the *mirasi* claim. In the second place the practice itself is probably due largely, as suggested by Mr. Lee Warner, to the grant by *mirasidars* of house sites to their labourers out of their own "*porunmanais.*" (*vide* section 5 of the Board's Proceedings No. 362, dated 24th June 1890). Now the rights of the *mirasidars* in these "*porumanais*" may stand on a very different footing to the right they now claim over vacant *nattam*. Although the *porumanais* may be originally misappropriations of *nattam pramboke*, the *mirasidars* may have acquired by prescription a valid title to them.

The whole question of the position of Pariah and low caste labourers in Chingleput and their oppression by the *mirasidars* came before the Board and Government in 1892, in consequence of a memorandum prepared by Mr. Tremenheere, who was then Collector. The views then expressed by both authorities were to some extent influenced by the desire to point out what they regarded as the exaggerated expressions of Mr. Tremenheere, but I can find nothing in either Board's Proceedings No. 584 A, dated 19th August 1892, or G. O. No. 1010 and 1010A, Rev., dated 30th September 1892, to indicate a change in the opinions and policy enunciated two years before. Government in fact reiterated its orders regarding the contesting of any civil suit brought to assert the *mirasi* claim to village sites.

The latest orders quoted are those passed on Mr. G. A. D. Stuart's Re settlement Report in 1909. These also indicate no change of view. Both Mr. Stuart and the Board emphasize the fact that the *mirasidars'* claim to all vacant *nattam* and to the power to oust any non-*mirasidar* (as now contended for) must be resisted: and Government apparently acquiesce although willing to transfer to "assessed" all *porunmanais* in which a prescriptive title as against Government can be proved or fairly presumed. The above appear to be the only cases in which the abstract question of the *mirasi* right now in dispute has been considered: and it seems to me that with the exception of the order of 1872 there is nothing that could possibly be construed as recognition by Government. For reasons given above I do not think this isolated pronouncement is of a nature to be treated as conclusive on the point.

It remains to consider certain cases in which the action of Government is represented as constituting (or at any rate supporting the idea of) recognition of the contested right and certain cases in which the latter is said to have come before the Courts and been the subject of adjudication.

Mr. Srinivasa Aiyangar has drawn our attention to a series of papers (Mirasi Papers Nos. 25 to 32) dealing with the payment of compensation by Government for certain waste lands in the *mirasi* village of Tondiarpet about the year 1810. There is nothing to indicate that any of these lands were *nattam* or indeed any kind of *poramboke*, and the fact that Government were prepared to pay compensation to the *mirasidars* for cultivable waste has no significance in the present connection. Whether such a claim would be admitted at the present day may be doubtful, but the papers make it clear that Government were not prepared to recognise any proprietary right on the part of the *mirasidars* but only what is referred to as "occupancy" right—by which I think is meant the preferential right of the *mirasidar* to take up and cultivate waste land (*vide* page 143), and that there was an inclination to show some special indulgence to the Tondiarpet *mirasidars*, because they had recently been evicted from their village in favour of certain Shanars, and thus prevented from exercising their preferential rights. I can find nothing in these papers bearing directly on the present question: and I do not think we have been referred to any case in which compensation has been paid by Government for the acquisition of unoccupied *nattam*.

The general question of the necessity of paying compensation to *mirasidars* for waste land taken up by Government was again agitated about the year 1856 (*vide* Mirasi Papers Nos. XCII and XCV, etc.), but here also only with reference to cultivable lands. The two papers mentioned, however, throw a great deal of light on the views prevailing at the time: and section 39 of the Govern-

ment despatch to the Court of Directors dated 5th June 1857 (M. P. No. XCV) makes it quite clear that they were only prepared to pay compensation for cultivable waste on the basis of the value of the *mirasidars'* preferential right to take up the land. For the orders of the Court of Directors as to the limitations on this preferential right *vide* section 30 of their despatch dated 17th December 1856 (M P. No. XCIV).

It is unfortunate that the reply of the Court of Directors to the despatch of the Government of Madras is not on record.

Since that time (1856) there seems to have been no discussion, so far as the record goes, of the liability of Government to pay compensation for waste lands taken up in *mirasi* villages. The only actual cases to which we are referred are two which came into Court. The first which will be referred to later as the Vyasarpadi case related to waste land, which at the time of acquisition, though not assigned by Government, was in the actual occupation and enjoyment of a man claiming under the *mirasidars*. The second, reported as *Sivantha Naicken* v. *Nattu Ranga Chari* (1), seems to be good authority for the proposition that in the case of immemorial waste compensation is *not* claimable by the *mirasidars*. It is argued that the decision proceeded solely on the facts of the particular case, but the first two sentences of section 3 of the judgment certainly seem to me of general application.

One specific case referred to in the papers of 1856 has been referred to and relied on by appellants' Vakil. It is dealt with in Mirasi Paper No. XCIII and also in section 37 of No. XCV: and although it arose in the Tanjore District it calls for comment. The case is a curious one. It relates to a plot of land classed as *threshing floor poramboke* in the village of Mamalore. The village was held by four sharers who called themselves *mirasidars*; and these sharers had divided the threshing floor *poramboke* among themselves. One of the *mirasidars* Rangappa Naik allowed one Narayanasami to put up a temporary house on 18 *gulies* of his (Rangappa's) share of the threshing floor: and this Narayanasami not only declined to quit when called on to do so, but obtained a grant of 40 *gulies* more of the same land from the Collector, and appropriated a further extent of 42 *gulies* in which he was subsequently confirmed by that officer. Rangappa having failed to obtain redress through the Civil Courts resorted to the Revenue Authorities: and both the Collector and the Board declined to interfere on the ground that the land was *poramboke* which Government could give to whomsoever they pleased. Government dissented from this view, and directed that the 82 *gulies* should be placed in possession of Rangappa, and that as regards the original 18 *gulies*, they should be entered in the accounts as his land, but he should be left to the ordinary legal means to oust the occupant.

There is no doubt that in this case Rangappa Naik had a genuine grievance. The land was set apart for use as "threshing floor," and the Collector had no right to assign any portion of it to Narayanasami. This, as Government pointed out in section 39 (page 555), could only be done if it had ceased to be required for the special purpose for which it was assigned: and in that case it would come under the same footing as ordinary waste, and the *mirasidar* would have a preferential claim to it. There is no doubt that Government at the present day would come to the same decision as Government did then, as regards cancelling the orders passed by the Collector. For the rest, the letter of Government undoubtedly contains passages which suggest that they saw no objection to the partition of the *poramboke* between the *mirasidars*, and regarded his share as his *mirasi* land with which he could do as he liked.

Appellants may fairly quote these in their favour; on the other hand it is possible that Government in its desire to refute the Board's argument as to the absolute right of Government in *poramboke* went too far in the other direction. I am not inclined myself to treat these expressions, possibly incautiously used in an isolated case, as good evidence of the determination of the Government of that day to recognise the *mirasidars'* private and complete title in *poramboke* lands; especially as we do not know what view the Directors took on this reference. It would appear from another despatch of the Court of Directors about the same time (M. P. No. XCIV) that they did not at all approve

of the views of Government regarding *mirasi* claims to waste lands and were much more in accord with those expressed by the Board of Revenue.

Turning to the cases on the subject, the earliest to which our attention was drawn is a very old case decided by Sir Thomas Strange, Chief Justice of the Supreme Court in 1808 (No. XXIV of the Mirasi Papers). This was a suit in ejectment brought by a person as the lessee of certain Vellalars, who claimed to be the ancient *mirasidars* of Tondiarpet. The defendants were certain Gramanis who according to the plaint were mere *porakudis* under the Vellalar *mirasidars*. Plaintiff alleged an ouster of his lessors by defendants in 1794 and alleged that his lessors had been driven out of the village altogether by the Gramanis with the sanction of the Collector: and the suit was brought to eject the defendants. Neither the Collector nor the Government was a party: and no attempt was made by defendants to justify the alleged ouster of the Vellalars, which the Court was inclined to regard as having been effected by the Collector's orders in consequence of the Vellalars' oppression of the Gramanis. The defence raised was that the Gramanis themselves were the *mirasidars*: but this was found against them. The only other question gone into by the Court was whether defendants were at the time of suit in possession of anything belonging to plaintiff's lessors, the Vellalars. It was found that they were not and the suit was dismissed. It will be seen from the above how little bearing the case can have on the point now under consideration. The property from which forcible ejectment of the Vellalars by defendants was alleged was the *nattam* (*vide* section 6 of the judgment): and this for a very obvious reason. This was the only part of the village of which they (the Vellalars) held actual possession. The cultivated lands were all cultivated by the Gramanis under them: so that there could be no ouster in regard to them (*vide* section 2 of the judgment). And by the *nattam* can only be meant the house sites actually occupied by the Vellalars at the time of the ouster. This is clear from section 37, wherein the learned Judge says, "Shall we say the *nattam*? It is in evidence that the persons whom they represent took possession of it for a short time, immediately after the ouster; but it is proved, on the part of the lessors of the plaintiffs themselves, to have been long since destroyed, the houses to have been pulled down, and the site of them to be now uninhabited."

The question with which we are concerned never, in fact, came under consideration in that case at all. There is an interesting discussion in the judgment on the nature and extent of *mirasi* rights generally, but it does not help us. Appellants rely on a remark in section 16 that "the *nattam* in which they lived including its adjoining backyards" was a material portion of the *mirasidars*' rights. I take this to mean simply the *nattam* which they actually occupied. If it meant the entire area of land set apart for building purposes, the reference to backyards (always part of the *nattam*) is meaningless.

Two decisions of the Sudder Court have been relied on: those in Special Appeal Suit No 108 of 1844 printed at page 483 of the Mirasi Papers and in Special Appeal No. 14 of 1849 (Decision of the Court of Sudder Adalut, Volume I, page 119). In neither of these was Government represented and neither is of any real assistance. In the first, which arose from Tanjore, the only question appears to have been the right of a *mirasidar* to evict a former *porakudi* from *samudayam* land which he (the *mirasidar*) had originally given him to build a house. The second is from North Arcot District and clearly relates to cultivable land. It has nothing to do with house site: and the general remarks in paragraph 7 of the judgment are of an *obiter* nature.

Exhibit N is a judgment of the District Munsif of Tiruvellore in Original Suit No.33 of 1894, in which the sole *mirasidar* of Kathurvedu successfully sued Government for a declaration of his title to 3·32 acres of *nattam* land in that village. The decision is of course only evidence of one instance of successful assertion of the *mirasidars*' claim. Stress is laid on the fact that Government did not appeal against the decision: but this is explained by the fact that the plaintiff had clearly proved a good title against Government by sixty years' adverse possession, while the right of Government to charge assessment was recognised by the Court. Government had, therefore, no case to appeal on.

Lastly much reliance was placed on an

unreported judgment of Turner, C. J., in Civil Suit No. 128 of 1882. In that case plaintiff, a vendee from the *mirasidars*, sued for recovery of 5 acres and odd of waste land on which he had built a house and made a garden. The defendant was Government who had ousted him, claiming the land as their own. It was found that plaintiff had a good title to the land, and, by consent, he was given a decree for damages in place of recovery of the land.

The land in dispute lay within Madras Municipal limits, but there is absolutely nothing to suggest that it was village site (*nattam*). The very size of the plot is against such a suggestion: for in *nattam* land 5 acres would under the Government system suffice for 50 house sites on the most liberal scale. The word *nattam* or house site is nowhere mentioned in the pleadings or judgment: and the reasoning of the learned Judge proceeds entirely on the assumption that it is waste land liable to pay assessment to Government on occupation He decides that *mirasidars* have certain property in the waste, and that property enables them to dispose of the occupancy of the lands, subject of course to the payment of land revenue. This is a very important pronouncement, but it has no immediate bearing on the present question: and the case is not, as was argued, a direct authority on it.

I have above to the best of my ability summarised and considered the evidence cited as bearing directly on the right now in dispute. There is other evidence with which it is unnecessary to deal, *e. g.*, various ancient sale deeds in which *mirasidars* have professed to transfer proprietary right in *nattam* and other *poramboke* lands. These, at most, amount to assertions of the right and I am very far from suggesting that the right now claimed is a modern invention. On the contrary I have no doubt it is an ancient claim which the *mirasidars* have asserted, sometimes successfully at the expense of the labouring classes in their villages—sometimes through the medium of the Courts, more frequently by force, and the exercise of the influence and dread attaching to their status. But the real question is whether this right has ever been recognised by Government, or declared by the Courts in such a way as to bind Government or to establish it for the purpose of the present reference: and this I do not consider to be proved by the direct evidence dealt with above.

It only remains to determine how far this direct evidence is strengthened, or plaintiffs' case rendered more probable, by the analogy of other rights inherent in the *mirasidar*.

The nature of the latter is set out in para, *supra*. Obviously nothing can be deduced from rights (*a*) and (*b*). No attempt has been made to show that the *mirasidars* possess rights over other *poramboke* lands bearing any analogy to the one in dispute. As regards (*e*) it is sufficient to quote Mr. Ellis (*vide* page 184, M. P.): "In the *anadhi carambu*, or immemorial waste, though they possess the exclusive right of cutting firewood, working quarries, etc., they have *no right of cultivation*, much less can they claim any to break up common used for pasturage, or to cut down productive trees, as palmyra, cocoanut trees, etc."

I do not think any argument could be based on this: and there is no evidence, so far as I am aware, to indicate that any such exclusive right has ever been claimed in modern times. There is no trace of anything analogous to it mentioned in Mr. G. A. D. Stuart's very careful and able report (dated 1908) except a claim set up in a few villages to an exclusive right to dig silt and cut grass in tank beds—which he says is not put forward very seriously.

There remains (*c*) and (*d*) which may be conveniently dealt with together.

(*c*) A preferential right to cultivation of all lands which have been brought under, but have gone out of, cultivation (*seykal karambu*).

(*d*) The right to certain fees (*tunduvaram*) on lands granted for cultivation to non-*mirasi* cultivators.

Now if it were shown that the *mirasidars* possessed not a mere preferential right to cultivate arable waste, but a right to evict any other person who had taken up such land under engagement with Government, and to appropriate that land for themselves, then it might be argued with some plausibility that they possessed a similar right in the *nattam*. I say "some plausibility" because even then, there would be a very vital difference between the two cases, or, to put it in

another way, to render the analogy useful to appellants it would have to be shown that their rights as regards arable waste granted to other persons by Government extended far beyond their largest claims. It has been claimed that where Government has granted waste land on *cowle* to a non-*mirasidar*, the *mirasidars* up to three generations might come forward, take the land from him and cultivate it themselves: but by so doing, it has always been assumed that they would cultivate it themselves and pay assessment to Government. It has never been suggested that they were entitled to cultivate it free of assessment, or to keep the land waste and pay no assessment. Here the claim of the *mirasidar* to evict the non-*mirasidar* is coupled with no such liability. No assessment is charged on *nattam* (except in case of encroachments) and the *mirasidar's* claim is to evict the non-*mirasidar* and keep the site unoccupied and useless, until the non-*mirasidar* is prepared to acquiesce in the *mirasidar's* terms. This to my mind cuts at the root of any analogy that can be sought to be drawn for the purpose of the present reference.

But, as a fact, I can find no authority in support of any right of recovery by *mirasidars* of arable waste granted by Government to another person. The Vyasarpadi case to which I have referred goes only to this length, that where the *mirasidars* have put a non-*mirasidar* in occupation of cultivable waste, Government cannot evict the latter, though they may (presumably) collect assessment from him. The very same learned Judge has ruled in *Subbaraya Mudali* v. *Sub-Collector of Chingleput* (12) that where the Revenue Authorities had granted cultivable land to a non-*mirasidar* disregarding the preference to which the *mirasidars* (in spite of a previous relinquishment) were entitled, it was nevertheless not open to the *mirasidars* to oust the person admitted by Government. Mr. Srinivasa Aiyanger seeks to dispose of this ruling on the ground that its correctness has been doubted by Shephard, J., in *Secretary of State* v. *Ashtamurthi* (3). That learned Judge was dealing with the conflicting rights of a *jenmi* and a tenant in possession and all he says is: "Notwithstanding the opinion expressed by Turner, C. J., in *Subbaraya Mudali* v. *Sub-Collector of Chingleput* (12), I think it must be allowed that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person."

I am not clear what there is in Turner, C. J.'s judgment, which was relied on by defendants before Shephard, J., but I can find no reason for doubting the correctness of the Chief Justice's ruling in the present connection.

There is a Full Bench case, *Sakkaji Rau* v. *Latchmana Gaundan* (4), to which also Turner, C. J., was a party. The actual question before the Full Bench related to the *mirasidars'* right to *tunduvaram* but it must be noted that the first prayer of the *mirasidar* plaintiff had been for recovery of land granted to the defendant by the Revenue Authorities: and his relief was refused in the first Court, and the refusal was never appealed against.

This brings us to the subject of *tunduvaram* or *swatantrams*. The right of the *mirasidar* to collect something from non-*mirasidars* holding lands directly under Government has undoubtedly been recognised by Government and is so recognized even in the present settlement. The matter is very clearly discussed in sections 4, 11 and 18 of Mr. Stuart's report. It appears that in the course of Mr. Puckle's Settlement in 1875 the value of these fees was found to amount to two annas in the rupee of the Government assessment, and the amount of *swatantrams* at this rate was duly entered in the village registers. So far as Government is concerned this matter is concluded: though according to Mr. Stuart (*vide* section 11 of his report) the fees are very rarely paid in practice at the present day, and the Courts have held as long ago as 1875 that the right to collect them is not to be taken as a necessary incident of *mirasi* right, but has to be established by reference to the custom of each village [*vide Sakkaji Rau* v. *Latchmana Gaundan* (4)]. The fees, in fact, seem to be a sort of compensation for the waiving of the *mirasidars'* preferential right of cultivation and nothing more. Its recognition by Government has no bearing on the

(12) 6 M. 303; 2 Ind. Dec. (N. S.) 491.

present claim relating to *nattam poramboke* which is exempt from assessment. Even if the analogy were held to be complete, so that the *mirasidars* could claim from the grantee of a house site from Government a small proportion of the assessment which would be leviable if the land were *ayan*, this would not support the right of eviction now under consideration.

There is one reported case, which has been cited by appellants, but to which I have not hitherto referred as it stands on a footing by itself. This is *Natesa Gramani* v. *Venkatarama Reddi* (5). The suit was brought by *zemindar* to enforce acceptance of *patta* by his tenants, who were also *mirasidars* of that particular village. One question for disposal was his claim to charge for water taken from a pond in *poramboke* land, as if it was water belonging to Government. The learned Judges accepted the concurrent findings of both the lower Courts, that in that particular village *poramboke* and assessed lands are generally the property of the *mirasidars*, and accordingly held the water not to be Government water. The decision was confined to the particular case: and in any event is not binding on Government.

I would answer the reference in the negative.

I need hardly repeat what I have endeavoured to explain at the outset of my judgment. I have considered the matter in its general aspect whether the right claimed is incidental to the status of *mirasidar*. We are, of course, not concerned with cases in which a *mirasidar* has, prior to the grant by Government, already acquired a title to the particular site either by previous grant or prescription, and sues on such title Nor am I to be understood as saying that the *mirasidars* of a particular village are precluded from showing (if they can)that in that village they have acquired by prescription a title in the *nattam* generally as against Government, which would include the right claimed. But the mere fact that they are the *mirasidars* of the village neither carries with it such a right, nor does it even raise a presumption of the existence of such a right.

KUMARASWAMI SASTRI, J.—The question referred to us for decision is, "whether in a *mirasi* village the *mirasidar* is entitled to recover possession of a house site held under a *patta* from Government".

The Chingleput District, in which the *mirasi* village in question is situate, is part of what was known as Tondaimandalam where village communities seem to have flourished with some vigour till recent times. A reference to the Mirasi Papers and the Chingleput District Manual shows that, under the Hindu Kings, *nattams* (villages) formed a close village or township, the whole property of which was corporate except probably the actual house site and its backyard in the possession of each villager. On the first formation of a village the rights of occupancy of the whole land comprised in its boundaries seems to have been divided into a number of equal shares or ploughs and allotted to the different members of the settling community. The affairs of the village were not managed by an official appointed by the Sovereign but by the sharers in common. The village or township and not the individual *ryot* was the Hindu revenue unit. The village boundaries seem to have been fixed and unalterable. At the earliest stage there seems to have been common cultivation and the net produce, after payment of taxes, was divided according to the shares of the numbers composing the village community. These villages were known as *pasankarai*. The lands seem to have been divided periodically but later on were divided once for all, the *mirasidar* enjoying the *mirasi* in his own cultivated lands without interference by his neighbours and a share in the waste and other lands not brought under cultivation in proportion to his share in the village. Such villages were known as *aridikarai*. Even in such villages, excepting as regards land appropriated to each *mirasidar*, the communistic principle seems to have prevailed. Though at first the sharer was not entitled to sell the land allotted to him without the consent of the other members of the community, the right of alienation was gradually established and the alienee acquired by the sale or mortgage a proportionate claim to all the incidents common to the village, as for instance, the right of taking up waste lands to be brought under cultivation, the right of quarries, fisheries, pasturage and taking timber from forest. When the sharers or *mirasidars* were unable

to cultivate their lands in person, they had recourse to tenants or *pyacarries* who were called Ulkudies if they resided in the village and Porakudies if they were non-residents. In the beginning, the tenants were all tenants-at-will. The Ulkudies, by reason of long possession, seem to have been recognised as having occupancy rights. The Pyacarries, whether Ulkudies or Porakudies, paid the *mirasidars* a certain proportion of the produce, or a certain fixed payment which was known as Swamibhogam or Tundivaram. The name given to the rights of the sharers was called Cawnyatchi when they were non-Brahmans and Swastium when they were Brahmans. During the Mahomedan period we find the term "*miras*" coming to be used indiscriminately for all such rights.

The lands of every village were divided into (1) lands which the *mirasidars* held free of any tax payable to Government, which comprised *poramboke* or lands incapable of cultivation and *tarisu* or waste and (2) those for which taxes had to be paid and which were called either *varapat* or *teeravapat* lands. As regards *tarisu* or waste lands they were either *anadi carumboo* or immemorial waste or *sheycal carumboo* or waste lands which had for some time been cultivated. As soon as either of the kind of waste was cultivated, it was classed as *varapat* or *teeravapat*. That part of the *poramboke* was called *gramanattam* which was the site of the village itself and was the place where the houses of the *mirasidars* were usually built. The *cheri* was the site set apart for the houses of Pariahs and other low caste people.

So far as the Sovereign was concerned, he was entitled to a share in the produce, which in theory was one sixth though in practice it seems to have been a great deal more. The whole village community was liable to pay the tax and, so long as this was done, it does not appear that the State interfered with the cultivation of the lands.

The origin of the rights claimed by *mirasidars* is lost in obscurity. I am unable to accept the theory that there was a grant by the Chola King Anandu Chakravarti to the Vellala colonists whom he is supposed to have introduced in Tondaimandalam. There is nothing but bare tradition to support it and, as pointed out by Sir Thomas Munro in his vigorous minute, dated the 31st December 1824 (page 432 of the Mirasi Papers), the whole story is extremely improbable. The origin of the rights of *mirasidars* has to be sought in custom or usage rather than in a royal grant. There can be little doubt that colonists or settlers who brought lands under cultivation and thus increased the revenues of the State, were looked upon with favour and encouraged: and, where cultivable lands were abundant, the settlers on any particular tract would have had a free hand in expanding their cultivation and would have considered cultivable lands in or near the village as within the exclusive sphere of their influence They would also have had abundant pasture lands for grazing their cattle, and forests for firewood and timber. So long as the State received its share of the produce raised, the settlers were, in all probability, given a free hand in the management of their internal affairs and encouraged in their enterprise by light assessments. A system, based originally on convenience and expediency, gradually acquired the sanction which use and custom invariably acquire in this country. The *mirasi* tenure is, in my opinion, more a customary tenure, whose incidents have to be gathered with reference to the rights actually proved to have been enjoyed by the *mirasidars*. So far as the rights of the Government are concerned, the question has not been free from difficulty. As regards the sites on which the houses of the villagers actually stood and the backyards attached thereto and as regards the lands which were actually brought under cultivation and treated as *varapat* or *teeravapat*, there can be little doubt that in course of time they came to be treated as the exclusive property of the villagers which they were at liberty to alienate as they pleased. So far as the waste lands are concerned, there can be little doubt that the villagers treated them as property which was capable of transfer in proportion to the extent of the cultivated land of the transferor but it is not shown that the Government acknowledged their absolute rights to the waste lands. I do not think that the records warrant us in coming to any definite conclusion on the question as to whether Hindu or Mahomedan Sovereigns who ruled over the Carnatic recognised the absolute rights of the *mirasidars* over waste or that compensation was paid for waste lands. No

doubt Sankariah in his reply set out at page 218 of the Mirasi Papers and Mr. Smalley (at page 401) state that *mirasi* rights were purchased or compensated for when grants were made. There is also a reference to the practice in the report of the Inam Commissioner which is set out in Government Order No. 2343 Revenue, dated 23d December 1861. It does not appear that the lands were in those cases waste. It would, in my opinion, be unsafe to draw any general conclusion on the rather meagre materials before us. It, however, appears that, so far at least as the Chingleput District is concerned, *mirasi* rights were not interfered with to any serious extent during the Hindu and Mahomedan periods and that the *mirasi* system prevailed comparatively unimpaired when the District came under British rule. The following passage from the minutes of the Board of Revenue, dated 5th January 1818 (page 368 of the Mirasi Papers) is instructive. After setting out the *mirasi* tenure with its incidents as they existed when *mirasi* rights were in full force, they observe as follows:—"It is by no means, however, to be understood that this is the state generally of *mirasi* property in the present time. The severe and arbitrary policy of the Mussulman princes, which, notwithstanding their short and unstable authority on the other coast of the peninsula, so materially affected the interests of the landlords both in Canara and Malabar, proved much more detrimental to the *mirasidars* of the Tamil country, where their authority was of considerable duration, and their dominion was firmly established under the commanding influence of European power. It is well known that, by successive augmentations, the demand on the *mirasidars* of the Carnatic was gradually raised, so as at last very generally to absorb not only the whole of the landlord's rent, but in many places a portion of the farmer's profit also. Most of the *mirasidars* in that part of the country were thus reduced to a situation which, except in name, differed little from that of the Ooloody Pya-carries or permanent farmers; and the Mussulman Government, by absorbing the whole landlord's rent, became not only the Sovereigns but the landlords of the country, enforcing in practice their favourite maxim that the State is the exclusive proprietor of the soil * * * * * * *. In the Chingleput District also, which was ceded to the Company as a *jaghire* before the full extent of the arbitrary power and severity of the Muhammadan Government had begun to be felt, as well as in Dindigul, Madura, Trichinopoly and Tinnevelly, the latest of their southern conquests, Meerassy, though greatly reduced in value, was found in a tolerably perfect state." I am unable to accept the contention of Mr. Srinivasa Aiyangar that, when the Chingleput District came into the possession of the East India Company, the *mirasidars* were recognised by the State to be the *sole* and absolute owners of the lands included in the boundaries of the village and that the only right the Government then had was to receive revenue. There can be little doubt that, by long usage and custom, *mirasidars* had certain exclusive rights and privileges over waste lands, but it does not follow that the rights of the Sovereign or lord paramount of the soil were ever relinquished in favour of the *mirasidars*. Even Sankariah, who supports the claims of *mirasidars* to waste lands, admits the rights of the State to issue *cowles* for the cultivation of waste lands if the *mirasidars* did not cultivate. In dealing with *mirasi* rights to waste lands he observes as follows:—"While, however, there is, as has been explained, a right of property to the inhabitants as respects their *mirasu*, yet, as this right is founded chiefly on possession, *a paramount right* to the territory, over which his dominion extends, appears to vest in the Prince; if, therefore, the *mirasidar* fail to cultivate, and loss thence accrues to the State, the *Sircar* enjoys and exercises the right to cause the lands to be cultivated and to issue *cowles* for that purpose." The right of the State to select a person to enjoy the *miras* and *to confirm him* in possession by *cowle*, if the *mirasidar* fails to cultivate or acts in any manner detrimental to the State, is also recognised by Sankariah and an instance is given where the Tanjore Rajah transferred villages by *sasanam* to non-*mirasidars*. In *Bhaskarappa* v. *Collector of North Kanara* (11) Mr. Justice West, in dealing with the opinions expressed by Mr. Ellis and the above passage in Sankariah's reply, observes as follows:—"There are many other statements to the like effect, and Sir Thomas Munro was undoubtedly right when he asserted that the Government had always

asserted a right of disposal over the waste lands of a village." Though probably Mr. Justice West was not quite accurate in his remarks as to the effect of the replies of Mr. Ellis and Sankariah supporting the absolute proposition laid down by Sir Thomas Munro, there is very little to support the contention that waste lands, during the Hindu and Mahomedan periods, were treated as the absolute property of the *mirasidars* to which the State had no claim except for a share of the produce when the *mirasidars* chose to cultivate. They seem to have been the subject of reciprocal rights and obligations.

Whatever may have been the rights claimed by or granted to the *mirasidars* during the Hindu and Mahomedan periods, the real question is as to the rights which were in existence when the East India Company acquired the territories of the Nawab and the extent to which those rights were acknowledged by the British Government. The antecession rights would only be effective in so far as the British Government consented to their continuance after having become the Sovereign rulers of the Carnatic. As observed by their Lordships of the Privy Council in *Secretary of State* v. *Bai Rajbai* (10), the relation in which the landholders stood to their Native Sovereigns before the cession of territory and the legal rights they enjoyed under them are only relevant in considering what rights the new Sovereign recognised, either by agreement, express or implied, or by legislation. In the words of their Lordships, "the implied agreement may be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of the old rights and the express or implied election to respect them and to be bound by them."

The question under reference has, therefore, to be decided with reference to the reports of the various officers as to the nature and extent of the *mirasi* tenure, the orders of the Government on such reports, and the decisions of British Courts with reference to the rights of the *mirasidars*.

When the East India Company acquired the territories now comprised in the Madras and Chingleput Districts and proceeded to settle questions relating to the assessment and collection of revenue, three divergent views seem to have been entertained. One was that the Government were the absolute Lords of the soil and that the persons in possession, though for generations, were only in the position of tenants-at-will. Another was that the *mirasidar* had hereditary property in the soil which was good as against the State, and the third was that the *mirasi* right was only a preference of cultivation derived from hereditary residence.

When the East India Company assumed direct control and management of the *jagir* Mr. Place was put in charge in 1794 and continued in office till 1798. He started with the view that the Government were the sole and absolute proprietors of the soil and that the *mirasidar* was only entitled to "a preference of cultivation derived from hereditary residence, but subject to the rights of the Government as superior lords of the soil to do what it chose for the cultivation of the land." Acting on this theory, he seems to have dispossessed several *mirasidars* in Tondiarpet, a suburb of Madras, and his action led to a suit in the Supreme Court (to which I shall refer later on) which, though dismissed on a technical ground, was the first judicial recognition of *mirasi* rights by the Supreme Court. Further enquiries induced Mr. Place to change his views and to hold that the *mirasidars* had undoubted hereditary property in the soil. In the disputes between Mr. Place and the *mirasidars* the Board of Revenue and the Government seem to have taken different views (See pages 25 to 38 of the Mirasi Papers). Mr. Place was asked to submit a final report and he did so on the 6th June 1799 (page 38 of the Mirasi Papers) where he reported in favour of the rights of the *mirasidars* to the property in the soil. Mr. Place defined *mirasi* as "a right to the use and substance of the soil vested in the present proprietor, his heirs, and successors, so long as he does or can cultivate it and pays his dues of Government and is obedient to its authority and that, when he does not or cannot cultivate his lands, when he withholds the dues of Government or is disobedient to its authority, such part as he *neglects* or in the latter case the whole, escheats to Government who may confer it on whom it pleases." In 1806 a claim for compensation

was made by certain *mirasidars* of Tondiarpet in respect of lands taken up for digging what was known as Clive's Canal. The Board of Revenue in their minute dated 1806 offered three *pagodas* a *cawni* as compensation and directed the Collector to inform the claimants of the right of Government to make any appropriation of *Sircar* lands, especially if waste, on commuting the occupancy right as may be possessed. Disputes arose as to the persons entitled to receive the amounts, and, on a claim being made by Messrs. Arbuthnot and Co., the Board, on the 24th December 1810, addressed the Government on the matter. The view taken by the Board was that the lands were of little value and would not have been taken up by *mirasidars* if they were assessed and offered to them. They proceeded as follows:—"The refusal, according to the general usage, would have left to Government the option of disposing it in any other manner: for the principle of the absolute property in the soil being vested in the *mirasidars*, however suitable to primitive ages and institutions, does not certainly accord with the usage of modern times in those parts of India, more especially as relates to land, which neither is, nor, within the memory of man, has been in a state of cultivation." Mr. Ellis was asked whether the *mirasidars* were entitled to any compensation and, if so, to how much. He treated the first question as settled by the decision of the Supreme Court in 1808.

The introduction of the *ryotwari* system was authorised by the Court of Directors in their despatch dated 16th December 1812, and this necessitated enquiries into the various land tenures. On the 2nd August 1814 the Government requested the Board of Revenue to get the opinions of the Collectors on 28 questions framed by the Government as to *mirasi* rights. The most important questions were questions Nos. 1 to 4 which run as follows:—(1) How has the *mirasi* right hitherto been recognised and respected, where *mirasidars* were not the renters? (2) Does *mirasi* right extend to waste lands? (3) Is *mirasi* right forfeited for ever, when cultivation is for a single season discontinued? and (4) Where *mirasi* right exists, has it always been respected by the officers of Government in framing the *jummabundy*?

The replies of Mr. Ellis, who was Collector of Madras, were that the *mirasi* right, which he defined as "a general term used to designate a variety of rights, differing in nature and degree, but all more or less connected with the proprietary possession or usufruct of the soil, or of its produce", always existed within the boundaries of the Supreme Court's jurisdiction, that it extended to waste lands, that it was not forfeited by non-cultivation or abandonment, unless the period extended to over three generations, and that it was always respected in the villages of Madras. In answer to the question as to whether the *mirasi* right extended to waste lands, his reply was as follows:—"*Mirasi* right, wherever it exists, extends certainly to waste land, but then the right is limited by the nature of the waste: the extent, entered in the *terapadi* accounts under the head of *sheycal carambu*, or cultivable waste, they hold as they do the general *varapet*, or the taxable lands of the village, and may cultivate it whenever their means permit, or rent it to *parakudis*; but in the *anadi carambu*, or immemorial waste, though they possess the exclusive right of cutting firewood, working quarries, etc., they have *no rights of cultivation*, much less can they claim any to break up common used for pasturage, or to cut down productive trees, as palmyra, cocoanut trees, etc. In the *terapadi* accounts the lands are distributed according to their several descriptions, either waste or cultivated, and the *mirasidars* must enjoy them as thus entered; on the *nattam* they must build their houses and nowhere else, they cannot cultivate or appropriate it to any other purpose; in the *poramboke* they have no right to fill up tanks, stop water courses, or obstruct roads; and so in other descriptions of land. *Mirasi* right is confined to the use of these as they exist. No alteration can be made with respect to them by the *mirasidars*; I mean that they have no inherent right to do so, but with the consent of the *Sircar*, any beneficial change in the appropriation of lands may take place, and a corresponding alteration must be made in the *terapadi* accounts—thus, if part of the *anadi carambu* lands be reclaimed, or a road in *poramboke* be stopped up and cultivated, the extent must be transferred from this head to that of *varapet*."

As regards the forfeiture of rights, he was

of opinion that the *mirasidar* was, by implied contract, bound to cultivate his full proportion of the *varapet* lands, according to the share he held in the village and that the Government could arrange for cultivation. If he failed to do so, he was of opinion that the State could employ *payacarries* for a fixed term, not an indefinite number of years, and in extreme cases could resume his *mirasi swatantrams* in respect of the lands he refused to cultivate.

I have already set out the reply of Sankariah on the question relating to waste. His view is that, as the waste lands are included in the Grama Taran, all such lands have been considered to appertain exclusively to *mirasidars*.

Mr. Peter, the Collector of Madura, was of opinion that the *mirasi* right extends to waste lands and that, if they are brought under cultivation even by a renter, the *mirasidar* is entitled to his share. Mr. J. Cotton, the Collector of Tinnevelly, was of opinion that the *mirasi* right, wherever it exists, extends to waste lands. Some Collectors did not, however, go so far.

In 1816 the Board of Revenue had under consideration a scheme for permanently assessing each field in each village with money rent for the purpose of introducing the *ryotwari* system and wanted information as to the rights of *mirasidars*. Mr. Ellis considered the question as to what arrangement was to be made in respect of waste lands and he proposed to transfer the waste lands to the *mirasidars* (page 358 of the Mirasi Papers). The Board of Revenue in proceedings, dated the 24th July 1817, passed no final orders on Mr. Ellis' proposals but reserved the subject for future consideration. On 8th September 1817 the Board of Revenue sent to the Government a proposal for the introduction of the *ryotwari* system and observed that the Board intended to preserve the rights of the *mirasidars* by directing Collectors not to enter into agreements with persons, who are not, by hereditary or prescriptive rights, entitled to pay their dues directly to the *Sircar*. The Government, on the 16th December 1817, in reply to the Board of Revenue, stated that the *ryotwari* Settlement should not be attended with any infraction of the rights of *mirasidars*, or others in the soil (page 365 of the Mirasi Papers). In 1818 the Board of Revenue recorded a minute on the different modes of Revenue Settlement existing in the Madras Presidency. In dealing with the Tamil country they observe that "In every Tamil village the exclusive right to the hereditary possession and usufruct of the several descriptions of land situated within its boundaries was originally vested in the Vellalars, one of the principal *Soodra* castes of that nation, by whom it is termed *cawnyatchi*, or free hereditary property in the land". As regards waste lands, they observe as follows:—"The Tarisee, or waste land, is subdivided into the *Anadi Carumboo*, or immemorial waste, and the *Sheycal Carumboo*, or waste land that has at some time been cultivated; each of these consists chiefly of tracts of common, on which the *mirasidars* graze the cattle employed by them in agriculture, or of jungle, in which they cut the firewood used by them for fuel, and both are held free from tax. Should the *mirasidars*, however, possess the means, they are vested with ample right to extend their cultivation to these lands, though it is understood that the consent of Government is necessary before they can break up the *anadi carumboo*, or land that has never been under the plough; but the moment any part of either the *sheycal* or *anadi carumboo* is reclaimed, the nature of the land is changed, it ceases to be *tarisee* or waste, and no sooner is it converted into cultivated land than it is transferred, as such, in the village accounts to the head of *warapat* or *teerwapat* and in common with all land of that description becomes, for the plain reasons already given, liable to tax."

On the 4th November 1820, Mr. Smalley, Collector of Chingleput, addressed the Board of Revenue on the introduction of the proposed *ryotwari* Settlement into his District. His proposal was that a fixed *toondooteerva* of $3\frac{1}{2}$ per cent. on the gross rent should be allowed to the *mirasidars* as it was about the average *toondoowaram* which the *mirasidars* in that District were then receiving from the *payacarries*. As regards waste land, he fully admitted the *mirasidar's* right to it, if the *mirasidar* was able to bring it under cultivation: but in cases where he refused or was unable to

cultivate, he proposed that the Government should let it to strangers reserving the right of the *mirasidar* to come in at any period within 105 years on paying the assessment to the person whom he wants to dispossess. The period of 105 years seem to have been the period of limitation in vogue according to Hindu notions, which fixed three generations as the period after which rights elapsed.

On the 4th December 1820 the Board of Revenue passed proceedings on a reference by Mr. Hyde, Collector of South Arcot, as to the Settlement of that District. They observed that, though much had been said about *mirasi* rights in the Southern Provinces, it was doubtful when and how those rights originated, what they exactly were, and whether any Native Government ever admitted them to the extent claimed. As regards waste land they observe as follows:—"The *mirasidar* has also an interest in the waste land, and a right to a *merah* or fee, when, being unable to cultivate himself, he gets a tenant who shall cultivate it, and pay the usual rent to Government. This is fair; he has his fee for the service he performs; but if the *mirasidar* neglects or refuses to get a tenant for the waste, and the *Sircar* is obliged to find one himself, to keep up or increase the revenue of the village, the *mirasidar* has no right to the fee; it may either be added to the rent payable by the tenant, or may be given up to him as an encouragement to him to extend the cultivation. The *mirasidars* may have claimed more than is here allowed them, and more may have been occasionally granted to them. The Government has been, and ought always to be, indulgent towards its *ryots*; but when we come to discuss the principle, it will be found that any further legal extension of the privilege of *mirasidars*, particularly in the case of their neglecting to keep up the cultivation and revenue of the village, is contrary to common sense, and those common principles upon which every Government and society is founded." In dealing with the letter of Mr. Smalley, already referred to, the Board stated that they concurred generally in the opinions expressed by Mr. Smalley as regards waste and furnished him with an extract of their proceedings, dated 4th December 1820 above referred to, on Mr. Hyde's report.

It appears from the Mirasi Papers (page 419) that the Government approved of these proceedings on the 23rd February 1821.

On the 18th August 1824 the Court of Directors addressed a despatch regarding the Board's Proceedings, dated 4th December 1820, where they observe as follows:—"The right of the *mirasidars* to the lands which they themselves cultivate is in general indisputable, as is very often, also, their right to certain advantages accruing to them, apparently, as descendants of the headmen of the villages. Their right, in any case, to limit the property of the Ooloody *ryots* in their permanent hereditary possessions, seems much more doubtful, and being hostile to the prosperity of the community, ought not to be allowed except upon unquestionable evidence in each case."

On the 2nd January 1822 the Court of Directors were of opinion that the question of *mirasidars'* rights ought not to be decided solely on the view which Mr. Ellis happened to entertain but should be decided after deliberate inquiry and full information.

On the 14th April 1823 the Board of Revenue passed proceedings on Mr. Smalley's report regarding the introduction of *ryotwari* Settlement in Chingleput. They authorised the Collector to give lands to others when the *mirasidars* refused to cultivate, and stated that the persons to whom the lands were given were not liable to be ousted but be confirmed in the possession of the land so long as they continued regularly to pay the rent.

In 1823 the Board of Revenue passed proceedings after they received the minute of the Court of Directors dated 2nd January 1822. As regards waste land they observe: "It has been stated in the replies from Madras, Tinnevelly and Madura that the right of the *mirasidars* extends to 'waste lands', but what this right is, has not been particularly defined. The Collector of Madras observes that though the *mirasidars* 'possess the exclusive right of cutting firewood, working quarries, etc., they have no right of cultivation, much less can they claim any to break up

common used for pasturage or to cut down productive trees, as palmyra, cocoanut, etc.' It is also stated that 'the consent of the *Sircar*' is necessary towards any beneficial change being made with the appropriation of the lands. It appears from the above that the *Sircar* has a right in these lands as well as the *mirasidars*, and the Board have now in view to ascertain whether the Government can, according to the ancient usage of the country, appropriate waste land for public purposes without making any compensation to the *mirasidars* further perhaps than the usual one which may be thought just and proper to make up for any loss they may sustain from being deprived of the use of common for their cattle, firewood, etc." The Board proposed to address the different Collectors as to whether the former Governments had the right to take up waste lands without paying compensation to *mirasidars* and whether in granting *inams* compensation was paid to *mirasidars*. The Government, however, passed no orders on these proceedings and no question was circulated.

On the 31st December 1824, Sir Thomas Munro wrote his famous minute on the state of the country and condition of the people. His view was that the *mirasidar*, when he failed to cultivate, lost all interest in the property and that the Government may give it to whomsoever it pleases. As regards waste land, he observes: "Mr. Ellis does not seem to be very decided as to the nature of the property enjoyed by the *mirasidar* in waste. He admits that he cannot break it up without the permission of the *Sircar*. He does not say that he has any specific share of it, or that he can sell it alone without the cultivated land, or that he can do more than sell with his arable his right of common in the waste. The *Sircar* from ancient times has everywhere, even in Arcot as well as in other provinces, granted waste in *inam* free of every rent or claim, public or private, and appears in all such grants to have considered *the waste as being exclusively its own property*. * * *

* * It has been supposed that in *meeras* villages in Arcot, in the original compact between the *Sircar* and the first settlers, the exclusive use of the waste was secured to those settlers: but it has already been shown that in all villages, whether *meeras* or not, the inhabitants reserve to themselves the exclusive use of the waste. But this right is good only against strangers, not against the *Sircar*, which possesses, I think, by the usage of the country, *the absolute right of disposing of the waste as it ple ses*, in villages which are *meeras* as well as in those which are not."

These views represent, what I may call, the extreme views as to the Crown's prerogative and they do not seem to have been subsequently accepted in their entirety either by the Madras Government or by the Court of Directors.

In 1839 the Collector of Chingleput addressed the Board of Revenue with reference to the rights of the *mirasidars* in the whole of the lands within the village boundaries, and as to whether the *mirasidars* had authority to sell the *poramboke* and immemorial waste lands. His view was that the rights of the *mirasidars* over the *poramboke* and *anadi* waste extended only to the privilege of grazing their cattle on them when waste and receiving the *coopatums* when cultivated.

On the 15th August 1839 the Board of Revenue passed proceedings to the effect that the *mirasidars* had no right or authority to sell *poramboke* and immemorial waste land. They observed that the usual mode of proceeding for parties wishing to obtain occupation of particular lands was to apply to the Officers of Government to be placed in possession on their executing an agreement to pay the usual assessment, and proceeded to state that "the rights of the *mirasidars* over immemorial waste are confined to the pasturing of their cattle, the cutting of firewood, etc., and similar common privileges, but these must always give way to any proposition ensuring the extension and realization of the public revenue."

In 1839 the Collector of Chingleput addressed the Board of Revenue on the claims made by the *mirasidars* when lands were offered on *durkhast* and on certain irregularities which, in his opinion, were causing loss of revenue to the Government. In his opinion, the proprietary right of the *mirasidars* did not extend to immemorial waste lands and that they had no prescrip-

tive right to oust *payakarry* cultivators from lands which were given to them by the Government owing to the *mirasidars* not having cultivated them. He, however, admitted the *mirasidars'* right to *toondoo-varam*, *swatantrams*, etc., in the *sheikal* lands and suggested that *payakarry ryots*, introduced by the Government, should be secured in their right of occupancy on paying to Government the Government dues and the *mirasidar's* fees.

The Board of Revenue in their proceedings, dated the 29th August 1839, referred to their proceedings of the 15th August 1839 (above referred to by me) and observed as follows:—"As regards the right of the *mirasidars* to the occupancy of waste, the Board of Revenue, though they have already recorded their opinion against the asserted right of the *mirasidars* to the absolute disposal of waste lands from which they have derived no benefit for a long series of years, are still inclined to believe that it would be proper, and at the same time consonant to usage, to give them the preference of possession when offers are made to bring the waste under cultivation. It should be the care of the Collector to ascertain that the parties offering for the lands possess the means to cultivate what they propose, and in these cases if the *mirasidars* decline to undertake the payment of the demand, the lands should be given to the parties offering."

On the 28th July 1841 the Board of Directors addressed a despatch dealing with the rights of the *mirasidars* to waste lands. At that time a suit was pending in the *Zillah* Court of Chingleput where certain *mirasidars* had sued the Collector and others for possession of lands granted by the Collector to non-*mirasidars* without their consent The Court of Directors in their despatch make the following observations:—"Without entering upon a discussion of the respective rights of Government, and the *mirasidars*, over the waste lands, (a point still under the consideration of the Superior Tribunal to which the case has been appealed) it will be enough for us to state our opinion that it is desirable that, in all cases where *payakarries* propose to cultivate the waste lands of a *mirasi* village, their proposal should be, in the first instance, communicated to the *mirasidars*, to whom, in the event of their being willing to cultivate, or to give security for the revenue assessable on the lands, the preference should be given. We consider that the Government has a clear right to the revenue to be derived from the conversion of waste lands into arable, but we at the same time think it preferable that this object should be attained, whenever practicable, without causing the intrusion of strangers into the village community" (pages 455 and 456 of the Mirasi Papers).

The suit in the Chingleput *Zillah* Court (to which I shall refer later on) was disposed of by the Provincial Court on the 17th November 1841 in favour of the *mirasidars*.

On the 3rd July 1844 the Court of Directors addressed a despatch in continuation of their despatch dated the 28th July 1841. They directed that "when proposals were made by *paracoody ryots* for waste lands in *mirasi* villages, they should, in the first instance, be communicated to the *mirasidars*, to whom, in the event of their being willing to cultivate, or to give security for the revenue assessable on the lands, the preference should be given;" and they directed that on all occasions care should be taken that the just rights of the *mirasidars* were respected.

On the 11th February 1856, the Government was of opinion that the *mirasidars* had no right to convert immemorial waste to any other condition or to any other use, without the permission of the Government.

On the 8th March 1856, the Government in proceedings observed: "The village communities are certainly the parties entitled to occupy the land thus newly made available for cultivation, and they are quite competent to divide it among themselves according to local customs and known rights" (page 536 of the Mirasi Papers).

On the 14th May 1856 the Board of Revenue considered the whole question and reviewed the situation. They were inclined to the view that the *mirasidars* should have the option of cultivating waste lands of every village before strangers are admitted and that if they refused to cultivate the land

they would have no right to receive any fees or rent from the persons to whom the Government had allotted the lands.

The question of the *mirasidars'* rights arose again in 1856 in connection with a complaint made by one Rangappa Naik, who alleged that he was dispossessed. The Board were inclined to the view that the land claimed by Rangappa Naik being *poramboke* was not part of the *miras* and that the Government could give it to whomsoever it pleased. The Government dissented from that view and in their letter to the Court of Directors observed as follows:—

"After a careful consideration of the case we are unable to concur in the Board's opinion of its merits. In addition to Mr. Forbes' testimony to the custom in Tanjore which in our opinion was entitled to much consideration, we held that the best authorities were agreed that in *miras* villages the *miras* extended to waste as well as to arable land. This right, we remarked, was not exactly the same in regard to waste as it was in regard to arable, as was clearly explained by Mr. Ellis; but in both cases it equally excluded strangers. The Board objected on the ground that the land in question being '*poramboke*' could not be regarded as simple waste; but we remarked that land required and used for roads, the sites of houses, threshing floors and some other purposes, was taken out of the arable extent as not being available for culture and was classed with rocks, hills, etc., under the term *poramboke*, but that as soon as such land ceased to be required for such particular purpose, it ceased also *ipso facto* to be *poramboke* and became subject to the ordinary laws affecting waste. Holding these views we were of opinion that the memorialist had suffered a wrong in that his *miras* land had been given to another in spite of his opposition." (page 555 of the Mirasi Papers).

The Court of Directors in their despatch, dated the 17th December 1856, to the Government of Madras desired that in the disposal of waste lands the principles laid down in the despatch of 28th July 1841 and 3rd July 1844 (already referred to by me) should be followed.

Prior to 1855 the lands which the *mirasidars* actually cultivated were entered in their own *pattas* whereas the lands which they cultivated through *payakarries* found a place in the *samudayam pattas*. But subsequently the *mirasidars* were called upon to declare once for all how much of their *pangu* lands they wished to retain in their holding and were assessed upon those lands, whether they cultivated or not.

On the 22nd April 1869 special *darkhast* rules were issued for the Chingleput District. Rule 7 states that "the *mirasidars* shall have the prior claim over all comers: *payakaries* holding *pattahs* have the next best claim, and objections made by them will hold good against non-resident cultivators. Should the *mirasidars* oppose the application, and request that the land may be given to them in shares proportionate to their respective claims, their request shall be complied with."

Rule 13 enacts that "beds of tanks not hitherto usually cultivated, threshing floors, burning grounds, burial places, cattle-standing grounds, land situated within 10 yards of tank *bunds* and roads, shall not be given away on *darkhast*, and applications for *gramanattam* or village sites shall not be entertained."

In 1872, the Government passed proceedings regarding *gramanattam* lands. These proceedings were passed after a consideration of the proposals of the Board of Revenue and the replies of the Collectors of all the Districts. In paragraph No. 22 the Government observe that "the true view of the case is that *gramanattam* is the communal property of the villagers, and that the Collector can only interfere with the view to benefit the community, and when his action is consistent with the common law." They then proceed to state that a special enactment would be necessary to alter the state of things, that in purely *mirasi* villages, where the entire area belongs to the *mirasidars*, the *gramanattam* no doubt appertains to them equally with the other *poramboke* but that such cases are exceptional and that the Board will instruct Collectors to re-assert the prerogative of Government by making it known that except in *zemindari* and *mirasi* villages which are private property, sites on the *grama-*

*nattam* are not to be appropriated without permission.

Till 1890 the village accounts in several villages of the Chingleput District contained entries where the *mirasidar's* name was entered and also the name of the actual person who was in possession. This system was known as "double entry system" and sites were described as "the site of so and so resided in by so and so." Mr. Mullaly, who was then the Sub-Collector, raised objection to this procedure. The Board in dealing with the question recommended its discontinuance but were fully alive to the difficulty of opposing the *mirasidars'* claims. They observe: "Undoubtedly the *mirasidars* have a great deal of evidence to support their claim, and if it is to be disputed, the strength of Government must lie in the fact stated by Mr. Galton in the *Nemalicheri* case, that Government has never acquiesced in it. If the system of 'double entry' now brought to notice for the first time is not stopped, this strong argument will cease to exist. Moreover, the Board thinks that the *dictum* of Government referred to in paragraph No. 6 of the Board's Proceedings of the 7th July 1886, No. 1547 (in Government Order No. 1684, dated 16th December 1872, already quoted by me) must now be contradicted or explained.

The fact that it is not mentioned by Sir Charles Turner in his judgment in the *Vyasarpadi* case (Civil Suit No. 128 of 1882), or in any of the petitions which have been presented to the Board by *mirasidars*, shows that it is not known to outsiders at present, but it may become known to them at any time and it reads as if it were a distinct acquiescence in the claim."

On the 3rd September 1890 the Government passed orders directing that the practice of registering the name of a *mirasidar*, as well as that of the occupant, in the house site accounts should be discontinued.

In 1892 the question of the *mirasidars'* right again came up for consideration in connection with the granting of sites to the Pariahs and other low caste sections of the community. The Board of Revenue sent up their proposals to the Government. In paragraph No. 9 of their proceedings dealing with the *mirasi* system the Board observe as follows:— "Briefly, the system, as it at present exists, rests on the claims of the *mirasidars* to all the waste lands in their villages and to the levy of *swatantram* or fees from *payakaries* or non-*mirasidars* who may take up land for cultivation. This claim was fully recognised in the new settlement carried out in 1876-78 (*vide* Government Order, dated 15th February 1876, No. 221) and after full consultation with the *mirasidars*, a memorial fee (*swatantram*), fixed at an average rate of annas 2 on every rupee of Government assessment, was declared to be leviable by the *mirasidars* not only on every field lying waste in each village, but also on all lands now held by the *mirasidars* themselves and included in their *pattas*, should such lands be subsequently relinquished and taken up by a non-*mirasidar*. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or *patta* from Government. The absolute right of the *mirasidars* in the waste lands of their villages was finally settled by the Courts in 1883 when the Government was compelled by the High Court to pay compensation to the *mirasidars* of the Vyasarpadi village, near Perambur, for waste lands taken up for public purposes." After dealing with the judgment of Sir Charles Turner, the Board observe: "It is impossible at the present day to question the rights of the *mirasidars*. It is altogether unnecessary to consider whether the survival of these *mirasi* claims is due, as remarked by Mr. Tremenheere, to the conservative effects of the decisions of the Mayor's Court of Madras. * * * *

As forcibly remarked by the Board (Board's Proceedings, dated 1st April 1874, No. 754, paragraph 8, Board's Proceedings, dated 25th May 1875, No. 1415) 'the system is strongly rooted in law and immemorial custom. It is there and must be regarded in many respects neither more nor less than a great but necessary evil.' 'It is of great antiquity, 'is dearly cherished' and has existed with more or less vitality 'notwithstanding many years of persistent efforts to crush it.'" Regarding *darkhast* rules they observe as

follows:—"In 1869 special *darkhast* rules (or rules governing applications for land for cultivation) were prescribed for the Chingleput District in which this preferential claim was distinctly recognised (Board's Proceedings, dated 22nd April 1869, No. 2710). In 1887 a proposal was made to assimilate these special rules to those of other districts in which *mirasi* rights are not recognised, but Government declined to sanction the change (Government Order, dated 21st October 1887, No. 6279, recording Board's Proceedings, dated 21st September 1887, No. 588). The chief point of difference between these special rules and those prescribed for other districts, apart from the fact that any land in Chingleput obtained by a non-*mirasidar* must pay two annas in the rupee of assessment as a memorial fee to the *mirasidars*, is that in *mirasi* villages the *mirasidars* have preference over all comers while in non-*mirasi* villages the preference is confined to those who own lands adjoining those applied for and to *pattadars* who take precedence over those who do not hold lands."

In dealing with the rights of *mirasidars* the Government observe: "The preferential right of the *mirasidars* to the occupation of the waste was deliberately recognised by the Court of Directors in 1841, after considerable discussion in which the views of Sir Thomas Munro quoted by the memorialists were duly considered." Then they set out Sir Thomas Munro's minute and observe: "Sir Thomas Munro merely dissents from the proposition that the 'exclusive use of the waste' was secured to the first settlers and that this right was good as against Government;" but that Sir Thomas Munro did not deny the preferential right of the *mirasidars* to occupation of the waste. The Government observe that "the question of ownership of Pariah house sites is one of legal right, and if the *mirasidars* have it they can only be expropriated by compensation; they cannot be deprived of their rights, however oppressive the exercise of them may be, by mere executive order."

In 1909 the Special Settlement Officer (Mr. G. A. D. Stuart) made certain proposals as regards *mirasi* rights. As regards *mirasi* tenure he proposed a fixed fee of two annas in the rupee of assessment of both dry and wet should be collected and paid to the *mirasidars*.

The Board of Revenue in dealing with Mr. Stuart's proposals resolved to omit from the Patta Settlement Register all reference to *mirasi* privileges.

The Government passed orders on the 19th October 1909 and in dealing with the preference under the *darkhast* rules observe that "it would not be equitable to go behind the arrangement made in the Settlement of 1877-78 recognising the preferential right of the *mirasidars* to cultivate waste." As regards *swatantrams* the Government observe as follows:—"The Government agree with the Board that all reference to *swatantrams* and *miras* privileges should be omitted from the re-settlement register and that the following foot-note should be substituted for the existing foot note in the memoirs on *mirasi* tenure:—'The right of the *mirasidars* to levy a fee at the rate of two annas in the rupee of the assessment of both dry and wet lands has been recognised by Government, except in the case of the under-mentioned fields which are free of *swatantrams* so long as they are held under the terms of the original grants.'"

I have set out in detail the various proceedings which throw some light on the question of the rights of *mirasidars* and on the attitude which the Government took up from the date of its assumption of control over the Chingleput District. It seems to me that, although the absolute right of the *mirasidars* to waste lands has never been acknowledged by the Government, their preferential right to the land has never been questioned, but on the contrary, has been unequivocally admitted both by the Court of Directors and by the Government. Individual opinions of Government officials have varied as to the origin and extent of *mirasi* rights over waste and as to the rights of *mirasidars* as against the Government. The preferential rights of the *mirasidars* to waste lands of the village have been conceded but there is a great divergence of opinion as to whether the *mirasidars* can as against grantees from the Government claim anything more than *tunduvaram* or the customary *swatantrams*. The Mirasi Papers also show that the rights and privileges claimed by *mirasidars* over waste have not been recognised in some districts and I find it difficult to construct out of the divergent opinions of Government officials, the Board of Revenue, and the

Government Orders, any tenure with certain well defined incidents.

Turning to the judicial decisions on the rights of the *mirasidars*, we find that there is a tendency in the later decisions to require proof of the rights claimed rather than treat *mirasi* tenure as a well recognised tenure with well defined incidents.

The first case of importance arose in 1808 and is reported in Strange's Notes of Cases, Volume I. The suit was in ejectment and was heard by Sir Thomas Strange and Mr. Justice Sullivan. The plaintiffs alleging themselves to be *mirasidars* of the village of Tondiarpet stated that the defendants had trespassed and ejected them from the "*nattam*" in their possession. The learned Judges discussed the evidence as to the claims and privileges of the *mirasidars* and, while holding that plaintiffs were entitled to the *nattam* claimed, they dismissed the suit on the technical ground that the defendants were not found to be in possession of any portion of it. The Court, however, refused to adjudicate upon the rights as between the *mirasidars* and the Government, observing that it was unnecessary to decide how far the *mirasidars*' rights were subject to the intervention of the Government.

In 1836, the rights of the *mirasidars* as against the Government were distinctly raised in a suit filed by Ranga Ayyangar and others against the Collector of Chingleput and the persons who got possession under titles conferred by the Government. The plaintiffs alleged that they were the only *mirasidars* of Cannumtongul village in Chingleput District, that the Collector (1st defendant) granted permission to the defendants who were not the *mirasidars* of the village to bring under cultivation about 80 *cawnies* of waste land, that the plaintiffs offered to cultivate the whole of the waste land amounting to about 164 *cawnies* and in anticipation of sanction cleared about 60 *cawnies* for cultivation, and that the plaintiffs were dispossessed by the other defendants acting under the orders of the Collector. The defendants defended the suit on the ground that the land was waste and that the Collector could grant *cowle* to any person for bringing it under cultivation. The plaintiffs filed a reply alleging that neither the Government nor the Collector had any power to grant waste lands without the consent of the *mirasi* inhabitants, that waste land could not be given to strangers for cultivation without receiving a *razinamah* from the *mirasidars* and that they applied for the cultivation of the whole of the waste land when they heard that strangers had applied for it. A number of witnesses were examined and documents filed and the Chingleput Court (Udalut Court) passed a decree in favour of the plaintiffs. The Court held that the evidence showed that the plaintiffs were the *mirasidars* and that the defendants had no *mirasi* rights in the village. As regards the rights of *mirasidars* the Judge observes as follows:—"That the *mirasidars* alone have a right to sell and mortgage *warraput* land, and that to every *mirasi* share there is a certain portion of waste land attached, but that the particular parts of the waste land which belong to each individual *mirasi* share are not usually known because those waste lands are seldom, if ever, divided, are facts which have been established by the evidence of witnesses in numberless cases before this Court; and as no one ever attempted to dispute the inherent right of *mirasidars* to the waste land, it is evident that without the consent of the proprietors of the soil, the Collector has no authority to deliver any part of these lands to other persons. In this case it appears that the 7th defendant and others gave their proposals on the 2nd May 1835; this circumstance was not communicated to the plaintiffs, but they on the 4th May 1835 sent in proposals for 40 *cawnies*; but after this on hearing of the proposal made by the 7th defendant and others, they, on the 21st May 1835, gave in an agreement to the Tahsildar, plaintiffs' document No. 50, promising to take all the waste lands in the village at the full *teervah* and to give security for the performance of their contract. On the 15th June 1835 the Collector grants the *cowle* to the 7th defendant and others, in doing which the Judge is of opinion the Collector acted contrary to the acknowledged right of the plaintiffs." The *cowle* granted to the 7th defendant and others was annulled and a decree was passed in favour of the plaintiffs. An appeal was filed to the Provincial Court by the Collector but the decision of the lower Court was affirmed on 17th November 1841. The Appellate Cour considered that the only question for

determination was whether the Government had power to grant waste lands in *mirasi* villages to strangers without first obtaining the consent of the *mirasidars*, and decided that the Government had no such power. No appeal was filed by the Government against this decision and the Board of Directors referred to this case in their Despatch, dated the 3rd July 1844, already referred to by me (see pages 456 to 469 of the Mirasi Papers).

In 1848 the plaintiff, who was a *mirasidar*, sued to recover arrears of *swatantrams* due to him for certain lands cultivated by the defendants. The defendants denied the right of the *mirasidar* to levy such *swatantrams* claimed and alleged that the lands for which they were claimed had been left waste from time immemorial by *mirasidars* who declined to take them up and that the Government thereupon rented the lands to them. The suit was dismissed by the *Sudder Ameen* on the ground that the land in question was immemorial waste not forming part of the plaintiff's share, that the defendants held it not from the *mirasidars* but from the Government, that in the *cowle* granted to them there was no stipulation that they were to pay any *swatantrams* to *mirasidars*, and that it was not customary to pay *swatantrams* in such cases. An appeal was filed and the Civil Judge decided that *mirasidars* had no right to levy *swatantrams* from *paycarries* who did not hold from them but under *cowles* granted by Government for lands which were classed immemorial waste.

The previous decision of 1844 does not seem to have been brought to the notice of the Court and the remark of the Judge that the question has been frequently decided in the negative does not seem to be accurate. The Judge seems to have been of opinion that, where the *mirasidars* fail to cultivate the lands and the Government exercises its right of granting *cowles* to third persons, the *mirasidars* are not entitled to claim any perquisites from the grantee. (See pages 485 and 486 of the Mirasi Papers).

In 1844 a suit was filed in the Kumbakonam Munsif's Court by a *mirasidar* to recover a piece of *samudayam* land from the defendants on the ground that the land was within his *mirasi* and was let to the defendants and that they failed to pay the rent. The defendants pleaded that the ground was *casawurgum*, that they built a house and lived in it for several years paying taxes to the Government and that the plaintiff had nothing to do with the land. The District Munsif decided the suit in favour of the plaintiff, and on appeal the Sudder Udalut Court confirmed the judgment of the Munsif and observed as follows:—"It is clear that the land in dispute is within the *mirasi* of the plaintiff and, therefore, in disposing of the question at issue it will be necessary to consider the privileges of the *mirasidars*, the customs of the province, and the grounds on which the defendants claim to continue the occupation of the ground. The *mirasidars* are the acknowledged hereditary proprietors of the soil. Those in Tanjore and other Districts in which *mirasi* right is recognised allow their *paracudis* or undertenants and others to erect houses on their *mirasi* lands, but their doing so, neither destroys the *mirasidars'* right to the lands, nor does it transfer the right to the *paracudis*. So long as the *paracudis* cultivate the *mirasidars'* lands, they are entered in the accounts as *paracudis*, but on ceasing to do so, they are called *casawurgums*, which the appellants admit that they are. This change of denomination, however, does not in any way affect the relative position of the parties, and the assertion of the appellants that as *casawurgums* they are independent of the *mirasidar*, is not correct. On the contrary, the custom of the province is that, if a *paracudy* ceases to cultivate and becomes a *casawurgum*, the *mirasidar* requires him to pay rent for a portion of his backyard which he would not do if he remained a *paracudy*." (See pages 487 and 488 of the Mirasi Papers).

In 1850 the Sudder Court decided that *swamibhogam* should be paid to the *mirasidar* by a tenant let in by Government. (Sudder Court Decisions, Volume I, 1850, page 119).

In 1857 the Sudder Udalut Court held that *ulkudies* had a right to sublet the lands they occupied and that the *mirasidars* were

not entitled to eject the sub-lessees (see page 577 of the Mirasi Papers).

In 1860 the Sudder Udalut Court decided that where a *mirasidar* desired to eject a *casawurgam* tenant who had been in possession of the property for a long time and had erected substantial buildings, the *mirasidar* was bound to compensate him for the value of the buildings (see page 585 of the Mirasi Papers).

In 1861 the Sudder Court held that, where lands were abandoned and left waste by the original cultivators, they were at the disposal of the revenue authorities and that the former occupants had no title to eject the parties who may have been placed subsequently in possession in accordance with the rules of the District and established usage (see page 590 of the Mirasi Papers).

A similar view was taken in *Punniakoti Mudali* v. *Munisami* (13).

In *Muniappa Mudali* v. *Kasturi Ranga Chariar* (14) it was held that in *mirasi* villages the *mirasidars* possessed the proprietary right in *samudayam* lands.

In *Sakkaji Rau* v. *Latchmana Gaundan* (4) the right of the *mirasidars* to recover *swatantrams* was raised. The plaintiff, as the sole *mirasidar*, sued to recover possession of lands and arrears of *thoondutirwa* and *thoondwarakuppatham*. The lands were granted to the defendant by the Revenue Officer, but it was not clear whether the *mirasidar* had applied for the lands before the grant to the defendant. The first Court dismissed the suit in so far as it related to ejectment but passed a decree awarding the *thoondutirwa* claimed. The District Court was of opinion that the plaintiff, by omitting to take a revenue engagement for the lands, had relinquished his *mirasi* rights and reversed the decree of the lower Court. The High Court at first held that, though the omission of the *mirasidar* to cultivate might empower the revenue authorities to introduce a cultivator, it did not further prejudice the prescriptive rights of the *mirasidar* and that those rights would not be lost by the *mirasidar's* declining to receive a *patta* for the lands. A review of the judgment was allowed and the case was re argued.

(13) Sudder Court Decisions (1862) p. 2.
(14) Sudder Court Decisions (1862) p. 50.

A Full Bench of the High Court considered the reports of the Collectors set out in the Mirasi Papers and the orders of the Board of Revenue and the Government and was of opinion that from the variety of opinions expressed they could not lay down as a uniform rule that *mirasidars* were entitled to dues from cultivators holding lands within the area of the *mirasi* estate under *pattas* from Government. They were of opinion that, where the right was denied, there should be enquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision on similar estates in the neighbourhood. A finding was called for on the following issue: "Is the *mirasidar* entitled, by the custom of the estate or neighbourhood, to demand payment of any, and, if any, what dues from *ryots* cultivating, under *pattas* from the Government, lands for which the *mirasidar* has refused to engage?"

Though it is expressly stated in the judgment that there has been no law depriving the *mirasidars* of any privileges they may have customarily enjoyed, their Lordships after a survey of various Government orders and opinions of officials were not prepared to lay down any general rule as to the rights of *mirasidars* but left the matter to be decided on evidence in each locality. This decision marks an important departure from the attitude taken up by Courts previously and makes usage in each locality the criterion for coming to any conclusion as regards the rights of *mirasidars*.

In 1882 the rights of the *mirasidars* as against the Government came directly in question in respect of a piece of land within the *mirasi* village of Vyasarpadi. The plaintiff alleged that the *mirasidars* of Vyasarpadi sold a portion of waste land situated in their *mirasi* estate to him, that he was in possession of the same, and that about the 26th April 1881 the Officiating Superintendent of the Gun Powder Factory, acting on behalf of and under instructions from Government, wrongfully took possession of the land and ejected him. The plaintiff claimed to recover possession of the land and also compensation. The Secretary of State for India filed a written statement pleading that the land was the property of the East India Company and subsequently became the property of the defendant and was in possession of the

Government, that some persons erected a hut on the land and planted a hedge and in so doing committed trespass and that, after being warned to remove the said hut and hedge, they were removed by officers of Government. The suit came on for hearing before Sir Charles Turner sitting on the Original Side of the High Court and a decree was passed in favour of the plaintiff. The question for determination was whether by the Customary Law *mirasidars* had any title to the waste lands within the area of the *mirasi* estate. With reference to *mirasi* rights to waste, Sir Charles Turner observes as follows:—"One question constantly occurring was the rights of the *mirasidar* to waste. The better opinion appeared to be that he had a right to the waste, even though he paid no revenue for it, but that if he omitted to cultivate what was cultivable by *paikarries*, the Government might issue *pattas* to strangers for its cultivation. There resulted a long struggle between the *mirasidars* and the Government, the former unable to cultivate and unwilling to pay assessment on much of the land over which they claimed rights and on the other hand resisting the introduction of strangers. When *pattas* were granted to strangers, the *mirasi* right was not altogether lost and in some villages the *mirasidars* succeeded in obtaining from the *ryots* introduced by Government recognition of their interest in the soil by the payment of small cesses." After referring to the state of things in Bengal where a satisfactory solution had been arrived at by the Regulation VII of 1822, he observes as follows:—"From the authorities I have consulted in this and other cases which have come before the Court, I hold that *mirasidars* have in this part of the Presidency certain property in the waste and that property enables them to dispose of the occupancy of the land subject, of course, to the payment of revenue and that this property is not necessarily lost by non-payment of revenue. I need not refer to any further authority than the replies made by Mr. Ellis and Mr. Sankariah who was for many years *sheristadar* in the *Huzur Cutcherry* of Madras."

In *Subbaraya Mudali* v. *Sub-Collector of Chingleput* (12) the question of the *mirasidars'* right was considered. The plaintiffs, as *mirasidars* of the village of Vallipuram in the Chingleput District, alleged that strangers made a *darkhast* for certain lands in their village, that they objected to such a grant and claimed that a *patta* should be issued in their own names and that the lands should be put in their possession. The defendants pleaded that the lands, although formerly held in common by the *mirasidars* of the village, were subsequently relinquished, that it was competent for the revenue authorities to arrange for the cultivation of the lands without reference to the former registered *pattadars*, that the lands were unoccupied waste at the disposal of the Government when they were assigned to the defendants and that the Civil Courts could not take cognizance of the suit. The District Munsif held that the *mirasidars* had a preferential right to the lands and that the grant of a *patta* to the 2nd and 3rd defendants was invalid and that the Civil Courts had jurisdiction. The District Judge held that the Court had no power to order the revenue authorities to transfer the registry of lands from one person's name to another and that, if the *mirasidars* could be shown to have formally relinquished the plaint lands or acquiesced in such relinquishment by the former *pattadars* acting as their representatives, they had no cause of action against any of the defendants. Holding that the claim of the plaintiffs was one which the Government was bound to recognise, he was of opinion that the plaintiffs had relinquished the lands and had no proprietary right to them. Sir Charles Turner was of opinion that, where a *mirasidar* ceases to cultivate waste lands within his *mirasi* estate, or neglects to cultivate cultivable waste, the Government is at liberty to issue *pattas* to those lands to any stranger who will undertake to pay the assessment and that where there has been a mere relinquishment of the revenue engagement by the *mirasidar* he does not lose his *mirasi* right. He was also of opinion that a Civil Court cannot compel the revenue authorities to make settlement with a particular person where the *mirasidars* had abandoned their engagement and so given occasion to the revenue authorities to offer engagements to others. Mr. Justice Innes was of opinion that the *mirasidars* had abandoned their right and that the Collector was consequently empowered to grant the lands to strangers. Where,

however, the relinquishment was not absolute but only for a period he was of opinion that, until the lands were sold for arrears of revenue, the Collector would have no power to dispossess the *mirasidars* absolutely. This case seems to have proceeded on the footing that a relinquishment by the *mirasidars* confers absolute power to Collectors to grant the lands to others and that the *mirasidars* cannot subsequently lay any claim against the persons to whom the lands have been granted by the Government.

The view of Sir Charles Turner that it was open to the Collector to introduce strangers if the *mirasidar* does not pay the Government dues was considered and dissented from in *Secretary of State* v. *Ashtamurthi* (3), where it was held that the only remedy was a sale of the holding for arrears of revenue and that the Government had no right to let in any new *pattadar* without having recourse to the remedies prescribed by Act II of 1864. Mr. Justice Shephard dissented from the view expressed by Sir Charles Turner and held that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person. In dealing with the rights of *jenmies* in Malabar he compares them to those of *mirasidars* and observes as follows:—"The rights of the *jenmi* are certainly not less extensive than those of the *mirasidar* with which they have often been compared (see Mirasi Papers, page 434, and Appendix I). Yet the *mirasidar* is generally entitled to a prior right to undertake the cultivation and consequent assessment, *Fakir Muhammad* v. *Tirumala Chari* (9), Mirasi Papers, page 219, and he does not lose any prescriptive rights he may have by the fact that *patta* is given to another, *Subbaraya Mudali* v. *Sub-Collector of Chingleput* (12)." Mr. Justice Shephard evidently thought that *Subbaraya Mudali* v. *Sub-Collector of Chingleput* (12) was in favour of the *mirasidars'* preferential right.

In *Sivantha Naicken* v. *Nattu Ranga Chari* (1) the dispute was between *shrotriemdars* and *mirasidars* in respect of compensation awarded by the Government for lands taken up under the Land Acquisition Act, I of 1894. The lands taken up were immemorial waste or jungle lands and the compensation amount represented the rent for the occupation of the land for five years as an artillery range and the value of the trees removed from it. The District Judge was of opinion that the *shrotriemdars* were entitled to compensation as the evidence showed that they were actually exercising their rights as owners of the land in question and leasing out those uncultivated lands on long leases. Mr. Justice Davies and Mr Justice Benson were of opinion that the only question was whether as *mirasidars* they were entitled to compensation for immemorial waste lands taken up under the Land Acquisition Act, and observed that there was no allegation or evidence that such a right had ever been claimed or established against Government in villages where Government had not alienated its right to third parties. They observe as follows:—"The rights of the *mirasidars* over immemorial waste (apart from their preferential right to cultivate) appear to be confined to grazing, cutting firewood and similar common privileges, as stated by the Board of Revenue in the passage quoted in this Court's judgment in *Sakkaji Rau* v. *Latchmana Gaundan* (4), but those rights were liable to be extinguished by the Government alienating the land. As already remarked there is nothing to show that the Government has ever treated the *mirasidars* as entitled to compensation for such curtailment of their communal rights. The *shrotriemdars* stand in the place of Government in this case, and the evidence is that they have from time to time leased portions of the waste lands of the village to the *mirasidars* of the village, and sometimes to strangers without giving the *mirasidars* a share of the rent or other compensation. There is, moreover, the recent admission of one of the leading *mirasidars*, who is also an appellant, that in the village the '*poramboke*' lands belong to the *shrotriemdars*: the '*tarisa*' or uncultivated lands which are not in the holding of anybody else do also belong to the *shrotriemdars* only' (Exhibit B)." *Govindarajulu Nadiu* v. *Venkataramanjulu Nadiu*, Appeal Suit No. 76 of 1891, where the *mirasidars* were allowed a part of the compensation given for land taken up under the Land Acquisition Act, was distinguished on the ground that the facts were different.

From the facts appearing in *Sivantha Naicken* v. *Nattu Ranga Chari* (1) it is clear that the *shrotriemdars* and not the *mirasidars* were proved to have exercised acts of owner-

ship on the land. The observations of their Lordships that the Government never treated the *mirasidars* as entitled to compensation for the abandonment of communal rights is not correct. The Mirasi Papers and the judgment of Sir Charles Turner in the *Vyasarpadi* case show that compensation was awarded by the Government not only under decrees of Court but also out of Court. The decisions of the Sudder Court and the Provincial Court of Chingleput, where the claims of the *mirasidars* have been distinctly recognised over waste land and where strangers introduced by Government have been ejected at the instance of the *mirasidars*, have not been noticed. Though the judgment is perfectly intelligible on the facts found that the *shrotriemdars* exercised acts of ownership over the land and the *mirasidars* admitted their rights, I am unable to follow it where the broad proposition was liad down that the rights of the *mirasidars* were liable to be extinguished simply by the fact that the Government gave *pattas* to third persons.

Mr. Justice Benson, who was a party to *Natesa Gramani* v. *Venkatarama Reddi* (5), expressly states in his judgment, when referring to *Sivanthi Naicken* v. *Nattu Ranga Chari* (1), that the decision proceeded on the facts proved in evidence as to the particular village and does not lay down as a matter of law that *poramboke* lands in villages such as this in Chingleput District must necessarily be held to be the property of the *zemindar*.

In *Secretary of State* v. *Manjeshwar Krishnayya* (2), a question arose as to the rights of the Government as regards forests and immemorial waste in South Canara District. This case has nothing to do with the *mirasi* rights in Chingleput District and, so far as the present question is concerned, it is only authority for the position that there is a general presumption in law that waste lands belong to Government. At page 282 there is the following observation:—"Mr. Ellis compared the land tenures in Canara to those in the Arudi Karai villages to the South of the Coleroon on the East Coast, where the right of Government to the waste lands has now, after protracted contest, been established as against the *mirasidars*." No reference has been made to any authority to establish the broad proposition laid down. I agree with Mr. Justice Sankaran Nair in holding that, with the exception of the observation in *Sivantha Naicken* v. *Nattu Ranga Chari* (1), which is explained in *Natesa Gramani* v. *Venkatarama Reddi* (5) as having been decided not on any general principles of law but with reference to the facts of the particular case, there is no authority for the above observation, and that it should be treated merely as an *obiter dictum*.

In *Natesa Gramani* v. *Venkatarama Reddi* (5) the question arose as to whether a second crop raised with water from certain ponds in *poramboke* or unassessed lands in the village was liable to any claim for rent by the *zemindar*. Both the Revenue Courts before whom the suit came on and the District Court on appeal found that in that village of the Chingleput District, *poramboke* or unassessed lands were generally the property of the *mirasidars*. The High Court accepting the finding decided in favour of the *mirasidars*.

Though, at first sight, it appears that this case was decided on the concurrent findings of the lower Courts, the lower Courts seem to have arrived at the finding more with reference to the considerations as to the rights of the *mirasidars* as set out in the Mirasi Papers than on the evidence which was very meagre. This case is, however, important as explaining *Sivantha Naicken* v. *Nattu Ranga Chari* (1). In dealing with the case their Lordships Mr. Justice Benson and Mr. Justice Wallis observe as follows:—"With regard to *Sivantha Naicken* v. *Nattu Ranga Chari* (1), we think the decision proceeded on the facts proved...as to the particular village and does not lay down as a matter of law that *poramboke* lands in villages such as this in the Chingleput District must necessarily be held to be the property of the *zemindar*."

Mr. Justice Sadasiva Aiyar is of opinion that "there can be little doubt that till 1886 the inclination of the High Court was to hold that *mirasidars* had ownership rights in immemorial waste and in *nattam* sites also" I do not think that the cases decided subsequently overrule the cases decided prior to 1886.

SESHACHALA CHETTY v. PARA CHINNASAMI.

In 1894 a suit was filed in the District Munsif's Court at Tiruvellore by one Bhashyakarlu Naidu, the *ekabhogam mirasidar* of the Kathirvedu village, against the Secretary of State claiming to be the absolute proprietor of the *gramanatham* in the village and seeking for a declaration of his title and an injunction restraining the defendant from levying any assessment on it. The written statement set up the absolute right of the Government to allot land for buildings and to allow cultivation on such lands as it thinks proper to the exclusion of the *mirasidars*. The second issue referred to the question of the absolute right set up by Government and the District Munsif held that, both on the general incidents of *mirasi* tenure and on the facts of the particular case, the *mirasidar* had a proprietary interest in the *nattam* but had no right to cultivate it as he pleased.

Though the appeal by Government to the District Court was dismissed, the matter was not taken up to the High Court.

Original Suit No. 136 of 1889 on the file of the Chingleput District Munsif's Court was a suit by the *mirasidar* to recover the value of trees standing on the *gramanatham poramboke* which had been cut by some Pariahs under orders of the Sub-Collector. The Government was a party to the suit. The plaintiff obtained a decree which was confirmed by the District Court and the Government did not carry the matter any further.

In *Chinnan* v. *Kondam Naidu* (15) Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer considered the nature of the *toonduvaram* demanded by *mirasidars*. Mr. Justice Sadasiva Aiyar was of opinion that the original *mirasidar* was entitled to demand from the *ulkudi kudivaramdar* some *swatantrams* including what was called *toonduvaram* the amount of which *swatantrams* was a certain proportion of the gross produce raised by the *ulkudi* tenant. He considered *swatantrams* 'as a fraction of the fruits of the *kudivaram* right which fraction can never be lost by the *mirasidar*.' Mr. Justice Spencer was of opinion that, when there was a body of *mirasi* proprietors, there were three instead of two to share and that the *toonduvaram* was the landlord's share. This view is supported by the observations of Collins, C. J., and Muthuswami Ayyar, J., in *Chidambara Pillai* v. *Thiruvengadathiengar* (16).

Appeal Suit No. 76 of 1891 was decided with reference to a dispute between the *shrotriemdar* and the *mirasidars* of the village of Ut'ukadu as to compensation. The land which was taken up by the Government lay waste from time immemorial and was stony and incapable of cultivation, unless it was first levelled and cleared of stones. The *mirasidars*, although they admitted that the *shrotriemdar* had the *melwaram* right in the property, contended that, Uttukadu being a *mirasi* village, the *kudiwaram* right vested in them. The District Judge dismissed the suit on the ground that the plaintiffs did not prove that they were *mirasidars*. On appeal their Lordships Mr. Justice Muthuswami Ayyar and Mr. Justice Best found on the evidence that the plaintiffs were *mirasidars*. They held that the *shrotriemdar* and the *mirasidars* had in law a joint interest in the land taken up, and that the compensation should be apportioned between them both. The whole judgment proceeds on the footing that, if the plaintiffs proved that they were *mirasidars* of the village, their joint right to waste land followed as a matter of course.

Reference has been made by Mr. Grant to the observations of Mr. Justice Bhashyam Ayyangar in *Madathapu Ramaya* v. *Secretary of State* (7), to the effect that the *gramanatham* or village site is presumably the freehold property of the Government. The *natham* in question was in the Kistna District where *mirasi* rights do not exist. There can be little doubt that in non-*mirasi* villages the control of the *gramanatham* vests in the revenue authorities and that they are at liberty to grant portions of it at their discretion to applicants. I need only refer to *Collector of Godaveri* v. *Jananavula Pedda Pengayya* (17) and *Putloor Boyanna* v. *Golusu Asethu* (8). In the case of *mirasi* villages different considerations prevail and the question is how far the

(15) 23 Ind. Cas. 113; 26 M. L. J. 169; 1 L. W. 41.

(16) 7 M. L. J. 1.
(17) 4 M. L. T. 440.

absolute right of Government to waste lands is controlled by such of the incidents of *mirasi* tenure as are in force by virtue of custom or usage recognised by the British Government and enforced by judicial decisions of competent Courts. If the question was merely one of preference, the decision in *Fakir Muhammad* v. *Tirumala Chariar* (9), which was followed in *Theivu Pandithan* v. *Secretary of State* (18), would apply; but if the *mirasidars* have a proprietary interest in the soil the rights are capable of being enforced if ignored by Government.

The conclusion I have come to is that while on the one hand the absolute right of the *mirasidars* to waste land has not been made out it is open to the *mirasidars* to prove that by custom or usage they have a proprietary interest in waste lands. Where such a right is proved the Government has no power to ignore the *mirasidars* and grant the land whether it be cultivable waste or other *poramboke* to strangers and the *mirasidars* can enforce their right by recovering possession. The absolute right of the Government to do what it likes with the waste in *mirasi* villages has not been established. The various orders of the Court of Directors and the Local Government and the decisions I have already referred to negative any such right.

It is argued by Mr. Grant that the effect of Act III of 1905 is to vest in the Government all waste lands irrespective of any rights which vested in the *mirasidars* before the date of the passing of the Act. It seems to me that the effect of Act III of 1905 is to vest in the Government lands which are not proved to be private property and that it is not a confiscatory measure. The effect is simply to throw the burden of proof in cases of waste land, on persons who claim that it is their property. Even prior to the passing of Act III of 1905 the effect of the judicial decisions was that *prima facie* waste lands vested in the Government. I need only refer to *Vyakunta Bapuji* v. *Government of Bombay* (19) and *Bhaskarappa* v. *Collector of North Kanara* (11), which were referred to with approval in *Secretary of State* v. *Manjeshwar Krishnayya* (2). As pointed out by Mr. Justice West in *Bhaskarappa* v. *Collector of North Kanara* (11), though the introduction of British rule did not extinguish the private rights already acquired, the principle from which we must start is that waste lands belong to the State. This, however, does not prevent *mirasidars* from showing that by usage and custom they have a proprietary interest in the waste lands of a village and that the rights of Government are controlled by their rights. No doubt the right of the Government to see that lands do not lie waste while there are persons who are willing to engage with Government and cultivate the lands, entitles them to grant lands to strangers if the *mirasidars* are unable or unwilling to bring waste lands under cultivation, but when they are willing and *bona fide* apply for waste lands, it is difficult to see how their claims can be rejected.

I have hitherto dealt with waste lands in general, because it seems to me that *gramanatham* is only one of the kinds of *poramboke* and there is no difference in the principle between the rights of *mirasidars* to the various kinds of waste. So far as *nattam* is concerned, it is land which has been set apart for erection of dwellings for *mirasidars* and the *ulkudi ryots* and also for village servants (the *cheri* being the portion set apart for *panchamas* and 'untouchables'). It was in all probability the original homestead of the settlers and the view taken by the Government in the Government Order of 1872 already referred to by me was that it was communal property of the villagers. I am unable to accept the argument of Mr. Grant that though *mirasidars* may have preferential rights as regards cultivable waste, the unoccupied *nattam* is the absolute property of the Government and can be granted to anybody it pleases without reference to the needs of the *mirasidars*. I am also unable to accept the contention of Mr. Srinivasa Aiyangar that the *gramanatham* being land which cannot under any circumstances be assessed, the Government can have no right to dispose of the *nattam*, as the right to claim revenue is the basis on which the right of interference by Government in *mirasi* villages stands. The Government has always the

(18) 21 M. 433 at p. 458; 7 Ind. Dec. (N. S.) 664.
(19) 12 B. H. C. R. App. 1.

paramount right of disposing of waste lands subject, of course, to such vested rights (either in *mirasidars* or communities) as may be proved to exist. In *mirasi* villages, the division and allotment of waste was left to the *mirasidars* as parties entitled to occupy the land and quite competent to divide it among themselves according to local custom and known rights (Government Order, dated 8th March 1856). It seems to me that the Government on the dissolution of village communities stands for executive purposes in their place and is clothed with all the rights of management which originally vested in the *mirasidars* jointly. There can be little doubt that, before the dissolution of the village communities, the affairs of the village were managed by the *mirasidars* in common. They were responsible for the distribution of lands, and they collected certain fees or *meeras* from the villagers to meet the expenses of the village. The dissolution of the village communities naturally vested in the Government the administrative duties which were formerly exercised by the *mirasidars*. The right of Government to allot lands to non-*mirasidars* and to put such persons in the position of *ulkudies* also gave the Government an interest in the *nattam* for, as a corollary to that right, the right of Government to grant sites in *nattams* followed. It would be against all principle to hold that, though the Government can confer waste lands on *ryots*, they cannot give the *ryots* sites in the *nattam* to build on. The Government has, therefore, a double right in the *nattam*. One is the right of superintendence over the *nattam* which originally vested in the *mirasidars* collectively, and the other is to grant sites on the unoccupied portions of the *nattam* to *ryots* to whom they grant waste lands.

I do not think Courts ought to attach much weight to the argument that any recognition of the rights of the *mirasidars* would work a great hardship on other sections of the community. There can be little doubt that *mirasi* rights are capable of abuse but the remedy is by legislation. As observed by Innes, J., in *Fakir Muhammad* v. *Tirumala Chariar* (9), the estimate of the conduct of the *mirasidars* in this respect would have no bearing on the question of their rights.

A review of the authorities leads me to the conclusion that the mere fact that Government grants the whole or any portion of unoccupied *gramanattam* to strangers is no ground for holding that the preferential rights of the *mirasidars* are extinguished in cases where the *mirasidars* have proved the unoccupied *nattam* in the village has been used by them as communal property or has been treated by the Government as such. In considering whether the *mirasidars* have anything more than the ordinary rights of preference which are conferred on non-*mirasidars* by the *darkhast* rules framed by the Government, it is difficult to ignore the following facts: —

(1) the resolution of the Court of Directors in 1844 and the Government Order in 1872;

(2) the acknowledged fact that *mirasidars* had a right to levy *tunduwaram*, which has been defined by the Board of Revenue in their minute of the 5th January 1818 as "the clear landlord's rent" and by Mr. Maclean in his Manual of Administration as "the profits of the *mirasidar* owner after paying Government dues;"

(3) the award of compensation to *mirasidars* where waste lands were acquired;

(4) decrees of Court granting relief to *mirasidars* in suits for ejectment, which necessarily presuppose the possession of an interest in immoveable property; and

(5) the framing of separate *darkhast* rules for the Chingleput District in 1869 and the deliberate distinction between *mirasi* and other villages in the previous settlements of the District and in the Standing Order No. 39 of the Board of Revenue issued in 1878, where "Collectors are directed to assert the prerogative of Government by making it known that except in *zemindari* villages, *mirasi* villages and villages which are private property, sites in *gramanatham* cannot be appropriated without permission." I find myself unable to hold as a general rule that the preferential right of the *mirasidars* in *mirasi* villages is the same as that of *ryots* in non-*mirasi* villages.

The materials before me are not sufficient to enable me to hold that the *mirasi* system is a well-defined tenure with certain well-recognised incidents so as to enable one in every case to start with the presumption that the *gramanatham* is the exclusive pro-

perty of the *mirasidars*. The rights of *mirasidars* in the various administrative Districts into which the territory formerly known as Tondaimandalam was divided after British occupation have not been uniformly recognised by the Government and while in some districts the *mirasidars'* claims dwindled down into a mere preferential right they were more extensive in others. There can be little doubt that the *ryotwari* system introduced by the East India Company dealt a very severe blow on the communal holding of property and destroyed village autonomy to a considerable extent. The granting of separate *pattas* and the right claimed by Government to confer occupancy rights on non-*mirasidars* in case *mirasidars* refused to engage or committed default introduced radical changes in the communal principle. As observed by Sankaran Nair, J., "it is now difficult to say whether there is any presumption of *mirasi* right in any District or to what extent the village community have succeeded in preserving their rights."

The nature and extent of *mirasidars'* rights over waste in any particular district or portion thereof must be proved in each case, and I do not think that it can be laid down as an abstract proposition of law that the right to eject grantees from Government of sites in the *nattam* or *cheri* follows as a matter of course. Where, however, *mirasidars* prove that they have been enjoying the *nattam* as common property or that by custom or user they acquired rights over it, the *mirasidars* have the undoubted right of requiring the Government to recognise such rights and of ejecting persons brought on the *nattam* or *cheri* by Government in violation of their rights.

The reference to the Full Bench is general and I do not think it necessary to find whether in the present case the *mirasidars* have proved their alleged rights. This is a matter for the Divisional Court.

To conclude I am of opinion that

(1) in *mirasi* villages the rights of Government over waste (including *nattam* and *cheri*) are subject to the rights of the *mirasidars*;

(2) the nature and extent of such rights are not uniform throughout the Presidency but vary, and the onus is on the *mirasidars* to prove that any specified incident attaches to *mirasi* rights in any particular District, there being no presumption that *gramanatham* is the exclusive property of the *mirasidars*;

(3) the rights of *mirasidars* over waste are not extinguished by the mere fact that the Government grants *pattas* to strangers; and would answer the reference accordingly.

*Reference answered.*

V. R. P.

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MADRAS HIGH COURT.

**FULL BENCH.**

CIVIL REVISION PETITIONS NOS. 427 TO 435 OF 1916.

January 18, 1917.

*Present*:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

S. SUNDRAM AYYAR, RECEIVER OF THE TANJORE PALACE ESTATE —PLAINTIFF—PETITIONER IN ALL

*versus*

IN C. R. P. No. 427

RAMACHANDRA AYYAR—DEFENDANT—RESPONDENT.

IN C. R. P. No. 428

RENGASAMI AYYANGAR—DEFENDANT'S LEGAL REPRESENTATIVE—RESPONDENT.

IN C. R. P. No. 429

SAMINATHA MUDALI—DEFENDANT—RESPONDENT.

IN C. R. P. No. 430

SELLATAHAMMAL—DEFENDANT—RESPONDENT.

IN C. R. P. No. 431

MUTHUSAMI AYYAR—DEFENDANT—RESPONDENT.

IN C. R. P. No. 432

SAMINATHA AYYAR—DEFENDANT—RESPONDENT.

IN C. R. P. No. 433

DORAISAMY AYYAR—DEFENDANT—RESPONDENT.

IN C. R. P. No. 434

KASINATHA AYYAR—DEFENDANT—RESPONDENT.

IN. C. R. P. No. 435

KALIAPERUMAL MUDALI—DEFENDANT RESPONDENT.

*Madras Estates Land Act (Mad. I of 1908), s. 3 (2)*

SUNDRAM AYYAR v. RAMACHANDRA AYYAR.

(d)—*Tanjore Palace Estate, whether 'estate' under the Act—Grants, irredeemable, of land revenue only, whether 'estates'*—'Inam', 'jagir', *meaning of—Suits for rent due to Tanjore Palace—Jurisdiction.*

The Tanjore Palace Estate, which is a grant by Government of land revenue alone to persons not owning the *kudivaram* right, is an 'estate' within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act. [p 980, col. 1.]

Section 3 (2) (*d*) of the Act does not exclude villages in the granted revenues of which the Government reserves no reversionary interest. [p. 981, col. 2.]

The word *inam* should not be given a restricted meaning and includes all *jagirs* and grants of a dignified character which for that reason are styled *mokhasa* and covering a number of villages in which Government do not claim a reversion. [p. 980, col. 1.]

Suits for rent due to the Tanjore Palace Estate under section 77 of the Act are cognizable by the Revenue Courts. [p. 980, col. 1.]

Per *Wallis, C. J.*—Clause (*d*) of section 3 (2) of the Madras Estates Land Act restricts the operation of the Act by including only the *inams* therein mentioned, thereby excluding the so-called minor *inams*, but the definition as a whole clearly shows the general intention of the Legislature to include all large estates held directly under Government and clause (*c*) extends it to estates consisting of one or more villages not held directly under Government but as a permanent under-tenure. [p. 979, col. 2.]

All *jagirs* are a species of *inams*, though there are many kinds of *inams* that are not *jagirs*. [p. 980, col. 1.]

Per *Sadasiva Aiyar, J.*—When a Madras Statute uses the word '*inam*', it does not signify a gift of whatever kind of property by a superior individual of whatever status to an inferior. [p 981, col. 1.]

Civil revision petitions, under section 115 of Act V of 1908, praying the High Court to revise the decrees of the District Court, Tanjore, in Appeal Suits Nos. 721 to 727, 432 and 425 of 1915, respectively, preferred against those of the Revenue Divisional Officer, Kumbakonam, in Rent Suits Nos. 27, 29, 32 to 34, 36, 51, 4 and 2 of 1914, respectively.

These petitions coming on for hearing on the 29th November 1916, upon perusing the petitions, the judgments and decrees of the lower Courts and the records in the cases, and upon hearing the arguments of Mr. *K. V. Krishaswami Aiyar*, for the Petitioner in all the petitions, of Messrs. *G. S. Ramachandra Aiyar* and *A. V Visuanatha Sastri*, for the Respondent in Civil Revision Petition No. 427 of 1916, and of Mr. *G. S. Ramachandra Aiyar*, for the Respondents in Civil Revision Petitions Nos. 428, 433 and 434 of 1916, and the Respondents in the remaining petitions not appearing in person or by Pleader, and the cases having stood over for consideration till the 5th December 1916, the Court (Ayling and Seshagiri Aiyar, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

AYLING, J.—These petitions involve the consideration of a single point only, but one of great and far-reaching importance, namely, whether the Tanjore Palace Estate is an estate within the meaning of section 3 (2) of the Madras Estates Land Act, I of 1908.

The suits out of which they arise were filed under the provisions of section 77 of that Act in the Court of the Revenue Sub-Divisional Officer of Kumbakonam. No question of jurisdiction was raised in that Court; but, on appeal to the District Judge, the latter, apparently of his own initiation, raised the point, and decided that the Tanjore Palace Estate was not an estate within the meaning of the Madras Estates Land Act; and that, in consequence, the Revenue Court had no jurisdiction. He accordingly returned the plaints for re-presentation to the proper Court. This is the order which is sought to be revised.

The District Judge relied solely on a recent unreported decision of a Bench of this Court in Second Appeal No. 2661 of 1913,* which, on the face of it, is clear

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*MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2661 OF 1913.

November 23, 1915.

*Present:*—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SUNDARAM IYER, RECEIVER AND MANAGER, PALACE ESTATE, TANJORE PLAINTIFF—APPELLANT

*versus*

DEVA SANKARA BHUT—DEFENDANT—RESPONDENT.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 1028 of 1911, preferred against that of the District Munsif, Tanjore, in Original Suit No. 344 of 1908.

Mr. *T. R Venkatarama Sastri*, for the Appellant.

Mr. *G. S. Ramachandra Iyer*, for the Respondent.

JUDGMENT.

NAPIER, J.—This was a suit by the Receiver of the Tanjore Palace Estate to recover possession of certain lands in the possession of the defendant alleged by the plaintiff to be held on a tenancy from year to year. The defendant relied on the terms of the *muchilika* Exhibit A dated June 13th, 1889, given to him by the Public Works Department authorities, as creating a permanent tenancy and alternatively

authority on the point. The petitioner's Vakil was forced to contend that the decision was wrong: and some argument was addressed to us on both sides regarding this. Speaking for myself, I do not think I should have felt justified, as a result of that argument, in refusing to follow that decision, if it had been reported in the authorised series. But at the very end of the argument, we found that the learned Judges had declined to allow the case to be reported on the ground that it had not been fully argued. In these circumstances, we felt some difficulty as to the best course to adopt. The argument addressed to us was certainly not of such a nature that we should like to base the decision of an important point on it. Both the learned Vakils were clearly to some extent influenced by the existence of the previous decision. I should not be prepared to come to a different conclusion without a much more exhaustive consideration of the question. The importance of the point

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contended that he was entitled to permanent rights of occupancy under the Madras Estates Land Act. The lower Appellate Court found that the defendant had a right of occupancy and the plaintiff appeals. Both defences are relied on in this Court. With regard to Exhibit A, it is sufficient to say that it is no more than a license to cut Nanal jungle on the right bank of the Vannar river from year to year and in no sense a lease of the land, far less a permanent lease. The Public Works Department clearly had neither the intention nor the authority to grant any such lease. The Government order of February 25th, 1889, in pursuance of which the so-called lease was executed, informed the Public Works Department authorities that the Tanjore Palace Estate was entitled to the grass grown on the Padugais and directed the crediting to estate funds of grass cut there. In consequence of these directions the right to cut grass was leased by the Executive Engineer for the benefit of the estate and the lease was in 1895 transferred to the Palace Estate. This contention, therefore, fails. The next contention has raised very large questions as to the nature of the interest vested in the Tanjore Royal Family in these lands by their restoration to the family and the effect of the Act of State on the rights of the tenants in possession. We do not propose to consider these questions, as we are satisfied that the estate does not come within the purview of the Madras Estates Act at all, whether the *kudivaram* interest is vested in the estate or not. It is clearly not within clauses (*a*), (*b*) and (*c*) of section 3. The only clause that could possibly apply is clause (*d*), any village of which the land revenue alone has been granted in *inam* to a person not owning the *kudivaram* thereof, provided that the grant has been made, confirmed or recognized by the British Government. The history of the grant is well known and it is to be found in the reports in *Secretary of State* v. *Kamachee Boye Sahaba* (1) and *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2). The Governor-in-Council in exercise of the sovereign rights of the Crown made over the estate to the senior widow with succession to the daughter of the late Rajah or failing her, the next heirs of the late Rajah [*vide Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (2)]. It was held in that case that this grant was a grant of grace and favour by Government (*vide* page 445) and this language does accord with the natural meaning of the word *inam*. We are satisfied, however, that we have not to look to the natural meaning of the word in construing the clause. "Granted in *inam*" is a phrase with which the Courts are very familiar and *inam* has acquired a definite meaning since the Inam Settlement. It was pointed out in argument that a forfeited *zemindari* when re-granted is, broadly speaking, "granted in *inam*" but it is never called an *inam*. One peculiar feature in *inams* has always been the intention of the Government to reserve a reversionary right, whether the grant be personal, service or religious. When the grant is personal, that right has been the subject of enfranchisement by the Commission. Could it be suggested that Government has at any time contemplated the position that enfranchisement would give a better title for the heirs of the late Rajah? Both the circumstances of the grant and its subsequent treatment are against any such supposition. The language of the Despatch of the Secretary of State of October 23rd, 1862, was that "His Majesty's Government was willing to relinquish to the surviving members of the late prince's family the benefits accruing from these possessions." The word relinquish is, I think, indicative. Nowhere is the grant termed *inam*, whereas later on in the same Despatch the Secretary of State approves of the decision of the Madras Government that "Certain alienations of the nature of *inam* should be dealt with by the Inam Commissioner." In the District Manual, the *mokhasa* (as it is there, rather loosely, termed), although stated to be treated *for all practical purposes* as an unenfranchised *inam*, is carefully distinguished from *inams* properly so-called. To conclude, the nature of the estate is far more analogous to a permanently settled estate though there is, of course, no revenue liability on it. We cannot include it in the class dealt with in clause (*d*) merely because of the literal meaning of the word *inam*. The respondent, therefore, cannot treat it as an estate and his claim to permanent rights of occupancy fails. The second appeal will be allowed with costs, plaintiff being given a decree for possession with mesne profits at Rs. 7 per annum from April 1st, 1908, till delivery in execution or three years from the date, whichever first occurs.

SADASIVA AIYAR, J.—I concur.

(1) 7 M. I. A. 476; 13 Moo. P. C. 22; 7 W. R. (Eng.) 722; 4 W. R. (P. C.) 42; 1 Suth. P. C. J. 373; 1 Sar. P. C. J. 684; 19 E. R. 388; 132 R. R. 7.

(2) 3 M. H. C. R. 424.

has already been referred to. The Tanjore Palace Estate embraces nearly 200 villages and extends over a large tract of country. I believe it has been assumed, from the very enactment of Act I of 1908, that it came within the scope of the latter's operation as an "estate:" and the number of decisions of this and subordinate Courts based on this assumption must be very large. In fact the dislocation and confusion which would be the logical result of the unreported decision being followed are so great that the necessity of resort to legislation might have to be considered.

In these circumstances I think we are justified in referring the question to a Full Bench and would state it as follows:—

Whether the Tanjore Palace Estate is an "estate" within the meaning of section 3 (2) of Act I of 1908 ?

SESHAGIRI AIYAR, J.—The short point is whether the Tanjore Palace Estate is an estate within the meaning of that expression in section 3 (2) of Act I of 1908. There can be no doubt that it is not covered by clauses (*a*), (*b*), (*c*) and (*e*). Does it come under clause (*d*) ? The proprietor, by whatever name he might have been known in the past, does not own the *kudivaram* right in the village in his possession. It is conceded that the grant to him was only of the land revenue. It was a grant, if any, by the British Government. The further question is whether the villages were granted in *inam*. Before dealing with this question, it may be stated that it is not conceded that there was any grant by the Government. Mr. G. S. Ramachandra Aiyar suggested that it was a case of a retention of a portion of the *Raj* and the relinquishment of the rest to the British Government. It may also be put the other way. See Hickey's book on the Tanjore Palace Estate, Appendix C3, and also *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1). Assuming that there was a grant, *was it an inam grant*?

In Second Appeal No. 2661 of 1913, Sadasiva Aiyar and Napier, JJ., held that the villages belonging to the estate did not come under clause (*d*). In that case the point was conceded in the Courts below and was only incidentally raised in the High Court. Consequently the question was not fully argued. I was informed by one of the learned Judges that the decision requires re-consideration. The other learned Judge, in refusing to give permission to publish the decision in the Indian Law Reports, has left a note that the case was not fully argued. Nonetheless, the decision has been followed by the District Judge in the present case; and we are informed that a large number of cases await the decision of this case.

The matter in controversy relates to the meaning to be attached to the term "*granted in inam.*" The learned Judges inclined to the view that, unless there is the incident of resumability, there can be no *inam*. The meaning given in Wilson's Glossary does not support this view. In *Unide Rajaha Raje Bommarauze Bahadur* v. *Penmasamy Venkatadry Naidoo* (2) the Judicial Committee seem to contemplate an *inam* which may not be resumed.

I am not prepared to accept Mr. Krishnaswami Aiyar's contention that there can be no *inam* unless it be conferred by the Government. I do not understand *Raghojirao Saheb* v. *Lakshmanarao Saheb* (3) laying down such a proposition. The learned Vakil argued that it is of the essence of an *inam* that it is permanent. It may be that permanency and heritability attach to an *inam* so long as it is not resumed. The observations of Bashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (4) were relied upon for the proposition that the Government has no right to resume even a service *inam*. As at present advised, I am not prepared to accede to this proposition. What was held in that case was that by the enfranchisement there was no resumption and re-grant. I do not understand that decision as laying down that the Government could not have resumed the land under any circumstances. See *Boddupalli Jagannadham* v. *Secretary of State* (5) and *Subramaniam Chettiar* v. *Secretary of State* (6) and *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (7).

(1) 3 M. H. C. R. 424.

(2) 7 M. I. A. 128 at p. 133; 4 W. R. (P. C.) 121; 1 Suth. P. C. J. 300; 1 Sar. P. C. J. 637; 19 E. R. 258.

(3) 16 Ind. Cas. 239; 36 B. 639; 16 C. W. N. 1058; 23 M. L. J. 383; 12 M. L. T. 472; (1912) M. W. N. 1140; 14 Bom. L. R. 1226; 17 C. L. J. 17; 39 I. A. 202.

(4) 26 M. 339.

(5) 27 M. 16.

(6) 28 Ind. Cas. 639; (1915) M. W. N. 276; 2 L. W. 353; 28 M. L. J. 392.

(7) 20 Ind. Cas. 769; (1913) M. W. N. 782; 24 M. L. J. 659.

On the other hand, there is no authority for saying that, unless a grant possesses the characteristics of resumability, it should not be regarded as an *inam*. In the fifth report of the Madras Presidency, Volume II, page 14, the nature of the *inam* or beneficial grant is stated at some length. It is clear that the Moghul Government made non-resumable *inam* grants. That the British Government, in the earlier years of its administration, granted many *inams* is evident from numerous grants made by them. This practice was objected to by the Board of Directors in 1822 and 1829 and was practically abandoned since then. There is no reason for supposing that the grants by the British Government always partook of the character of resumability.

It is not necessary to discuss the matter much further, as, in my opinion, the question is one of great importance and should be settled by a Full Bench of this Court.

I agree, therefore, that the question suggested by my learned brother should be referred to the decision of a Full Bench.

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These civil revision petitions coming on for hearing, in pursuance of the above order, on the 10th January 1917, upon perusing the said Order of Reference, and upon hearing the arguments of the Counsel on both sides and the cases having stood over for consideration till this day, the Court expressed the following

OPINION.

WALLIS, C. J.—The repealed Rent Recovery Act, VIII of 1865, contained in section 1 a comprehensive definition of "landholders," and proceeded to regulate the relations of certain classes of landholders enumerated in section 3 with their tenants, as those holding under them were called, leaving other landholders unrestricted. The classes who were made the subject of this special legislation were broadly speaking, with one exception, assignees of land revenue, and ordinary Government *ryots* paying the full assessment direct to Government were unaffected. In the present Act the line is drawn by the definition of "estate" in section 3 (2), which has been adapted from the definition of "estate" in section 4 of the Madras Proprietary Estates Village Service Act, II of 1894. Clause (*d*) restricts the operation of the Act by including only the *inams* therein mentioned, thereby excluding the so-called minor *inams*, but the definition as a whole clearly shows the general intention of the Legislature to include all large estates held directly under Government, and clause (*e*) extends it to estates consisting of one or more villages not held directly under Government but as a permanent undertenure. The presumption, therefore, is that it was the intention of the Legislature to apply the provisions of the Act to the numerous villages constituting the Tanjore Palace Estate, though it is, of course, necessary to show that they come within one or other of the classes of the definition. The villages in question formed part of the territories of the Rajah of Tanjore, as to which he agreed by the treaty of 1799 to cede the collection of the revenues and the administration of justice to the East India Company. By some arrangement come to at the time the Company refrained from enforcing its rights under the treaty to the revenue of these villages, and they remained in the enjoyment of the Rajahs until the death of the last Rajah, when his territories were taken possession of on behalf of the Crown by an act of state. It was expressly decided in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (8) that these villages, forming the so-called private estate of the Rajah, then became the property of Government; and some years later they were granted as a matter of grace and favour to the widows of the late Rajah and after them to his daughter, or failing her his next heirs, as held by this Court in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1). It is admitted that the *kudivaram* right in the suit village, and in almost all the other villages, does not belong to the estate; and these villages are, therefore, villages of which the land revenue alone has been granted by the British Government to persons not owning the *kudivaram* right, and they, therefore, come within clause (*d*) if they can be said to have been granted "in *inam*" within the meaning of the section. The definition of the word *inam* in Wilson's Glossary expressly covers irresumable revenue-free grants

(8) 12 M. I. A. 1; 9 W. R. (P. C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

or assignments of revenue such as this. The word "*inam*" as held by the Privy Council in *Raghojirao Saheb* v. *Lakshmanrao Saheb* (3) is a term of wide signification, wide enough, as held in *Sam* v. *Ramalinga Mudaliar* (9) to include *jagirs* which, however, are separately mentioned in clause (*c*) of the definition. The meaning of the term *jagir* is discussed in that case, and I agree with the observation of Coutts Trotter, J., that all *jagirs* are a species of *inams*, though there are many kinds of *inams* that are not *jagirs*. The terms *jagir* and *jagirdar* were terms of some dignity, and were used in the grants themselves or by the grantees for that reason. The grant now in question appears to have been commonly spoken of as a *mokhasa* grant, and though it cannot be said to have been granted as what is understood as *mokhasa* tenure, the use of the word goes to show that it was regarded as an *inam* of a dignified character. There was no distinctive word for a peculiar *inam* of this kind, and it was probably thought better to use the word *mokhasa*, though not strictly applicable, rather than to describe the grantees merely as *inamdars*, a term which includes large numbers of petty grantees in very humble circumstances. There is, in my opinion, no sufficient ground for supposing that it was intended to exclude from the operation of section 3 (2) (*d*) grants which were irresumable, as the fact that they were irresumable would not be a ground for excluding them, having regard to the policy of the Act. I am not satisfied that the rules for the adjudication and settlement of *inam* lands of 1859 have any bearing on this question. Under rule 4 personal or subsistence grants, such as this, if inquired into, would have simply been confirmed according to their tenor, that is to say, as revenue-free and irresumable. However this may be, I do not think these rules afford any ground for putting a restrictive construction on the word *inam* as used by the Legislature in the Act of 1908, especially when the result of so doing would be to exclude from the operation of the Act a large estate which there is no other reason for excluding. I would answer the question in the affirmative.

SADASIVA AIYAR, J.—I take it that, though the question referred to us is as regards the whole of the Tanjore Palace Estate consisting among other things of about 190 villages, our answer is to be confined to the *mokhasa* Ullikadai village within whose limits are situated all the subject-matters of the suits out of which these revision petitions have arisen. As regards this village, it seems to have been conceded by the respondents' Vakil before the referring Bench that the land revenue alone belonged to the Tanjore Palace Estate. I concur entirely with my lord as regards the whole estate that there was a new grant in 1862 to the Rajah's senior widow by the British Government. That new grant related to the Government revenue alone (according to the admission above mentioned) so far as the arable lands of the Ullikadai village were concerned.

The next question is whether the grant of the revenue of this village can be called a 'grant in *inam*' by the British Government and whether the definition of estate found in clause 2 (*d*) of section 3 of the Madras Estates Land Act applies to this village. I concurred with Mr. Justice Napier in his judgment in Second Appeal No. 2661 of 1913 in which he held that in the phrase 'granted in *inam*,' the word '*inam*' should be given a definite and restricted meaning which (according to my said learned brother) that word had acquired in the Madras Presidency since the days of the first Inam Settlement. That restricted and definite meaning (if I understood his judgment aright) was a grant of lands or land revenue made in such a manner that a reversionary right could be claimed by the British Government in the subject of the grant on the occurrence of certain events. As no such reservation was intended in the case of the grant of revenue of any of the villages of the Tanjore Palace Estate, we held in Second Appeal No. 2661 of 1913 that it did not consist of villages whose revenues were granted 'in *inam*'. The Government never seems to have contemplated the registration of these villages as *inam* villages or to include them in the list of *inam* villages to be entered in the Registration Records relating to such villages. There seems to have been no intention to instruct the Inam Commissioners or the Inam Settlement Officers to deal with any of these Palace Estate villages by way of confirma-

(9) 34 Ind. Cas. 803; 30 M. L. J. 600; 40 M. 664.

tion or of modification of the grant of 1862.

No doubt, the word '*inam*' means "gift or benefaction" in the widest and most popular sense of that Arabic term, which has passed practically into every one of the vernacular languages of India. It is a gift by a superior to an inferior and is applied in popular language to any gift, *whether of moveables or immoveables* and of however petty a value. But it has also got several restricted meanings, such restricted meanings varying in different parts of India. Wilson says, "In India, and especially in the south, and amongst the Marathas, the term was specially applied to grants of land held rent free, and in hereditary and perpetual occupation." Then he says, "the tenure came in time to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assessment." He says further on that "the term was also vaguely applied to grants of rent-free land without reference to perpetuity or any specified conditions." He likewise mentions very numerous distinctions among the tenures called "*Inams*" (See also pages 38 to 41 of Mr. Rama Doss' Book on the Estates Land Act).

It is thus clear that when a Madras Statute uses the word '*inam*', it does not signify a gift of whatever kind of property by a superior individual of whatever status to an inferior. Some restriction of the above very wide general significance being assumed (the *Inam* rules found in the Board's Standing Orders, Volume 2, paragraph 52, the Proceedings of the Inam Commissioner and the Regulation IV of 1862, all these also evidently implying such a qualification), Mr. Justice Napier's opinion was that the Legislature, when talking of a grant "in *inam*", could have had in its contemplation only grant in the subject of which the Government had retained some reversionary interest to be enforced in certain contingencies. I am free to admit that the knowledge of my learned brother Mr. Justice Napier as regards revenue matters and revenue regulations and his long official experience of such questions (through official contract with the higher Revenue Officers of the Government) being much more extensive than I could profess to claim, I without much hesitation deferred to his opinion on the question. Even after the full arguments which I have heard in this Full Bench Reference, I cannot say that the view which Napier, J., and myself took in Second Appeal No. 2661 of 1913 is wholly unsupportable.

But as my lord the Chief Justice, whose experience and whose knowledge of the history, policy and progress of the legislation which resulted in the passing of the Madras Estates Land Act is, if I may say so with respect, unique, is of opinion that the Legislature could not have intended in the definition in clause (*d*) of section 3 (2) to exclude villages in the granted revenues of which the Government reserved no reversionary interest, I agree that the opinion *contra* expressed in the decision in Second Appeal No. 2661 of 1913 should be overruled, especially because (as pointed out by Mr. Justice Ayling in his referring judgment) the preponderating balance of convenience is in favour of not restricting unduly the meaning of the phrase "granted in *inam*".

SESHAGIRI AIYAR, J.—The further arguments addressed to us have confirmed me in the view I took in the Order of Reference. I entirely agree with the opinions expressed by the learned Chief Justice.

*Reference answered in the affirmative.*

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## PRIVY COUNCIL.

APPEAL FROM CALCUTTA HIGH COURT.

January 24, 1917.

*Present*:—Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

*Raja* RANJIT SINGH BAHADUR—DEFENDANT—APPELLANT

*versus*

*Srimati* KALI DASI DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Village Chowkidari Act (VI B. C. of 1870), ss* 49, 50, 51—*Bengal Decennial Settlement Regulation (VIII of* 1793*), ss.* 36 *to* 41—Patni *tenure*—Chowkidari chakran *lands, resumption of*—*Permanent Settlement*—Zemindar, *rights of.*

Chowkidari Chakran lands resumed by Government and transferred to the *zemindar* under Bengal Act VI of 1870 pass by virtue of such transfer to the holder of a *patni* lease of the villages within which such lands are situate. [p. 986, col. 2.]

The *prima facie* title of the *zemindar* to Chakran lands within his district is recognised by the Permanent Settlement. The *zemindar's* interest in such lands, in the absence of express provision to the contrary, passes under a *patni* grant [p. 985, col. 1,

RANJIT SINGH *v.* KALI DASI DEBI.

Not only does Bengal Act VI of 1870 recognise the existing title of the *zemindar* to the lands resumed, but the estate taken by the *zemindar* under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the *zemindar* or those through whom he claims enter or have entered into contracts affecting his existing estate, the rights of third parties under such contracts are preserved. [p. 986, col. 2.]

Consolidated appeals from two judgments and twenty decrees of the Calcutta High Court, passed in second appeal from various Courts in the Birbhum District.

FACTS.—Twenty suits were brought by various plaintiffs to recover possession from the defendant Raja, who holds large Zemindaris in the Birbhum District, of Chowkidari Chakran lands resumed by Government and transferred to him under Bengal Act VI of 1870. Each plaintiff was the *patnidar* or *dar-patnidar* of the village within which the lands subject of the suit were situate. In these suits in which the *dar-patnidar* was plaintiff, the *patnidar* was made a defendant. The decree in each suit was in favour of plaintiff and was confirmed on appeal by the High Court.

Hence this appeal.

Messrs. *De Gruyther*, *K. C.*, and *Eddis*, for the Appellant.

Sir *H. Erle Richards*, *K. C.*, Messrs. *Dunne*, and *H. N. Sen*, for Punchanani Dasi (Respondent in several appeals).

Sir *W. Garth*, for Mina Kunwari Devi (Respondent in one appeal.)

Several other respondents did not appear.

Mr. *De Gruyther*, *K. C*, for the Appellant. —The Village Chowkidari Act 1870 (Bengal Act VI of 1870) does not apply to Chowkidar Chakran lands unless they were excluded from the Revenue Settlement. The onus of showing that they were so excluded is on the Government. The very fact of those lands falling under the Act shows that they were not included in those settled with the Zemindar.

*Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (1), *Ram Chandra Bhanj Deo* v. *Secretary of State* (2).

(1) 26 Ind. Cas. 676; 42 I. A. 30 at pp. 31, 39, 42; 42 C. 710; 19 C. W. N. 65; 17 Bom. L. R. 32; 21 C. L. J. 31; 17 M. L. T. 1; 2 L. W. 11; 28 M. L. J. 457 (P. C.).

(2) 37 Ind. Cas. 223; 20 C. W. N. 1245; 20 M. L. T. 235; (1916) 2 M. W. N. 175; 4 L. W. 251; 14 A. L. J. 1009; 18 Bom. L. R. 838; 24 C. L. J. 296; 31 M. L. J. 745; 43 C. 1104; 43 I. A. 172 (P. C.).

Here the Chowkidari Chakran lands did not belong to the Zemindar at the date of the *patni* leases. The profits of these lands were not taken into account in fixing the assessment. The Zemindar had no right in the lands under Bengal Regulation VIII of 1793; he merely had a certain call on the services of the Chowkidars. Bengal Regulation XXII of 1793 gives the right of nominating Chowkidars to the Zemindar: there is no authority to the effect that such right passed to the *patnidars* and no suggestion that the *patnidars* in fact exercised such right.

Bengal Regulation VIII of 1793 is relied on as showing that the Zemindar had the proprietary right in these lands, but section 4 of that Regulation only covers cases where Government assessed rent or revenue on the lands. Here no revenue was assessed.

Our title to these lands is a new title under Act VI of 1870 arising long after the *patni* leases were made.

At first the Police in Bengal came under the Zemindars—Harington's Analysis, Volume I, pages 459, 513. The Zemindars entertained Tannahdars and Pykes, and remunerated them either by assigning them Chakran lands or by money. In the calculation of the giver the profits of such Chakran lands were not brought into account, and deductions were made in favour of the Zemindar for money payments made by him. This was altered by Regulation I of 1793, section 8 (4). The Police control was taken away from the Zemindars, the allowances were resumed, and the lands assigned by the Zemindars were left to them until Act VI of 1870, after and in consequence of which they were given the proprietary right in such lands: *Joykishen Mookerjee* v. *Collector of East Burdwan* (3), *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (1).

Reference was also made to *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (4), *Upendra Narain Bhuttacharjee* v. *Pratap Chunder Pardhan* (5), *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (6), *Ranjit Singh*

(3) 10 M. I. A. 16 at pp. 17, 18, 20; 1 W. R. (P. C.) 26; 1 Suth. P. C. J. 542; 2 Sar. P. C. J. 54; 19 E. R. 879.

(4) 4 C. W. N. 814 at p. 817.

(5) 31 C. 703; 8 C. W. N. 320.

(6) 33 C. 596; 10 C. W. N. 598; 5 C. L. J. 299.

v. *Radha Charan Chondra*(7), *Shaikh Jonab Ali* v. *Rakibuddin Mallik* (8), *Kazi Newaz Khoda* v. *Ram Jadu Dey* (9) and *Binad Lal Pakrashi* v. *Kalu Pramanik* (10).

Mr. *Eddis* followed.

Sir *H. Erle Richards, K. C.*, for the Respondent Panchanani Dasi.—There are three obstacles to appellant's case. (1) Section 41 of Regulation VIII of 1793, (2) the matter is concluded by *Joykishen Mookerjee* v. *Collector of East Burdwan* (3). There has been at Calcutta a current of decisions against the contention, extending from 1900 till now, with the one exception of *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (6), which is to some extent in his favour.

I have in my favour findings of fact that the lands are within the ambit of my *patni* and that the Chowkidars were in my service.

Appellant's contention that the lands did not belong to him as Zemindar was not raised in the Courts below, where the question argued was limitation. The present question is one of fact and cannot be raised now.

Apart from this, the contention fails on the merits. *Lakhiraj* lands are dealt with in section 36 of Bengal Regulation VIII of 1793. Section 41 lays down in terms that Chakran lands are not meant to be included in the exception contained in section 36 and are declared responsible for the public revenue. If, as is now contended, these lands belonged to Government independently, there is no sense in making them security for the revenue. Lord Kingsdown, in *Joykishen Mookerjee's* case (3), explains that Chakran lands were included in the Malguzari lands for the purpose of securing the assessment, because in the event of a sale for non-payment it was important they should be transferred to the purchasers, with whom the appointment of the Chowkidars would vest.

There is a direct decision of the Calcutta High Court against appellant's contention, *Kazi Newaz Khoda* v. *Ram Jadu Dey* (9). The same point arose but was not even argued in *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (11).

The case of *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (1) is really against appellant; it lays down that the Zemindar is entitled as such to Chowkidari Chakran lands within his Zemindari. The same principle is recognised in *Ram Chandra Bhanj Deo* v. *Secretary of State* (2).

By section 51 of Act VI of 1870, the transfer of Chakran lands to the Zemindar under that Act is subject to all contracts theretofore made, etc. *Patni* leases are contracts within the meaning of that section.

Mr. *Eddis*, in reply.—Our point was taken in the Original Court and is still open to us.

We do not say *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (1) is wrong: we rely on it. In that case the lands were lands belonging to the Zemindari assessed to revenue, but assigned by the Zemindar for service purposes, and, therefore, though called Chowkidari Chakran lands, did not fall within the definition in Act VI of 1870. This is the converse case; the lands here are lands not assessed to revenue and falling within the definition.

## JUDGMENT.

LORD PARKER OF WADDINGTON.—This is a consolidated appeal from decrees of the High Court of Judicature at Fort William, in Bengal, made in twenty suits, each of which, though relating to a distinct subject-matter, raised substantially the same questions of law. Each suit was in substance a suit to recover possession from the appellant, who is the registered proprietor of extensive Zemindaris in the Birbhum District of Bengal, of Chowkidari Chakran lands recently resumed by Government and transferred to him under the provisions of Act VI of 1870 of the Bengal Council. The plaintiff in each suit was the *putnidar* or *dar-putnidar* of the village within the boundaries of which the lands the subject of the suit were situate. In those suits in which the *dar-putnidar* was the plaintiff, the *putnidar* was made a

(7) 34 C. 564.
(8) 9 C. W. N. 571; 1 C. L. J. 303.
(9) 34 C. 109; 5 C. L. J. 33; 11 C. W. N. 201.
(10) 20 C. 708; 10 Ind. Dec. (N. S.) 477.

(11) [35] C. 343; [12] C. W. N. 459; 7 C. L. J. 439.

defendant, but took no part in the argument. The decree in each suit was in favour of the plaintiff and against the appellant.

Their Lordships consider it unnecessary to deal at further length with the history of the litigation. It is abundantly clear from the facts found in the Courts below, and was not disputed before their Lordships' Board, that any interest which the appellant or his predecessors-in-title originally had in the lands the subject of each suit had, prior to the resumption and transfer of such lands under the Act of 1870, been transferred to and become vested in the plaintiff *putnidar* or *dar-putnidar* by virtue of the lease or sub-lease under which he held the villages in which these lands were situate. Two points only were argued before their Lordships. It was contended, *first*, that the proprietor with whom a Zemindari was settled under the Bengal Permanent Settlement, did not obtain or retain in the Chowkidari Chakran lands situate within the territorial boundaries of a village comprised in his Zemindari any interest capable of being made the subject of a *putni* lease; and *secondly*, that even if he obtained or retained any such interest, the effect of the Act of 1870 was to confer on him a new title not in any way affected by any *putni* lease theretofore granted by him or his predecessors-in title. In order to arrive at a conclusion on these questions, it is necessary to consider (1) the nature of Chowkidari Chakran lands, (2) the provisions of the Bengal Permanent Settlement, and (3) the true meaning and effect of the Act.

At the time of the English occupation a Zemindar was responsible not only for the payment of the revenue but for the preservation of peace and order within his District. For the latter purpose he maintained Tannahdars, or police officials, and Chowkidars, or village watchmen. Both had from time immemorial been remunerated by allotments of land to be held in consideration of the services they rendered to the Zemindar, either rent-free or at a low rent, but whereas the police official rendered police service only, the Chowkidar not only assisted the police, but rendered acts of service personal to the Zemindar. Chakran lands are lands held by service tenure. Generically the term includes all lands so held, whether by police officials, Chowkidars, or persons whose only duties are personal to the Zemindar. The expression "Tannahdari lands or Tannahdari Chakran lands" means lands held on service tenure by Tannahdars or police officials. The expression "Chowkidari Chakran lands" means lands held on service tenure by Chowkidars, or village watchmen. As one would naturally expect, it had long been customary, in fixing the revenue or *jumma* payable for the Zemindari, to leave Tannahdari and Chowkidari Chakran lands out of account.

Passing to the Settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the English occupation the Zemindars had any proprietary interest in the lands comprised within their respective Districts, the settlement itself recognises and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the "Zemindars, independent Talukdars and other actual proprietors of the soil" (see Regulation I, section 3, and Regulation VIII, section 4). It is clear that since the settlement the Zemindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly referred to as Malguzari lands [see the case of *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Sing* (12)]

Bearing this in mind, their Lordships will proceed to consider the Regulations of the Permanent Settlement, so far as they deal with Chakran lands. The leading authority on this subject is *Joykishen Mookerjee* v. *Collector of East Burdwan* (3). To use Lord Kingsdown's expression in that case, the effect of the settlement is to divide Chakran lands into two classes, namely, (1) Tannahdari Chakran lands, that is, lands held on service tenure by police officials, and (2) all other Chakran lands. As to Chakran lands of

(12) 12 M. I. A. 292 at p. 331; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 430; 20 E. R. 349.

the former class, they were by Bengal Regulation I, section 8, clause 4, made resumable by Government, the Government relieving the Zemindar from the duty of maintaining a police establishment. These Tannahdari Chakran lands were, in fact, shortly afterwards resumed and became Government lands, the title of the Zemindar being extinguished by such resumption. As to all other Chakran lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Bengal Regulation VIII, section 41.

In order to understand the 41st section of the last mentioned Regulation, it is necessary to refer to some of the preceding sections. By virtue of the 36th section the assessment is to be fixed exclusive and independent of all existing *lakhiraj* lands, that is lands exempted from the public revenue. Such lands are, therefore, in effect withdrawn from the settlement, and the Zemindar, though these lands might be locally situated within his district, could claim no title therein by virtue of the settlement.

Sections 37 to 40 deal with certain lands referred to as "private lands" of the Zemindars. By section 37 these are not to be included in the *lakhiraj* lands referred to in section 36, and special directions with regard to them are given in sections 38, 39 and 40. Speaking generally, such lands are not excluded from, but on the contrary are included in the settlement. Then comes the 41st section dealing with Chakran lands; these, whether held by public officers or private servants in lieu of wages, are also not to be included in the *lakhiraj* lands referred to in section 36. They are to be annexed to the Malguzari lands and declared responsible for the public revenue assessed on the Zemindaris in which they are included in common with all other Malguzari lands therein.

Sections 37 to 41 inclusive appear to their Lordships to suggest that neither the "private lands" of the Zemindars nor Chakran lands had theretofore been taken into account in fixing the revenue for which the Zemindar was responsible to Government. Otherwise there would be no point in excluding them from the *lakhiraj* lands dealt with by section 36. However this may be with regard to the private lands of the Zemindar or with regard to Chakran lands, the services for which were purely personal to the Zemindar, it is quite clear that Tannahdari and Chowkidari Chakran lands, the services for which involved the performance of duties in which the public was interested, had not, as a rule, been taken into account for the purpose of increasing the *jumma*.

The effect of section 41 appears to be this: The question whether any of the Chakran lands therein referred to ought to be taken into account for the purpose of increasing the *jumma* is left to be determined by the custom which had hitherto prevailed or any special directions contained in the Regulations. But whether or not so taken into account, all Chakran lands are to be considered Malguzari for the purpose of ascertaining the lands in respect of which the *jumma* is paid and upon which it is secured. The *prima facie* title of the Zemindar to Chakran lands within his district is thus recognised by the settlement. Tannahdari Chakran lands may be resumed under Regulation I, section 8, clause 4, but with regard to all other Chakran lands, if resumable at all, they can be resumed by the Zemindar alone. In the case, however, of Chowkidari Chakran lands, not even the Zemindar may be entitled to resume them, for Chowkidars have public duties to perform and the lands which they hold on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. Subject, nevertheless, to the requirements of the public interest, the Zemindar is the owner and as such is entitled to the enjoyment of any personal services which the Chowkidars ought to render and when vacancies occur to appoint others in their place. All this follows from what was said by Lord Kingsdown in *Joykishen Mookerjee* v. *Collector of East Burdwan* (3).

Such, then, being the Zemindar's interest in Chowkidari Chakran lands within his district, it is difficult to see why this interest should not be made the subject of a *putni* grant. That it could be so made appears to have been admitted in the last mentioned case, and the whole of Lord Kingsdown's

judgment proceeds on that footing. In their Lordships' opinion there can be no reasonable doubt on this matter. Indeed, the only argument to the contrary advanced by the appellant's Counsel was based on certain expressions used by Mr. Ameer Ali in giving the reasons of the Board in the recent case of *Secretary of State* v. *Kirtibas Bhupati Harichandan Mahapatra* (1). In that case, which has little, if any, bearing on the question now in controversy, the point for decision was whether the power of resumption conferred by Act VI of 1870 extended to certain Chakran lands which the Government had affected to resume thereunder. Here it is admitted by everyone that the powers of the Act were applicable. Moreover, it is abundantly clear that Mr. Ameer Ali, whatever expressions he used, did not intend to depart in the smallest degree from what had been laid down by Lord Kingsdown in *Joykishen Mookerjee* v. *Collector of East Burdwan* (3). Under these circumstances, any argument based on a meticulous examination of isolated expressions used by him can, in their Lordships' opinion, have little weight.

It remains to consider the effect of a resumption by the Government of Chowkidari Chakran lands under the provisions of Act VI of 1870 of the Bengal Council.

It should be observed that the definition of Chowkidari Chakran lands contained in the Act refers not only to the public duties of Chowkidars but also to their personal duties to the Zemindar. It is apparently for this reason that the revenue assessment in the lands resumed is, by section 49, fixed at only one-half of the annual value of such lands. If the Zemindar had no interest, the effect of this provision would be to make him a free gift of half of the value of the lands resumed. It appears to be for the same reason that the Zemindar is under section 50 entitled to contest the correctness of any assessment which is made. After the assessment is complete the Collector is, under section 50 by order in the scheduled form, to transfer the land to the Zemindar subject to the assessment. By the 51st section such order operates to transfer the land to the Zemindar subject to such assessment and "subject to all contracts theretofore made in respect of, under or by virtue of which any person other than the Zemindar may have any right to any land, portion of his estate, or tenure in the place in which such land may be situate." The latter words may not be very happily chosen, but their obvious intention is to preserve the right of third parties. They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the Zemindar, or those through whom he claims and that under this contract some third party may have an interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of a *putnidar* under a *putni* grant by virtue of which the *putnidar* is lessee of the Zemindar's interest in the lands resumed, and also the rights of a *dar-putnidar* under a *dar-putni* grant. In their Lordships' opinion, therefore, not only does the Act recognise the existing title of the Zemindar to the lands resumed, but the estate taken by the Zemindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the Zemindar or those through whom he claims has or have entered into contracts affecting his existing estate, the rights of third parties under these contracts are preserved. It is a satisfaction to their Lordships to find that the view above expressed is that hitherto almost universally adopted in the Indian Courts.

The result is that the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly. With regard to costs, the appellant should pay to the respondents who have appeared one set of costs between them, but these should, having regard to the terms on which leave to appeal was granted, be as between solicitor and client.

*Appeal dismissed.*

Solicitors for the Appellant: Messrs. *Downer* and *Johnson*.

Solicitors for the Respondent Panchanani Dasi: Messrs. *Watkins* and *Hunter*.

Solicitors for the Respondent Mina Kumari Debi: Mr. *G. C. Farr*.

RAGHUBIR MISSER *v.* BHAJAN SINGH.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 1345 OF 1916.
June 7, 1917.
*Present*:—Mr. Justice Atkinson and
Mr. Justice Jwala Prasad.
RAGHUBIR MISSER AND OTHERS—
—APPELLANTS
*versus*
BHAJAN SINGH AND OTHERS—
RESPONDENTS.

*Boundary fence, ownership of—Trees growing on fence—Bengal Tenancy Act (VIII B. C. of 1885), s. 103B—Record of Rights, entry in—Presumption—Conflict with established law.*

A boundary fence is owned by the adjoining proprietors to the centre of the fence, each owner being entitled to claim the land forming the fence to its centre and the trees growing thereon.

An entry in the Record of Rights cannot have the effect of overruling well-settled principles of law. Where such entry conflicts with the established law, the established law must prevail over the entry and the presumption attaching to the entry must be deemed to have been rebutted.

**Appeal against a decision of the District Judge, Gaya, dated the 25th September 1911, reversing that of the Munsif, Aurangabad, dated the 4th June 1916.**

Mr. *Sivnandan Rai*, for the Appellants.

Mr. *Siveshwar Dayal*, for Mr. *Kulwant Sahay*, for the Respondents.

JUDGMENT.—The plaintiffs in this action seek that they may be declared entitled to 57 toddy palm trees standing upon an *ar* between Survey plot No. 83 and Survey plot No. 87 situated in *Mauza* Khanpura in the District of Gaya.

The Record of Rights in this case shows that the trees on this *ar* have been declared to be the property of the defendants, but this entry in the Record of Rights cannot have the effect of overruling well-settled principles of law. If, therefore, the entry in the Record of Rights conflicts with the established law, I think the established law must prevail over the entry in the Record of Rights, and that the presumption attaching to the entry in the Record of Rights must be deemed to have been rebutted. The plaintiffs and the defendants are occupiers of adjoining lands and their holdings are separated by an *ar* which operates as a boundary between the holding of the plaintiffs and the holding of the defendants. On this *ar* are planted the trees in suit. On the northern side of the *ar* are the defendants' lands; and on the southern side are the plaintiffs' lands; and it is on the southern side of the *ar* that the trees which are the subject-matter of this suit are planted.

The defendants claim these trees by virtue of the entry in the Record of Rights. The plaintiffs on the other hand contend that inasmuch as the trees in suit are planted on their side of the *ar* they are entitled to the trees. The *ar*, as I have said, operates as a boundary fence between the property of adjoining owners and it is well settled according to the English Law that a boundary fence is owned by the adjoining proprietors to the centre of the fence, each owner being entitled to claim the land forming the fence to its centre.

The learned Judge has held in this case that the *ar* is a boundary fence and that the trees in dispute are growing in the portion of the fence which belongs to the plaintiffs; that the ownership of the trees must depend upon whose land they are growing and that inasmuch as they are growing on the plaintiffs' land, the plaintiffs are the proprietors. I see no reason to dispute or challenge the accuracy of law stated by the learned Judge. He says that this is the settled law of the Settlement Department and that it accords with the general custom existing in this country and it also accords with the principles of equity. Therefore the Record of Rights cannot prevail in this case and as the trees in suit are growing upon the plaintiffs' lands they must be declared to be entitled to them.

The appeal is accordingly dismissed, each party bearing its own costs throughout.

*Appeal dismissed.*

SURAJ NARAIN *v.* RATAN LAL.

## PRIVY COUNCIL.

APPEALS FROM OUDH JUDICIAL COMMISSIONER'S COURT.

January 30, 1917.

*Present*:—Lord Chancellor(Lord Buckmaster), Lord Wrenbury and Mr. Ameer Ali.

*Pandit* SURAJ NARAIN AND ANOTHER—APPELLANTS

*versus*

*Pandit* RATAN LAL AND ANOTHER—RESPONDENTS.

*Hindu Law—Mitakshara—Joint family—Blending of self-acquired property with ancestral property—Effect of entries in account books as showing whether funds are joint or separate—Evidence Act (I of 1872), ss. 21, 32—Admission—Statement against party's interest, admissibility of.*

*A*, a member of a Hindu joint family, whose home was at Lucknow, practised as a Pleader at Hardoi, and made considerable savings from his professional earnings. He eventually became managing member, but was all along entrusted with the management of the joint family property in Hardoi district. Throughout he kept the accounts of the joint property and of his own earnings in one account book. He purchased sundry properties out of the funds so entered in the name of his son-in-law *B* and stated that he made such purchases to provide for *B*:

*Held*, that, by blending his private earnings with the receipts and payments on joint account, he showed an intention to make them joint property: but that it was not conclusive that all purchases entered in the book were made for the joint family: and that as regards the purchases in the name of *B*, *A*'s statement that they were made to provide for *B* was a statement against his own interest and as such admissible in evidence, and that coupled with the other evidence in the case it established *B*'s title to such properties as against the joint family. [p. 994, col. 2; p. 995, cols. 1 & 2]

Consolidated appeals from a judgment and decrees of the Court of the Judicial Commissioner, Oudh (Piggott, J. C., and Evans, A. J. C.), dated the 30th October 1909, modifying sundry decrees made by the Additional Judge, Hardoi, dated the 27th August 1908.

FACTS.—The parties belonged to a family of Kashmiri Brahmins whose history is set out in *Suraj Narain* v. *Iqbal Narain* (1). Bishan Narain formed a joint family with his sons, Raj Narain, Ram Narain, Bakht Narain, and Suraj Narain. On his father's death in 1867 Raj Narain became the manager of the family. Ram Narain qualified as a Pleader and started practice in 1869 at Hardoi, away from the family home which was in Lucknow.

(1) 18 Ind. Cas. 30, 40 I. A. 40; 17 C. W. N. 333; 13 M. L. T. 194; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).

Raj Narain died in 1890, and Ram Narain then became manager, but continued his practice as before at Hardoi. From 1869 till his death in 1900 Ram Narain kept account books in which he entered all his receipts and expenditure. The account books of the joint family continued to be written as before at Lucknow. Ram Narain's daughter was married to Ratan Lal, respondent, who lived with his father-in-law for some time, and afterwards left him to reside in a Native State where he was employed. Ratan Lal sent sums of money to his father-in-law from time to time, and Ram Narain purchased considerable properties in the name of Ratan Lal. On Ram Narain's death it was claimed on behalf of the joint family that all properties so purchased by Ram Narain stood *ismfarzi* in Ratan Lal's name and formed part of the joint family property. The Additional Judge held that most of the properties in dispute were purchased with Ram Narain's money and that the family undoubtedly possessing a nucleus of ancestral property, the properties so purchased by Ram Narain really belonged to the joint family. The Appellate Court held that the transactions impugned as *ismfarzi* were not of that nature, and that in any case the properties were purchased by Ram Narain with his self-acquired income over which he had full power of disposal, and that having regard to the circumstances of the case and the statement (quoted in their Lordships' judgment) of Ram Narain himself, the purchasing of property in the name of Ratan Lal was by way of gift to him and to his wife. Piggott, J. C. (in whose judgment Evans, A. J. C., concurred) summed up as follows:—

"For the reasons given, I am of opinion that the fair conclusion upon the evidence is that the money invested by Pandit Ram Narain in favour of Ratan Lal and Madan Mohan Lal, in so far as it was not an investment of money remitted to Ram Narain by Ratan Lal for that purpose, consisted of Pandit Ram Narain's own self-acquired property over which he had full rights of control and disposal. His intention in making these investments would appear to have been expressly to prevent this money from blending with the joint property of the family, and to make provision out of it for the benefit of his only daughter, as well as to give expression to the

affection felt by him for his son-in-law Ratan Lal. This I may note is substantially the view taken by the District Judge of Hardoi in a rent suit to which Pandit Bakht Narain and Pandit Ratan Lal were parties which came before him for disposal, and I think he put the case very fairly in the said judgment which is on the record as Exhibit F-61. Before leaving this part of the case, however, I wish to add a few words upon another point. I am by no means satisfied that, even apart from my finding that the gifts in favour of Ratan Lal and Madan Mohan Lal were made by Pandit Ram Narain out of his self-acquired property, the plaintiffs would in this case be entitled to succeed, at any rate as regards the bulk of the property in dispute, once the main issue regarding the *ismfarzi* nature of the transactions was decided against them. The position of Pandit Ram Narain must be considered, *first*, as it stood before he became manager of the joint family on the death of his brother Pandit Raj Narain in August 1890, and *secondly*, as it stood, after that date. Up to the year 1890 we have Pandit Ram Narain living, exercising his profession as a Pleader, and carrying on business as a banker and dealer in cloth at Hardoi, while his brother Pandit Raj Narain, the manager of the joint family, resided, practised and carried on business at Lucknow. With the consent of the manager of the joint family Pandit Ram Narain was allowed the control of a portion of the joint family property, consisting of shares in villages acquired by purchase, or on usufructuary mortgage, or taken on farm from Government in the District of Hardoi. The oral evidence of some of the *Ziladars* and other Estate servants produced by Pandit Ikbal Narain as witnesses in this case shows that the income of some of the Hardoi villages was ordinarily remitted direct to Pandit Raj Narain at Lucknow; but no doubt in the main the control of the income arising out of the immoveable property owned by the family in the Hardoi District was in the hands of Pandit Ram Narain. We do not know with any certainty how accounts were settled up between Ram Narain and Raj Narain, and how they stood to one another with reference to their respective enjoyment of the income of the joint family property which came into their hands; but it is fairly presumable that Pandit Ram Narain was allowed by his elder brother to spend a certain portion of the joint family income according to his own will and pleasure, as representing an allowance made to him for his personal enjoyment out of the joint family funds. Now if it be conceded, though I am not prepared to do so except for the sake of argument, that the investments made by Pandit Ram Narain in favour of Ratan Lal and Madan Mohan Lal were partly drawn, or even wholly, from that portion of the joint family income thus left to his control and disposal, what would now be the position of the plaintiffs with reference to these investments? Suppose Pandit Ram Narain had simply squandered the money in riotous living; suppose he had made large gifts of cash or jewelry in favour of some women of bad character on whom he was besotted; or suppose he had made large gifts in favour of some religious teacher, or of some political cause to which he had become violently attached, would the plaintiffs now be entitled to call in question these transactions, or to pursue in the hands of the donees property which could be proved to have been acquired by means of these donations? I conceive not. We know that Pandit Raj Narain himself as manager of the joint family never called in question any of these transactions. If he had felt dissatisfied with Pandit Ram Narain's management of the joint family property he would have been entitled to take the same under his own control, and to limit Ram Narain strictly to the enjoyment of such earnings as might admittedly represent his own self-acquisitions, together with such specific allowance from the joint family funds as he in his capacity of manager might see fit to make. He might, if very seriously dissatisfied with his younger brother's conduct, have brought a suit for partition, or have taken such stringent measures towards excluding Ram Narain from the enjoyment of the joint family property as would have driven the latter to sue for partition on his own account. In such suit for partition, there might also have been a settlement of account, and issues might have been raised as to whether the money squandered by Pandit Ram Narain, or used by him for purposes to which joint family funds should not have been applied, might not be assigned to Pandit Ram Narain's

own share, as having been drawn by him in advance from the *corpus* of the family property. I very much doubt, however, whether any suit would have been maintainable against the donees for the recovery of money given to them by Pandit Ram Narain, not out of the *corpus* of the joint family property or by alienation of immoveable property belonging to the joint family, but out of the income enjoyed by him with the consent of the manager. In any case we know as a matter of fact that Pandit Raj Narain made no attempt in his lifetime to interfere with any of the dispositions in favour of Ratan Lal or Madan Mohan Lal which it is now sought to call in question. From the month of August 1890 onwards to the time of his death, Pandit Ram Narain occupied the position of manager of the joint family. In this capacity his control over the joint family funds would extend so far as to permit him to make gifts of affection to a reasonable and proper extent out of the income of the joint family property. I may refer on this point to *Bachoo* v. *Mankorebai* (2). The rights of the other members of a joint family to control wasteful or improper expenditure of the income on the part of the manager rest principally upon their right at any moment to claim a partition, accompanied by a proper settlement of accounts. The question how far they would be entitled to sue for the revocation of gifts made out of the income by the manager of the joint family seems to me at least a doubtful one, and might depend upon the particular circumstances of each case. In the present case at any rate we know that no objection was taken by any other member of the family in Pandit Ram Narain's lifetime to any dispositions made by the latter in favour of his son-in-law or his daughter's son. It is only after Pandit Ram Narain's death that the plaintiffs come into Court with the plea that, even supposing the property now in possession and enjoyment of the defendants Ratan Lal and Madan Mohan Lal was received by them by means of gifts made by Ram Narain, such gifts should be held to be invalid and the defendants liable to restore or account for the same. From every point of view this part of the plaintiffs' case, in my opinion, fails.

(2) 29 B. 51; 6 Bom. L. R. 268.

Hence these appeals.

Mr. *A. M. Dunne*, for the Appellants.—There were two questions for determination: (1) Whether there is sufficient evidence to show that Ram Narain so blended his self-acquired property as to make it joint. (2) If the purchases were made with the joint funds—the result of the blending—was the claim of the respondent maintainable? As to the first, it has been concurrently found that the family was joint and undivided, and that for some years Ram Narain was its manager. The whole property possessed by the members of the family ought to be presumed to be joint and the burden of showing that it was not joint lay on the respondent. *Luximon Row* v. *Mullar Row Bajee* (3).

The purchases in Ratan Lal's name were *benami*. In such cases the test is the source from which the purchase-money was paid, *Dhurm Das Pandey* v. *Musammat Shama Soondri Debiah* (4). There is no presumption of advancement in India. On the contrary the presumption is in favour of its being a *benami* purchase unless the contrary is shown, *Gopeekrist Gosain* v. *Gungapersaud Gosain* (5) and *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry* (6). There was nothing to show that Ram Narain made any distinction between his professional earnings and the income from the family estate. The accounts kept by him indicate that both incomes were blended together and the statement of Ram Narain shewed that all was joint. The present case falls within the principle laid down in *Lal Bahadur* v. *Kanhaiya Lal* (7).

As to the second point the respondent has failed to prove that any gift was made to him, nor was a gift of such valuable property by the manager of a

(3) 2 Knapp 60; 5 W. R. (P. C.) 67; 1 Norton's L. C. 169.

(4) 3 M. I. A. 229 at p. 240; 6 W. R. (P. C.) 43; 1 Sar. P. C. J. 271; 1 Suth. P. C. J. 147; 18 E. R. 484.

(5) 6 M. I. A. 53; 2 Suth. P. C. J. 13; 1 Sar. P. C. J. 493; 4 W. R. (P. C.) 46; 19 E. R. 20.

(6) 10 M. I. A. 403; 5 W. R. (P. C.) 11; 1 Suth. P. C. J. 609; 2 Sar. P. C. J. 164; 19 E. R. 1025.

(7) 34 I. A. 65; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 29 A. 244 (P. C.).

joint family to his daughter warranted by the Hindu Law.

Messrs. *L. De Gruyther*, *K. C.*, and *B. Dube*, for Ratan Lal, Respondent submitted that Ram Narain did not blend his professional income with the joint family funds. The real test is, Did Ram Narain throw his own self-acquired income into the common stock? There was no evidence that he did so. The system of accounts that he adopted only shewed that he made entries of all his receipts and expenses in one book. But he kept other account books also which have not been produced by the plaintiffs and which would have shown that he kept the funds of the joint family separate from his own. In the case of *Lal Bahadur* v. *Kanhaiya Lal* (7) there was one common stock, and the members of the family were father and son. Ram Narain became manager after 1890. Ram Narain had absolute power to dispose of his professional income, and that he did by purchasing properties in Ratan Lal's name for the benefit of his daughter. The purchase was not *benami* or *ismfarzi*. It was made with the deliberate object of providing for his daughter and her children. His statement made in 1899 and his conduct showed that the gift was intended and made. There was no reason for the transaction to be *benami*.

In *Gopeekrist Gosain's* case (5) the family was joint and the purchase was made by the father in his son's name. But here all the circumstances point to the fact that Ram Narain intended that the beneficial interest in the properties purchased with his funds should belong to the respondent and his wife. Reliance was placed on the following authorities: *Obhoy Churn Mookerjee* v. *Punchanun Bose* (8); *Rajah Chundernath Roy* v. *Ramjoy Mozoomdar* (9); *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (10); *Uman Parshad* v. *Gandharp Singh* (11).

(8) (1864) Marshall 564; 2 Hay 630.

(9) 15 W. R. (P. C.) 7; 6 B. L. R. 303; 2 Sar. P. C. J. 613.

(10) 13 M. I. A. 395; 14 W. R. (P. C.) 14; 6 B. L. R. (P. C.) 578; 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 571; 20 E. R. 599.

(11) 14 I. A. 127; 15 C. 20; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique & Jackson's P. C. No. 98; 7 Ind. Dec. (N. S.) 599.

The Courts below were right in respect of the properties to which section 517, Civil Procedure Code, 1882, applied.

Mr. *Dunne* in reply—The case in Marshall's Report (8) is distinguishable. It was under the Dayabhaga Law under which the money belonged to the father, but here the money was joint property.

The statement made by Ram Narain in 1899 is inadmissible in evidence. Section 32 (3), Evidence Act, does not apply as it is not against the interest of Ram Narain. He was interested in supporting a gift of a portion of the joint family property which he had illegally made. It was a statement made in his own favour rather than against himself. Some properties were purchased in Ratan Lal's name at auction sales, and both Courts have held that section 517, Civil Procedure Code, 1882, precludes the plaintiffs from claiming them. As to that reference was made to *Bodh Singh Doodhooria* v. *Gunesh-chunder Sen* (12); *Sankunni Nayar* v. *Narayanan Nambudri* (13).

## JUDGMENT.

LORD CHANCELLOR (LORD BUCKMASTER.)—In April 1867 Bakhshi Bishnu Narain died, leaving four sons, whose names in order of birth are: Raj Narain, Ram Narain, Bakht Narain and Suraj Narain. The family was a Hindu joint family, governed by the Mitakshara Law and possessing ancestral property. Accordingly, upon his father's death the eldest son, Raj Narain, became *karta* and so continued until his death in August 1890. His brother, Ram Narain, then succeeded and acted as *karta* until his death in October 1900. Disputes then arose between Bakht Narain and Suraj Narain as to Bakht Narain's claim to be registered as *karta* and as to their rights and the rights of their respective sons in the joint family properties. Some arrangement and reconciliation of this family quarrel, though one neither firm nor durable, seems to have been effected, but disputes broke out again with regard to the property, and four suits were instituted on the 3rd November 1903 by Bakht Narain, and a

(12) 12 B. L. R. (P. C.) 317 at p. 329; 19 W. R. 356; 3 Sar. P. C. J. 253.

(13) 17 M. 282; 4 M. L. J. 64; 6 Ind. Dec. (N. S.) 195.

fifth suit in 1905 by Suraj Narain, who claimed a half share in the entire joint estate. These appeals are consolidated appeals in those suits, the question for determination being whether certain very numerous properties acquired since the death of Bakshi Bishnu Narain are joint property. The appellants, who are certain members of the joint family, contend that they are. The respondent, who is the son-in-law of Ram Narain, says that they are not. The Subordinate Judge decided in favour of the present appellants. The Court of the Judicial Commissioner of Oudh reversed that decision. Hence these appeals.

Raj Narain had no son. Ram Narain also had no son, but had one daughter, to whom her father was much attached. She married Ratan Lal, the respondent, who contends that the disputed properties were either bought with his money or were given him by Ram Narain, and for those reasons are his own, or, at any rate, are not joint property.

The material facts that led up to this dispute are these:—From about the year 1864 to the year 1880, or, perhaps later, Raj Narain practised as a Pleader at Lucknow. In the year 1869 Ram Narain, who was then 23 years old, left Lucknow for Hardoi, and from that year onwards practised as a Pleader at Hardoi. He was successful, and later in life became a rich man. Before 1890, while Raj Narain was *karta*, and after 1890, when Ram Narain was *karta*, properties were acquired at Hardoi. They were taken in various names—that of Raj Narain, that of Ram Narain, that of Ratan Lal, those of Ratan Lal and of his son Madan Mohan Lal, and of other persons. The books of account of the family property were kept at Lucknow, where Raj Narain lived; but Ram Narain, who was at Hardoi, acted as manager of the properties at Hardoi as well before as after 1890. He bought properties at Hardoi, receiving, at any rate in one instance which is proved (that of the village Mahora), money from Lucknow to make the purchase, and he received income and made disbursements in respect of joint family property at Hardoi. But the purchases at Hardoi were made to a large extent not with joint family moneys, but with fees earned by Ram Narain in his practice as a Pleader and it is with these properties that these appeals are concerned. Under these circumstances their Lordships have taken as the first question to be answered in order to adjust the rights between the parties this question:—

Whether there is sufficient evidence to show that Ram Narain so blended his own property with the joint property as to make the whole joint property.

In the Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep moneys and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the circumstances of the case. The latest authority is *Lal Bahadur* v. *Kanhaiya Lal* (7). The facts there were that in 1866 a partition of ancestral property had been effected between three brothers. The question arose in the case of one of the brothers who had thus taken his third share of the ancestral property. He had children. From the year 1852 onwards he had earned money as an official of the Indian Education Department, which he had paid into the same banking account as moneys admittedly joint. The question was whether these earnings were joint property. This Board held that they were. The dominant sentence in the judgment is as follows:—

"It is admitted that Durga Parshad and his sons lived together as a joint Hindu family, and it is established that there was a considerable nucleus of ancestral property in his hands after the partition. The onus was, therefore, on the respondent to prove that his subsequently acquired property was his separate estate."

Their Lordships call attention to the fact that the person here spoken of as having ancestral property "in his hands" was the *karta*. Down to 1890 Ram Narain was not the *karta*. After that date he was. The decision, therefore, applies in strictness to the present case only from that date. Further, in that case the father was the *karta* and not, as in the present case, a brother. But in the facts to be presently stated their Lordships find that the decision has a very close application to the present case.

The position with regard to the private earnings of Ram Narain is this: It has not been established that any circumstances existed from which it could be inferred that there was any joint family estate in the separate earnings of the four brothers, and it must be accepted that the earnings of Ram Narain were monies which he was at perfect liberty to use in any manner that he thought fit. At the same time, it would be quite consistent with the principle which regulates joint family estates that he should, in fact, have brought them into the joint property and made them part of the whole. The question is: Has he done so?

There is really little or no direct evidence upon the point except the books of account that he kept, supplemented by his own verbal evidence in a suit that was decided in 1893. But this evidence is important, and, in their Lordships' view, throws considerable light upon the true history of the case. The book of account that he kept, apart from the books of a cloth business carried on at Hardoi and admittedly joint property, and separate registers and accounts of each of the villages, was a book which appears to have been in the same form and continued from 1869 down to the date of his death. It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources, and undoubtedly it includes – and, so far as their Lordships are aware, it is the only book that includes – the receipts of his earnings as Pleader and his private payment. For the year 1876 the book has been placed *in extenso* in the record. This year has been selected as a typical year, and their Lordships have accepted it as characteristic of the accounts throughout the whole material period of time. In addition to receipts from his professional income, it shows receipts from several properties which are admittedly joint properties, and, although the books and materials were open for the respondents' inspection, and these books included the register of the villages admittedly owned by the joint family in the Hardoi district, it has been impossible to show that these entries do not include receipts from all the joint properties that were then under Ram Narain's management. The entries also undoubtedly show certain payments of joint accounts, and in the case of the Mahora village they show the receipt of money from the joint family estate and its application in the purchase of this property. There are entries of revenue payments in respect of villages which were joint property; of income received from such villages; of fees received for professional work as Pleader; of payments for the purchase of villages—*e.g.*, the village of Samrihta, which was acquired in the name of Raj Narain, the *karta*, in July 1876; the villages of Kasmundi and Backharwa, acquired in the name of Raj Narain in the same month; the village of Masit, acquired in December 1876 in the name of Ram Narain; of payments made to servants at Lucknow on account of their pay, and so on. The account may be called an "omnibus" account, into which Ram Narain's professional fees are carried in common with other items such as described, and from these mingled sources a balance is struck day by day, and the whole account is abstracted and summarised at the end of the year. The receipts amount to Rs. 27,205-13-8, of which Rs. 2,866-4-9 are fees, Rs. 12 are presents, Rs. 1,578-3-6 are income from "personal villages on account of village Mahora" and from "joint village", Rs. 2,819-6-3 are "from the account of the personal and the leased villages," and so on. On the other side are "purchases, Rs. 19,056-14-0." among which the villages of Masit, Samrihta, and Kasmundi are found. As the result, a credit balance of Rs. 189-1-6 at the beginning of the year becomes a credit balance of Rs. 141-11-1 at the end of the year.

Now there is nothing whatever to show that out of this account payments were from time to time transmitted to the joint family accounts that were kept at Lucknow, and this, in their Lordships' opinion, is a most material matter because, if no such remittances were made, it follows that the balances that were carried forward from time to time and brought into account against future purchases were blended balances of Ram Narain's own earnings and of joint monies and that they remain so blended throughout the whole period of time. It is quite true

that, as time went on, other monies were also entered in these accounts which cannot be regarded as joint. There were monies received from Kishan Lal and Ratan Lal, from his daughter, and, it may even be, from other sources, and it is urged that these monies cannot possibly be regarded as blended with the joint family estate, and that, therefore, Ram Narain's private earnings ought equally to be regarded as outside the joint property. But this argument is not conclusive, because these monies, regarded as the monies of Kishan Lal, Ratan Lal and his wife, were not the monies of people sharing in the joint estate, and were incapable of being blended in the manner suggested and they would remain monies for which Ram Narain would be liable to account; but his own means stood in a different position, and if their association with the joint family monies in the account in the manner mentioned would be sufficient evidence of their being blended, the mere fact that other monies were there also would not necessarily destroy the value of the inference.

The respondents had the means of showing before the Subordinate Judge that this system of account could be and was explained, *e.g.*, that this was but an omnibus book, and that he kept a separate joint property account. The respondents did not do so. The Subordinate Judge had all the books before him. Their Lordships have not. He concluded that the appellants were right. Their Lordships are not prepared to differ from him as to the effect of the books, all of which he saw and some of which their Lordships have seen. They have looked carefully to see what the Judicial Commissioners held on appeal as regards this part of the case. They express themselves as "perplexed" by the entries and found it "impossible to arrive at any certain conclusion as to the system on which these various account books were kept up." Their Lordships are not prepared to stop at the point of perplexity. They think that the books blend Ram Narain's professional earnings with his receipts and payments on account of joint properties, and thus afford evidence upon the question under consideration.

A second and most important head of evidence is found in a deposition made by Ram Narain on the 5th August 1893. This was three years after he became *karta*. He says:—

"The money was of our family, partly on account of savings from my practice and partly from remittances from Lucknow. The sale-deeds are in names of Raj Narain and some in my name too. I did not send any money in cash to Raj Narain from Hardoi. He never asked me to send."

And in cross-examination:—

"Money was not sent from Hardoi, as property was being purchased there. The proceeds of sale of ancestral villages and other ancestral money were used in villages in this district and also in other work of the family. No profit was [*sic*] ever took place in our family. My father had four sons: *viz*, Raj Narain, eldest, myself, Bakht Narain, and Suraj Narain. We were all joint and all family property was joint. Partition never took place. One member of the family works as manager. Raj Narain was manager and now I am manager. I, Bakht Narain, and Suraj Narain are still joint"

Their Lordships cannot find that the Judicial Commissioners gave any effect to this evidence. It is plain and directly to the point, and they have found no answer to it.

This conclusion, however, does not determine the case. Some of the properties that are in dispute are properties that were purchased in the name of the respondent, Ratan Lal, and it is still open to him to show that each of those transactions represented a gift from Ram Narain to himself. This question also is singularly destitute of direct evidence. There is an undoubted foundation from which such an intention could be readily assumed. Ram Narain was on terms of very close and intimate affection with his daughter. She was his sole child, and the formal phrase *nurchashmi*, under which he constantly referred to her, conveyed more than a formal meaning. Ratan Lal, his son-in-law, also shared his affection, and seems to have made considerable sacrifices in return. He allowed his wife to stay in her father's house, and in the disputes which divided the family he took the side of Ram Narain against

his own parents, and it is said, was, therefore, disinherited. Ram Narain undoubtedly received from his son-in-law monies for profitable investment, and the suggestion that these monies might be regarded as returned by the payment of certain household expenses is one repugnant to the best ideas and traditions of a Hindu family, and one which their Lordships wholly reject. It is, therefore, easy to infer that Ram Narain had many motives which would prompt him to make abundant provision for his daughter and her husband, neither of whom would in the absence of such provision have any share in his estate.

But even with this presumption, the mere fact of purchases of properties in the name of Ratan Lal would not of itself be sufficient to show that they were intended as a gift, but their Lordships think that evidence is not wanting to make the inference complete, and that evidence is contained in the statement of Ram Narain himself. Their Lordships are in entire agreement with the Subordinate Judge and the learned Judicial Commissioners in holding that the statement of Ram Narain made in 1899 is properly admitted in evidence. It was a statement which, whether the property was joint or whether it was his own, it was against his own personal interest to make, since in effect it declared that the properties there referred to were those of Ratan Lal; nor do their Lordships see any reason why it should be discredited; and if accepted it furnishes sufficient evidence, taken in connection with the circumstances, to support the claim of Ratan Lal. It is in these terms:—

"The capital outlay required to pay the arrears of revenue was provided partly by me and partly by Ratan Lal. The profits will be enjoyed entirely by him. I manage this estate for him and also his other Zemindari in this District. I have bought a lot of Zemindari in his name, in order to make provision for him, as against my adopted son, who would be my heir."

Their Lordships do not think that this evidence and that given in 1893 are irreconcilable. The former related to a period different from the latter, and it does not follow that they cover the same transactions. Upon the view which their Lordships have already expressed, Ram Narain did blend his own monies with the joint family monies, and purchased property in his own name and that of Raj Narain which must be regarded as joint estate; but this does not necessarily lead to the conclusion that the properties purchased in the name of Ratan Lal were of the same character. It is admitted that there were abundant monies coming from the private earnings of Ram Narain to furnish the consideration for these purchases, and that he was at full liberty to use them for that purpose if he so desired. But if once the intention to buy them for Ratan Lal be accepted, as their Lordships think it must, there only remains the question as to whether these monies had been so dealt with by Ram Narain before his purchase as to put it outside his power to gratify the intention of making the gift. The material before their Lordships does not lead them to this conclusion. Remembering that Ram Narain had full power to deal with his earnings as he thought fit, the fact that he blended those that were not otherwise used does not mean that every entry of a purchase in the book is an entry of a transaction so dealt with that it must be regarded as joint property. If, for example, having monies of Ratan Lal's in his own hands, he either by using his own monies or by borrowing on his own account obtained the funds necessary for the purchase of the property in question, and such properties were bought with the intention of benefiting Ratan Lal, the mere fact that the transactions were recorded in the books which also recorded the receipts of his own and the joint monies would not prevent them being used for that purpose, and this view appears to have been taken by the Subordinate Judge; but if this be so, it appears to their Lordships to apply equally to purchases made with Ram Narain's monies alone, when once it is accepted that they were used with the intention of making a gift. The learned Judicial Commissioners appear to think that even assuming that they had been blended in the first instance, there was nothing to prevent Ram Narain from making this use of them and there would appear to be some support for this view in the fact that similar joint monies were apparently used for the

endowment of the daughter of Ikbal Narain

Their Lordships do not, however, think it is necessary to rely on this circumstance. For reasons already given, they think that the gift in favour of Ratan Lal may be regarded as established so far, but so far only, as the properties are concerned in the Hardoi district, which were bought in the name of Ratan Lal alone.

There only remains one further point for consideration, and that affects certain properties, Nos. 1—4 inclusive and No. 32 in List 5, which were purchased at auction at a sale under order of the Court in the name of Ratan Lal. Their Lordships were satisfied that any claim to these properties by the appellants is defeated by section 317 of the Civil Procedure Code.

Their Lordships will, therefore, humbly advise His Majesty (1) that these appeals ought to be allowed in part; (2) that the decrees of the Court of the Judicial Commissioner of Oudh respectively, dated the 30th day of October 1909, and the decrees of the Court of the Additional Judge of Hardoi respectively, dated the 27th day of August 1908, as regards the following properties which have not been in question upon these appeals ought to be affirmed: List V annexed to plaint in Suit No. 1 of 1908, Item 23, *Mauza* Gobardhanpur, 2 *biswas*; List VIA annexed to plaint in Suit No. 1 of 1908, Item 1, houses and shops in Hardoi *Khas*; List VIII annexed to plaint in Suit No. 1 of 1908, Item 1., decree in suit of *Pandit Ratan Lal v. Sripal Singh*, and the business carried on in the cloth shop at Hardoi; (3) that it ought to be declared that the appellants are also entitled to the following properties: List V annexed to plaint in Suit No. 1 of 1908, Item 30, Kashmiri Bagh Sitlaji, Item 31, half share of the land at Pakra; List VIA annexed to plaint in Suit No. 1 of 1908, Item 19, land at Suklapur, Item 20, land at Thok Khala, Item 21, land at Thok Uncha; List VIII, annexed to plaint in Suit No. 1 of 1908, Item 34, decree against Pandit Ram Narain, Item 35, agreement for costs; (4) that the appellants' claim to the remaining properties ought to be dismissed; (5) that in other respects, except as to costs, the decrees of the Court of the Judicial Commissioner ought to be set aside; (6) that subject to the aforesaid declarations and modifications the decrees of the Court of the Additional Judge ought to be restored; and (7) that the parties ought to bear their own costs of these appeals.

*Appeals allowed in part.*

Solicitors for the Appellants: Messrs. *James Gray & Son.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 134 OF 1915.

April 20, 1917.

*Present*:—Mr. Justice Fletcher and Mr. Justice Newbould.

NANDA LAL BANERJEE—PLAINTIFF—APPELLANT

*versus*

UMES CHANDRA DAS—DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 167—Incumbrance, annulment of—"Date of sale," meaning of.*

The words "date of sale" in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed, and not the date when the property is actually sold to the purchaser. This is especially so where the sale took place when the Civil Procedure Code of 1882, under which the purchaser could acquire no interest until the sale certificate was issued, was in force. [p. 998, col. 1.]

*Yusuf Gazi* v. *Asmatullah*, 15 Ind. Cas. 430; 17 C. W. N. 440; 16 C. L. J. 131, not followed.

*Matangini Chaudhurani* v. *Sreenath Das*, 7 C. W. N. 552, followed.

Appeal against the decree of the District Judge, 24 Perganas, dated the 12th September 1914, confirming that of the Subordinate Judge at Alipur, dated the 30th June 1913.

FACTS of the case appear from the judgment.

Babus *Dwarka Nath Chuckerbarty* and *Ramtaran Chatterjee*, for the Appellant.—The case now set up for the defence is that the plaintiff had knowledge of the incumbrance, *viz*, the *dar-putni* lease but no such point was taken in the written statement, nor was there any issue raised on this point. So the defendant should not be allowed to raise this point not taken in the written statement. It is a question of fact, and the

defendant was bound to state it specifically in the written statement.

Then even if the plaintiff had any knowledge of the incumbrance, that knowledge is not sufficient because he had no notice of the incumbrance as a purchaser. A notice is no notice unless it is taken by a person interested or bound to take notice. The word "notice" in section 167, Bengal Tenancy Act, contemplates "notice by a purchaser as such." To annul the incumbrance notice to the Collector under section 167 may be given within a year from the date of sale. "Date of sale" in section 167 should be taken to mean "day of confirmation of sale." The notice given in this case within a year from the confirmation of sale was a good notice and was sufficient to annul the incumbrance. The section says that the incumbrance is annulled as soon as the notice is given to the Collector.

The purchaser, however, has no title to the property unless the sale is confirmed. So he cannot give any notice for the annulment of incumbrance prior to the confirmation of sale, for it would be an anomaly if the incumbrance can be annulled by the purchaser prior to the accrual of title to the property purchased. See *Banko Behary Das* v. *Krishna Chandra Bhowmick* (1).

Babu *Mohesh Chunder Banerji*, for Babu *Jyotish Chunder Hazrah*, for the Respondent.—The point that the purchaser had notice of the incumbrance at the time of sale was taken in the written statement, and an express issue was raised on this point. At the time of sale the plaintiff had knowledge of the incumbrance but still he did not give notice for its annulment within a year from the date of sale.

As regards the question within what period notice for the annulment of incumbrance should be given, I rely on the express wording of the provisions of section 167, Bengal Tenancy Act. There is no ambiguity in the language used in the section and section 167, sub-section (1), says that notice is to be given within a year from the date of sale or the date on which the purchaser first had notice of the incumbrance. The case of *Yusuf Gazi* v. *Asmatullah* (2) supports my contention. "Date of sale" cannot by any stretch of language mean date of confirmation of sale. If the Legislature had in mind "date of confirmation," there is no reason why those words were not used but instead of them the expression "date of sale" is used.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned District Judge of the 24-Pergannahs affirming the decision of the Subordinate Judge at Alipore. The plaintiff sued for a declaration of his right to a *putni* which he had purchased at a sale for arrears of rent held under the provisions of the Bengal Tenancy Act. The sale at which the plaintiff purchased took place on the 16th December 1907. Litigation ensued after the sale and the sale was not confirmed until the 5th September 1908. On the 22nd September 1908, the plaintiff took possession and the present defendant then set up a *dur-putni* right. On the 8th March 1909, an application was made under section 167 of the Bengal Tenancy Act to annul the defendant's encumbrance and the notice was served on the 13th April 1909. The present suit was brought on the 12th April 1912. The defence as raised by the defendant in his written statement was, first of all, that the plaintiff was the *benamidar* of the defaulting tenant. That was found against the defendant. So was also the defence raised that no notice had been served under the terms of section 167 of the Bengal Tenancy Act. But the suit was dismissed on the ground that the plaintiff had notice of the defendant's encumbrance before he purchased the property and, therefore, he was out of time under the terms of section 167 in not having served the notice to annul the defendant's encumbrance in time. It has been argued in this appeal that that point was not raised in the defence and no issue had been settled with regard to it and that the defendant ought not to have been allowed to enter into that defence. There is a good deal to say with regard to that. In the view that I take of the authorities of this Court, I am unable to agree with the view of the learned

(1) 9 Ind. Cas. 528; 18 C. W. N. 349; 18 C. L. J. 170 on L. P. A. 21 Ind. Cas. 419.

(2) 15 Ind. Cas. 430; 17 C. W. N. 449; 16 C. L. J. 131.

Judge of the lower Appellate Court that the date of the sale was the 16th December 1907, and not the date on which the sale was confirmed, namely, the 5th September 1908. If the 'date of sale' mentioned in section 167 of the Bengal Tenancy Act is the date when the sale is confirmed, then it is quite clear that the notice that was served on the 13th April 1909 was within one year from the date of the sale. The sale to the plaintiff was made under the provisions of the Code of Civil Procedure of 1882 and, under section 316 of that Code, the title to the property sold in execution vested in the purchaser from the date of the certificate of sale and not before. Section 65 of the present Code of Civil Procedure is in different terms. The question as to what is the meaning of the words "date of sale" as used in the sections of the Bengal Tenancy Act has formed the subject of judicial decision in certain cases before this Court. The first case that reference may be made to is the case of *Matangini Chaudhurani* v. *Sreenath Das* (3), where Maclean, C. J., and Mr. Justice Stevens held that the words "date of sale" used in section 169, sub-section (1), clause (*c*), of the Bengal Tenancy Act meant the date of the confirmation of sale and not the actual date of sale. It is quite true that that decision was on section 169, but there cannot be any difference, so far as I can see, between the meaning of the words 'date of sale' as used in section 169 and in section 167. It is quite true that subsequent to that decision, the Legislature amended section 169 by altering the words 'date of sale' to 'the date of the confirmation of sale;' but still the decisions of this Court remain unaffected that the words 'date of sale' used in the Act as they existed before the amendment meant the date when the sale was confirmed. There is no reason why that decision should not govern the words 'date of sale' as used in section 167. The next decision that reference may be made to is the decision in the case of *Yusuf Gazi* v *Asmatullah* (2), a decision of Mr. Justice Brett and Mr. Justice Sharfuddin. There the learned Judges held that the words 'date of sale' in section 167 meant the date on which the sale of the holding or tenure had actually taken place and the reason on which they based their judgment is this: that as section 169 as amended referred to the date of the confirmation of the sale, therefore, in section 167 where the words 'the date of the confirmation of the sale' did not appear, the words 'date of sale' must refer to a period other than the date of the confirmation of the sale. In my opinion, there is a manifest fallacy. Section 167 and section 169 prior to the amendment both used the same words, namely, the words "date of sale." It was judicially declared in this Court that the words 'date of sale' in section 169 meant the date of the confirmation of the sale and the Legislature in amending section 169 clearly did not consider the terms of section 167, and section 167 remained unaffected by that amendment. I think that the learned Judges who decided the case of *Yusuf Gazi Asmatullah* (2) were not justified in distinguishing the case, or, at any rate, in departing from the decision in the case of *Matangini Chaudhurani* v. *Sreenath Das* (3), on the ground that by a subsequent amendment of section 169 different words had been used to those that appeared in section 167. It may be doubted whether the same learned Judges in a subsequent case did not to some extent go back upon that decision, because in the case of *Taibatannessa Chowdhurani* v. *Pravabati Dasi* (4) those learned Judges came to the conclusion that in certain circumstances the words 'date of sale' as mentioned in section 167 of the Bengal Tenancy Act meant the date of the confirmation of the sale. With all due respect to the learned Judges, the conduct of a defendant cannot alter the meaning of the words used by the Legislature in a particular section of an Act. I think the learned Judges in the decision reported as *Taibatannessa Chowdhurani* v. *Pravabati Dasi* (4) have shown that in certain cases at any rate, the words 'date of sale' as used in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed. The next decision that has been referred to is the decision of a Judge sitting singly in this Court; that is, the decision of Mr. Justice N. R. Chatterjea in the case of *Banko Behary Das* v. *Krishna Chandra Bhowmick* (1). There the learned Judge held distinctly that the words 'date of sale' used in section 167 of the Bengal Tenancy Act meant the date when the sale was confirmed and he did so relying upon the decision of this Court

(3) 7 C. W. N. 552.

(4) 4 Ind. Cas. 750; 10 C. L. J. 640.

in the case of *Matangini Chaudhurani* v. *Sreenath Das* (3). It is quite true that that decision is not binding on us; but the opinion of the learned Judge is, of course, entitled to the highest respect. In his view, the case was covered by the case of *Matangini Chaudhurani* v. *Sreenath Das* (3), and I think he rightly held so. The case of *Matangini Chaudhurani* v. *Sreenath Das* (3), which is the first of these authorities is not distinguishable from the present case. It is quite true that against the decision of Mr. Justice N. R. Chatterjea a Letters Patent Appeal was preferred; but the judgment of the learned Judges who heard the Letters Patent Appeal rested on grounds other than that as to the meaning of the words 'date of sale' as used in section 167, but they cast no doubt upon the correctness of the decision of Mr. Justice N. R. Chatterjea in that respect. I think the words 'date of sale', especially where the sale took place under the Code of 1882 and where the purchaser could acquire no interest until the sale certificate was issued, mean clearly the date of the confirmation of the sale. To hold otherwise would practically in some cases take away from the plaintiff the right to annul encumbrances at all because, as in the present case where the plaintiff has been found to have known of the encumbrance before the date of the actual sale and litigation ensued, and the sale was not confirmed for a considerable time after the date of the sale, if the date referred to in section 167 of the Bengal Tenancy Act be the date of the actual sale, than the purchaser will have no period within which he can annul encumbrances unless he elects to annul the encumbrances before his title to the property has been finally determined. I think that the view that was expressed by Mr. Justice N. R. Chatterjea in the case of *Banko Behary Das* v. *Krishna Chandra Bhowmick* (1) is the correct view and that the words 'date of sale' referred to in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed, and not the date when the property is actually sold to the purchaser. That being so, even if this defence was open to the defendant in this case, I think it was not sufficient to bar the plaintiff's suit. The learned Judge of the lower Appellate Court dismissed the plaintiff's suit on his finding that the plaintiff was out of time for the purpose of annulling the encumbrance. There were other issues arising on the merits and they have not been determined. The case must, therefore, go back to the lower Appellate Court to have the appeal re-heard with reference to the other issues which have not been disposed of. Costs will abide the result of the re-hearing by the lower Appellate Court.

NEWBOULD, J.—I agree.

*Case sent back.*

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## CALCUTTA HIGH COURT.

IN THE MATTER OF APPEAL NO. 87 OF 1914.

January 9, 1917.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

*Re* KETOKEY CHARAN BANERJI AND OTHERS - DEBTORS—PETITIONERS

*versus*

*Srimati* SARAT KUMARI DEBI—CREDITOR—OPPOSITE PARTY.

*Costs awarded against nominal party put forward by real party, whether can be recovered from real party —Inherent power to award costs—Appellate Insolvency Jurisdiction of High Court—Civil Procedure Code (Act V of 1908), s. 151.*

Proceedings for the adjudication of the petitioners in insolvency, instituted in the Original Side of High Court by certain persons in the name of a lady, were dismissed with costs against the lady by an order of the Court, and an appeal against the order preferred in the name of the lady was also dismissed with costs by the Appellate Court:

*Held*, on a substantive application of the petitioners to the Appellate Court that the real people who put forward the lady to institute the proceedings for the adjudication in insolvency should be made to pay the costs of the proceedings awarded against the lady and taxed by the Taxing Officer, although those persons were not present when the taxation of costs took place on notice to the lady, and although one of them did not live or carry on business within the limits of the Original Side of the High Court. [p. 1000, col. 1; p. 1001 col. 2.]

The High Court in its Appellate Insolvency Jurisdiction has ample inherent power to make an order in regard to the costs of the proceedings for adjudication in insolvency, where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court. [p. 1000, col. 2.]

Rule granted on the application of the petitioners on the 21st December 1916.

FACTS of the case will appear from 37 Ind. Cas. 71.

Mr. *N. Sarkar*, for the Petitioners.

Mr. *H. D. Bose*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In this case there was

a firm consisting of certain persons Ketokey Charan Banerjee, Apurna Chunder Banerjee, Keshini Charan Banerjee, Gyanada Churn Banerjee and Nagendra Nath Banerjee, who, as I understand, it has been found, had certain interest in the firm. The business was carried on under the style of A. C. Chatterjee & Co. The first four of the above-mentioned persons were adjudicated insolvents upon the application of one Sarat Kumari Debi who is the wife of one Surendra Nath Banerjee, and it has been found that Surendra Nath Banerjee and Nagendra Nath Banerjee were joint in business. The basis of the application for the adjudication in insolvency was that certain shares in the business had been assigned to an individual whose name was Dinonath Mukerjee and the order of adjudication was made upon that allegation. After two or three investigations, it was found that the assignment to Dinonath was an assignment to him as a *benamdar* for Nagendra Nath Banerjee and Surendra Nath Banerjee. It has also been found by this Court that Sarat Kumari Debi was not a real creditor of the firm at all but that she was put forward merely as a blind for Nagendra Nath Banerjee and Surendra Nath Banerjee, so that the real position was this that Nagendra Nath Banerjee and Surendra Nath Banerjee were in reality presenting the petition for the adjudication in insolvency based upon an assignment which was apparently made to a third person but was in reality made to themselves, and then having got that adjudication they were putting forward Sarat Kumari as a creditor whereas they were themselves in reality making a claim as creditors in the adjudication. It should further be added that upon the application of the petitioners, Greaves, J., by an order dated 4th August 1916 annulled the adjudication order. The Court of Appeal having held that the application of Sarat Kumari Debi was not the application of a *bona fide* creditor of the firm, and her claim having consequently been dismissed with costs, the petitioner now comes before the Court asking for an order that the real people behind Sarat Kumari Debi should be made to pay the costs of the proceedings connected with the claim of Sarat Kumari Debi as a creditor in the insolvency, and this application is based upon the allegation that the proceedings by Ragendra Nath Banerjee and Surendra Nath Banerjee in the name of Sarat Kumari Debi were an abuse of the process of the Court.

The first point taken by the learned Counsel who showed cause against this Rule was that this Court had no jurisdiction to make the order. The section of the Civil Procedure Code to which our attention was drawn was section 151, which provides as follows:— "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

As regards the inherent power of the Court to deal with an abuse of the process of the Court there is authority to be found in the case of *Jointee Chunder Sein* v. *Anundo Lall Doss* (1). I need not refer to the facts of that case, but it is an authority for saying that this Court has ample power to make an order with regard to the costs of the proceedings, where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court: and in my judgment there is no doubt that on the facts of this case we have jurisdiction to make the order asked for if we think it proper so to do.

The next point raised is that inasmuch as Nagendra Nath Banerjee lived outside the jurisdiction of the original side of this Court and he did not carry on business within the limits of the original jurisdiction of this Court, we could not now make any order as against him, it being admitted that Surendra Nath Banerjee was within the jurisdiction of this Court. As regards Nagendra Nath Banerjee in my judgment the position is this: This Court has held that in reality he was one of the two persons who came to the Court for the purpose of making use of the process of the Court, and if we come to the conclusion on the facts of the case that not only did he make use of the process of the Court but also that he abused the process of the Court, I have no doubt that this Court has jurisdiction to make an order not only in his case but also in the case of Surendra Nath Banerjee.

(1) 14 W. R. O. C. 1 at p. 4.

The third point that was raised by the learned Counsel, Mr. Bose, was that on the facts of the case no order as to costs ought to be made. In my judgment this Rule should be made absolute. I think that I have already stated the facts sufficiently to show that from the beginning to the end the proceedings instituted by Nagendra Nath Banerjee and Surendra Nath Banerjee were an abuse of the process of the Court. In the first instance, as I have already said, they put forward an assignment which purported to be made to a third person as a basis of the insolvency proceedings, whereas it has been found as a fact that the assignment was in reality made to these two. They then put forward the lady Sarat Kumari Debi, who was the wife of Surendra Nath Banerjee, as a *bona fide* creditor, whereas it has been found as a fact that she was not a *bona fide* creditor; and for the purpose of my judgment and to make the statement of facts quite clear, I propose to read what was said by my learned brother Mr. Justice Mookerjee on the hearing of the appeal as follows: "The essence of the matter is that her account opens with two sums, Rs. 2,487-8-6 and Rs. 14,233-13-6 respectively; in respect of one of these sums, the lady was a *benamdar* of her husband, while in respect of the other, she was a *benamdar* of her brother-in-law. True it is that there is no evidence of the source of the subsequent advances, but in the absence of tangible proof, we cannot assume that those sums belonged rather to her husband than to her brother-in-law. There is, further, a significant admission by Nagendra Nath Banerjee that he and his brother, Surendra Nath Banerjee, are joint, and this account may lend some support to a possible theory that both the brothers used the name of the respondent as their *benamdar*. But whatever the real state of affairs may be, one cardinal fact is established beyond controversy, namely, that the respondent is not a creditor of the insolvents. How much of the sum which stands in her name is her husband's money and how much thereof is her brother in-law's money, we do not know; but if she be not a creditor of the insolvents, as I hold she is not, the conclusion is irresistible that her name must be removed from the category of the creditors of the insolvents in these proceedings". I ought to have said that Sarat Kumari Debi is a *purdanashin* lady with, as I understand, no property of her own.

Now, under those circumstances I think in such proceedings as these, when they have failed in consequence of the decision of this Court, and when, if the costs are taxed, there are no means of getting them paid by Sarat Kumari Debi, she having no property, and when we find that the real people behind her were first of all her husband, and secondly, her brother-in-law, who have used her name in connection with these proceedings, it would be most unjust if we were prevented from making a proper order as to costs. In my judgment there has been an abuse of the process of the Court. Consequently the costs which have been taxed with respect to this matter, which I understand, amount to Rs. 1,872, should be recovered from Nagendra Nath Banerjee and Surendra Nath Banerjee.

There is one final point taken by the learned Counsel, and that was that his client was not present when the taxation of the costs took place. It is, however, admitted that notice was given to Sarat Kumari Debi of the fact that the taxation of the costs was going to take place, and if either of his clients had desired (she being the wife of one and the sister-in-law of the other, and the facts must have been known to them) to dispute any item of the taxation, they should have appeared through their attorney to investigate the costs. I do not think in this case any further taxation of costs ought to take place.

My learned brother Mr. Justice Mookerjee reminds me that there was one other point to which I have not referred, and that was this: It was contended by Mr. Bose that inasmuch as the appeal was heard by a Bench constituted by myself, Mr. Justice Woodroffe and Mr. Justice Mookerjee, this matter could not be disposed of by the Bench constituted as at present by my learned brother Mr. Justice Mookerjee and myself. There is nothing in that contention, for this reason. This is not a question of

review of the judgment which was passed by us sitting together with Mr. Justice Woodroffe. This is a substantive application made to us to-day, and in my judgment there cannot be any doubt that the Bench as at present constituted has full jurisdiction to deal with this matter. It would probably have been more convenient if the application could have been made to the Bench when Mr. Justice Woodroffe was sitting with us, and we could have been glad to have had his assistance but I have no doubt that the Bench as at present constituted has full jurisdiction to deal with the matter.

The Rule is made absolute with costs.

MOOKERJEE, J.— I agree.

*Rule made absolute.*

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BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 1128 OF 1915.

December 18, 1916.

*Present*:—Mr. Justice Batchelor and Mr. Justice Shah.

PARSHOTTAM VERIBHAI AND OTHERS— DEFENDANTS — APPELLANTS

*versus*

CHHATRASANGJI MADHAVSANGJI THAKOR—PLAINTIFF — RESPONDENT.

*Broach and Kaira Incumbered Estates Act (XXI of 1881), s. 28 — Mortgage by* talukdar, *validity of—Mortgagee, right of, to recover mortgage money—Contract Act (IX of 1872), s. 65, applicability of.*

Section 65 of the Contract Act has no application to a case of transfer of property by way of mortgage, where the transfer is perfectly valid when made and remains valid for a certain period of time fixed by the law, *i. e.*, the lifetime of the mortgagor. [p. 1002, col 2.]

Therefore, where a mortgage effected by a *talukdar* becomes void under section 28 of the Broach and Kaira Incumbered Estates Act, 1881, after the death of the *talukdar*, the mortgagee is not entitled to recover back the money advanced by him on the mortgage. [p. 1002, col. 2.]

*Javerbhai Jorabhai* v. *Gordhan Narsi*, 28 Ind. Cas. 442; 17 Bom. L. R. 259; 39 B. 358, distinguished.

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 127 of 1914, reversing the decree passed by the Subordinate Judge, Umreth, in Civil Suit No. 29 of 1913.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.

BATCHELOR, J.—The suit out of which this appeal arises was brought by the plaintiff for a declaration that a deed of mortgage made in March, 1894, by his father is null and void. The plaintiff also sought to recover possession of the property.

The plaint stated that the plaintiff is, and his father was, a *talukdar* of Kherda, and the mortgage-deed was void under section 28 of the Broach and Kaira Incumbered Estates Act, XXI of 1881, after the death of the mortgagor, the plaintiff's father. The defendants are the representatives of the original mortgagee.

The lower Appellate Court has decided in favour of the plaintiff upon the main contention, and nothing has been said in the argument before us to lead us to doubt the accuracy of that conclusion. Under section 28 of Act XXI of 1881 it is provided that in circumstances such as we have here no mortgage shall be valid as to any time beyond the natural life of the mortgagor *talukdar*.

Mr. Thakor, however, on behalf of the defendants, has contended that they are entitled to recover back the money advanced by them on the mortgage and that until this restitution is made to them, the plaintiff has no right to recover possession of the property. The learned Pleader has relied in the first instance upon section 65 of the Indian Contract Act. That section, however, in my judgment is of no application. For the case before us is not a case where an agreement is discovered to be void or where a contract became void. The present is a case rather of a transfer of property by way of mortgage, the transfer being perfectly valid when made and remaining valid for a certain period of time fixed by the law, *i.e.*, the lifetime of the mortgagor.

Then the learned Pleader called in aid of his contention this Court's decision in *Javerbhai Jorabhai* v. *Gordhan Narsi* (1). That case must, however, as I think, be distinguished. It was a case under the Bhagdari Act, 1862, and the consideration for the mortgage failed *ab initio*. In those circumstances the Court held that it was open to the plaintiff mortgagees to recover

(1) 28 Ind. Cas. 442; 17 Bom. L. R. 259; 39 B. 358,

under the covenant, which provided that if there should be any hindrance or obstruction concerning the house, the defendants and their property, their heirs and representatives would be liable for any loss which the plaintiffs might suffer and for the moneys which the plaintiffs had advanced. In other words, in that case, since the mortgage was void from the beginning, the event contemplated in the covenant had in fact happened, and the plaintiffs were entitled to take advantage of that happening. The covenant in the present case is in form very like that in *Javerbhai's* case (1). It runs in these words: "If any manner of obstruction or hindrance be caused or any claim or right be preferred as regards this land, I personally, my heirs and representatives and children are to be answerable for your amount in respect of the mortgage." But it seems to me impossible to say here that the event contemplated in the covenant has in fact happened. For the defendants actually obtained possession of the mortgaged property and retained possession of it until the death of the mortgagor, *i.e*, for a total period of about nineteen years.

Now the parties to this mortgage and this covenant must, I think, be taken to have contracted with reference to the existing law, and the covenant must be read as limited to the time during which the mortgage remained valid under that law. During all that time, as I have said, there was no hindrance or obstruction or any other circumstance which could call the terms of the covenant into operation. It is true that the defendants' term of possession has been shorter than it would have been if the law had been otherwise. But I cannot see how the defendants can lawfully complain of that. They must in my view be regarded as having taken their chance as to the length of their possession. As the learned District Judge observes: "Presumably the mortgagor and mortgagee knew how they stood, and I suppose the mortgagee took proper care of his interests in view of the unsatisfactory nature of his security." I am of opinion, for these reasons, that the contract between the parties has effectually been carried out, subject to the law of the country according to which they must be taken to have contracted. It follows, therefore, that the defendants are not entitled to any money compensation for handing over possession to the plaintiff.

The appeal, therefore, in my opinion, fails and should be dismissed with costs.

SHAH, J.—I am of the same opinion.

*Appeal dismissed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL. No. 2617 OF 1916.

February 19, 1917.

*Present*:—Sir Donald Johnstone, KT., Chief Judge.

KAURA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

KALU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Onus, question of—Question of law and fact—Punjab Courts Act (III of 1914), s. 41.*

In a case where, in the absence of all evidence on an issue, a decision is arrived at on a wrong laying of onus, the question of onus would be a question of law and a second appeal would be competent. [p. 1004, col 2.]

It is otherwise, however, where the onus having been wrongly laid, the case is nevertheless decided on a weighing of evidence on both sides. [p. 1004, col. 2.]

Second appeal from the decree of the District Judge, Mianwali, dated the 7th July 1916, reversing that of the Munsif, First Class, Mianwali, dated the 8th November 1915, decreeing plaintiffs' claim.

Mr. *B. N. Kapur*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiffs are Kaura, Sarfaraz, Allah Ditta and Khanan, sons of Bahadur, and the defendants the two sons and a son's widow of the late Thakur Das. In 1878 we find, (*a*) Thakur Dass entered in Revenue Records as *malik-i-adna* of 53 *kanals* in the *kachha* (land subject to river action), he having acquired by purchase from plaintiffs' father; and (*b*) plaintiffs as the *ala maliks* of the same. In 1904 Kaura plaintiff and one Ahmadyar applied for portion of some 13,000 *kanals* known as *Thul shamilat-i-deh*, and the Revenue authorities found themselves face to face with the question of the rival rights in this *shamilat* of *ala* and *adna maliks*, the plaintiffs and Ahamadyar being among the *ala maliks*. On 21st July 1904, the Revenue Assistant ruled

that only *adna maliks* were entitled to a share, the *ala maliks'* rights being limited to taking 6 per cent. calculated on the Government revenue. On this basis in 1907 an area of 75 *kanals* 5 *marlas* (now in suit) was allotted to defendants. Plaintiffs' case is that their father Bahadur sold to Thakur Das only the *adna* rights in the 53 *kanals* and not any corresponding share in *shamilat*.

Defendants pleaded that the sale included share in *shamilat* and that plaintiffs are estopped by their own declarations and conduct from denying this.

The first Court laid upon defendants the onus of proving what the sale included and after a lengthy discussion found the point in favour of plaintiffs. It also considered the grounds on which estoppel was set up and held that there was no waiver or estoppel.

The lower Appellate Court reversed this decision and set aside the decree granted by the first Court. Its judgment is not to my mind very clear, but in a general way it may be said that the learned District Judge on the authorities seems to find that there is much to be said for the presumption that the sale, though it did not mention share of *shamilat*, did include that, and that the conduct of Kaura and Sarfaraz, plaintiffs, coupled with the inaction of all the plaintiffs from 1904 (when the Revenue Assistant found in principleagainst them), tells heavily against them.

When this second appeal by the plaintiffs was laid before Mr. Justice Leslie Jones in Chambers, he admitted it with the remark: "Is the onus rightly placed?" This has led to a preliminary objection that the question of imposition of *onus probandi* not being a question of law, no second appeal lies, and in support certain rulings have been quoted—*Sadhu Ram* v. *Musammat Baini Bai* (1), *Nur Ilahi* v. *Municipal Committee, Delhi* (2) (only indirectly in point); but in my opinion the problem cannot be put in this naked form: much depends upon the nature of the case and the way in which the case has been handled in the lower Appellate Court. I distinguish, for instance, between a case in which, in the absence of all evidence on an issue, a decision is arrived at on a wrong laying of onus, and a case in which, onus having been wrongly laid, the case is never heless decided on a weighing of evidence for and against. In the present case the lower Appellate Court has noticed all the substantial matters favourable to each party and has come to a conclusion. It first points out that there was no deed of sale to Thakur Das but merely an entry in the 1878 Settlement Record that he had bought the land from Bahadur for Rs. 210 and was in possession and was *adna malik*. Then it discusses such rulings as *Ram Das* v. *Amir Shah* (3) and Mr. Thorburn's Settlement Report explaining the creation of *adna milkiyat*; quotes with approval the Settlement Commissioner's judgment of December 2nd, 1904, which insists upon a presumption in favour of Thakur Das; adverts to Sarfaraz's statement of 29th June 1904, in which he seems to give a sort of half-hearted assent to defendant's claim; refers to the statement of Kaura plaintiff and 11 others made on 13th September 1907, to the effect that they had seen the spot and were satisfied with the partition. Finally, after discussing and distinguishing further judgments as to the right presumption in such cases, it adverts to the plaintiffs' long silence and their conduct. Now, though in my opinion the initial onus was on defendants, yet the facts and considerations set forth by the lower Appellate Court lead fairly to the conclusion that the onus was shifted to plaintiffs by reason of them; and after all, the lower Appellate Court never says the initial onus was on plaintiffs it is only after discussing a good many features of the case that it says, as it were, *In these circumstances* the onus is on plaintiffs.

I have thus disposed of grounds 1 and 2 of appeal. Ground 3 raises no question of law Ground 4 is merely a defence against possible attack. Ground 5 is now useless, as the lower Appellate Court's decision as to what was sold must stand. Ground 7 has not been argued.

Appeal dismissed with costs.

*Appeal dismissed.*

(1) 66 P. R. 1898.
(2) 68 P. R. 1897.
(3) 113 P. R. 1901; 34 P. L. R. 1902.

KEDAR NATH DEY ROY *v.* LAKHI KANTA DEY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 507 OF 1914.

May 11, 1917.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

KEDAR NATH DEY ROY—DEFENDANT—APPELLANT

*versus*

LAKHI KANTA DEY—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (5)—Step-in-aid of execution—Application for summoning witnesses as to standard of measurement.*

During the pendency of a substantial application for execution of a decree for possession of certain property, an application made by the decree-holder for summoning witnesses for the purpose of determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution of the decree by delivery of possession, is a step-in-aid of execution within the meaning of Article 182, clause (5), of the Limitation Act. [p. 1006, col. 2.]

**Appeal against an order of the District Judge, Mymensingh, dated the 1st August 1914, affirming an order of the Munsif, Mymensingh, dated the 23rd May 1914.**

FACTS of the case appear from the judgment.

Babu *Heramba Charan Guha*, for the Appellant.—The question for determination in this appeal is whether the application for execution of the decree is barred by limitation. The decree-holder applied for delivery of possession of certain properties and in that proceeding the judgment-debtor raised an objection to the standard of measurement. The Court found it necessary to take evidence in the matter, and thereupon the decree-holder applied for summons upon his witnesses on 11th February 1911. The question is whether the application for summoning witnesses may be treated as a step-in aid of execution within the meaning of Article 182, clause (5), of the Limitation Act, and whether the period of limitation is to run from that date. As that application was not a positive act done by the decree-holder in furtherance of his application for execution, it was not a step-in-aid of execution, and the present application made within three years from that date is time-barred. The period of limitation cannot be taken to run from the date of applying for summoning witnesses with a view to meet the objection of the judgment-debtor. Opposing any objection of the judgment-debtor is not a step-in-aid of execution. See *Troylokya Nath Bose* v. *Jyoti Prokash Nandi* (1), *Umesh Chunder Dutta* v. *Soonder Narain Deo* (2), *Shib Lal* v. *Radha Kishen* (3).

Babu *Birendra Kumar De*, for the Respondent.—The cases referred to in support of the appellant's case are distinguishable and do not apply to the facts of the present case. In none of these cases was the decree-holder doing any act in furtherance of his application for execution, as has been done in the present case. In this case, the decree-holder applied for summoning witnesses to prove the standard of measurement which was a necessary step for obtaining delivery of possession in execution of the decree. This application, therefore, was a step taken by him for the execution of his decree. Of course, merely opposing an objection may not give a fresh start of limitation, but where any positive act is done in furtherance of the application for execution, a fresh period of limitation runs from the date of that Act; and as in the present case, the decree-holder applied for summons for the purpose of getting the relief prayed for by his application in the execution case, this application ought to be taken as a step-in aid of execution of his decree.

JUDGMENT.—The question involved in this appeal is whether the application for execution of the decree, out of which this appeal arises, is barred by limitation.

It appears that the appellant obtained a decree for possession of certain property and possession was delivered to him on the 28th January 1911. The judgment-debtor raised objections to the delivery of possession by the Commissioner, and the Court found it necessary to determine the standard of measurement and, for that purpose, to take evidence in the matter. The decree-holder applied for summons upon his witnesses who were examined. The Court, after taking evidence on both sides, directed fresh delivery of possession by another Commissioner and ordered the decree-holder to deposit costs, which not having been paid, the execution case was

(1) 30 C. 761; 8 C. W. N. 251.
(2) 16 C. 747; 8 Ind. Dec, (N. S.) 495.
(3) 7 A. 895; A. W. N. (1885) 287; 4 Ind. Dec. (N. S.) 989.

dismissed on the 30th January 1914 for default.

The question is whether the application made by the decree-holder on the 11th February 1911 for summoning witnesses was a step-in-aid of execution under Article 182, clause 5, of the Limitation Act.

It is true, as contended by the appellant, that a step-in-aid of execution must be a positive step taken by the decree-holder on his own account in furtherance of his own application, and not merely in opposition to any objection taken by the judgment-debtor. But, in the present case, although possession had been delivered to the decree-holder, the judgment-debtor filed a petition of objection to the delivery of possession; and the application for execution was pending and had not been disposed of.

Upon the objection of the judgment-debtor, the Court found it necessary to ascertain the standard of measurement, without the determination of which possession could not be delivered. Under these circumstances, it became necessary to adduce evidence on the point.

The application to the Court for summoning witnesses, therefore, was an act in furtherance of the application for execution which was still pending and was, therefore, a step-in-aid of execution.

The cases relied upon on behalf of the respondent were of a different nature. In the case of *Trolokya Nath Bose* v. *Jyoti Prokash Nandi* (1) it was held that the decree-holders' opposition to an application of the judgment-debtor to sell his properties in an order different from that in which they had already been directed to be sold, was not an application to take some step-in-aid of execution. It was only asking the Court to refrain from taking the coarse which had already been taken and not asking the Court to take some positive step. In *Umesh Chunder Dutta* v. *Soonder Narain Deo* (2) the appearance of the decree-holder by his Pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of a decree was held not to be an application to take a step-in-aid of execution. In *Shib Lal* v. *Radha Kishen* (3) the Court held that resisting or offering objections to an attempt on the part of the judgment-debtor to set off the amount of the decree against the amount due to himself is not taking some step-in-aid of execution. On the other hand, in the unreported case (Miscellaneous Appeal No. 373 of 1894, decided on the 7th August 1895) it was held that where a decree-holder opposing an application to set aside a sale held at his instance puts in a list of witnesses and asks the Court to summon and examine the witnesses, he takes a step-in-aid of execution and is entitled to have a fresh period of three years for another application for the execution of his decree.

In the present case, as already stated, there was a substantive application by the decree-holder which was pending and his application for summoning witnesses was in furtherance of the execution of the decree, namely, for determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution of the decree by delivery of possession.

We think, therefore, that the application was a step-in-aid of execution and the present application for execution, having been made within three years of the date on which such a step was taken, is not barred.

The appeal fails and is dismissed with costs, one gold *mohur*.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 201 OF 1916.

May 28, 1917.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

MOTI LAL—PLAINTIFF—APPLICANT

*versus*

RAM NARAIN—DEFENDANT RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Preliminary decree—Death of defendant before final decree—Application for substitution—Limitation Act (IX of 1908), Sch. I, Art. 177.*

A preliminary decree does not put an end to a suit; it must be continued up to the stage of the final decree. [p. 1007, col 1.]

Where after the passing of a preliminary decree in a suit the defendant died, and an application to bring his representatives on the record was made more than six months after his death:

*Held*, that the application was barred by time. [p. 1007, col. 1.]

*Jamnadas Chhabildas* v. *Sorabji Kharsedji*, 16 B. 27; 8 Ind. Dec. (N. S.) 495, relied upon.

Civil revision from an order of the District Judge, Agra.

SATAGOPA BHATTAR *v.* VENKU NAYUDU.

Mr. *Narain Prasad Asthana*, for the Applicant.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—The facts of the case, so far as they are necessary for the purposes of this application, may be reduced to this. The present applicant obtained a preliminary decree in a partnership case against one Pirbhu Dayal and others. Pirbhu Dyal died after the preliminary decree had been passed. Some two years after his death, the plaintiff applied to have the name of his heir brought upon the record and asked the Court to proceed with the suit. The heir objected on the ground that the application was barred by limitation as it ought to have been made within the period of six months from the date of the death. The Court of first instance held that it was a case to which Order XXII, rule 10, applied and granted the application as having been made within three years of his death. The defendants appealed. The Court below has held that Order XXII, rule 4, applied and that the application is barred by time. The plaintiff comes here in revision. The first plea taken before us is that if Order XXII, rule 4, applied an appeal lay to the Court below. As a matter of fact the applicant went into Court urging that Order XXII, rule 10, applied and the Court of first instance agreed with him and passed an order under that rule, and an appeal did lie from such an order. It is again argued before us as a second point that Order XXII, rule 10, applies to suits like the present and not Order XXII, rule 4. It is quite clear that rule 10 applies to all other cases which are not dealt with or covered by rules 1 to 9 in Order XXII. It is urged that a preliminary decree has been passed in this case and, therefore, rule 4 cannot apply. With this we cannot agree. In our opinion the suit was still pending. A preliminary decree does not put an end to the suit. It must be continued up to the stage of the final decree. That being so, it is clear that rule 4 covers the present case. If authority be deemed necessary for our decision we would point to the case of *Jamnadas Chhabildas* v. *Sorabji Kharsedji* (1), which is a clear authority in point. Our attention was called to the case of *Chunni Lal* v. *Abdul Ali Khan* (2). This, however, is by no means in favour of the present applicant. That was a mortgage suit to which sections 88 and 89 of the Transfer of Property Act of 1882 applied. There it was held that a decree under section 88 of the Transfer of Property Act, 1882, was only a decree *nisi* and not a final decree, and that the suit in which such a decree is passed does not terminate until an order absolute is made under section 89. Whether the law laid down there was correct or incorrect, it is clear that the law as it now stands, since the present Code of Civil Procedure came into force, is in accordance with that decision. The suit is clearly still pending. Rule 4 of Order XXII clearly does apply. The Court of first instance was wrong in applying rule 10, and we, therefore, disallow the present application with costs.

*Application dismissed.*

(1) 16 B. 27; 8 Ind. Dec. (N. S.) 495.

(2) 23 A. 331.

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COURT OF THE BOARD OF REVENUE, MADRAS.

REVENUE REVISION PETITION NO. 3 OF 1917.

July 12, 1917.

*Present*:—Mr. Aziz-ud-Din, Ag. 4th Member.

SATAGOPA BHATTAR, SON OF VENKATA KRISHNA NAMBIAL OF THIRUNIUGUR—PETITIONER

*versus*

VENKU NAYUDU, HONORARY MANAGER, THIRUMUGUR DEVASTANAM, AND ANOTHER—COUNTER-PETITIONER.

*Madras Estates Land Act (I of 1908), ss. 3 (5), 205 —Board of Revenue, revisional powers of, extent of—Order refusing to recognise petitioner as landholder —Revision, whether lies.*

The revisional powers vested in the Board of Revenue by section 205 of the Madras Estates Land Act are subject to considerable limitations. [p. 1008, col. 1.]

No revision lies to the Board of Revenue under section 205 of the Madras Estates Land Act against an order refusing to recognise the petitioner as a landholder under section 3 (5) of the Act. [p. 1008, col. 1.]

Revision against the order of the Revenue Divisional Officer, Melur, D. Dis. No. 407 Rev., dated 4th February 1917.

RAMA NAND *v.* EMPEROR.

Mr. *K. S. Jayarama Ayyar Avargal*, for the Petitioner.

Mr. *P. Chenchayya*, for the 1st Counter-Petitioner.

ORDER.—This is a revision petition against the order of the Deputy Collector of Melur, refusing to recognise the petitioner, Sadagopa Bhattar, as a landholder under section 3 (5) of Act I of 1908.

The point requiring adjudication at the outset is, whether a revision petition lies to the Board of Revenue against the order. Section 3 (5) lays down that "where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act (I of 1908) or between two or more joint landholders, as to which of them is entitled to proceed and be dealt with as such landholder, the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector, subject to any decree or order of a competent Civil Court, may recognize or nominate as such landholder in accordance with the rules to be framed by the Local Government on this behalf." Thus, it is clear that the Deputy Collector's order can only be revised by a competent Civil Court and by no other authority.

The revisional powers vested in the Board of Revenue by section 205 of the Act are subject to considerable limitations and do not obviously govern cases of the kind under consideration. The revision petition is dismissed.

Petitioner should bear his own and the counter-petitioner's costs.

*Petition dismissed.*

V. R. P.

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PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 111 OF 1916.

January 12, 1917.

*Present*:—Mr. Justice Broadway.

RAMA NAND AND OTHERS—PETITIONERS

*versus*

EMPEROR, THROUGH TEJA SINGH—COMPLAINANT—RESPONDENT.

Actio personalis moritur cum persona—*Penal Code (Act XLV of 1860), s. 323—Death of complainant—Right of prosecution, survival of.*

A prosecution under section 323 of the Indian Penal Code is a personal action and the right to carry on a prosecution under that section does not survive to the legal representatives of a deceased complainant.

*Ishar Das* v. *Emperor*, 10 P. R. 1908 Cr.; 8 P. W. R. 1908 Cr.; 7 Cr. L. J. 290; 112 P. L. R. 1908, *Krishna Behari Sen* v. *Corporation of Calcutta*, 31 C. 993; 8 C. W. N. 745, relied upon.

Petition, under section 526 of the Code of Criminal Procedure, for transfer of the case pending in the Court of the Honorary Magistrate, 3rd Class, Bhiwani, District Hissar, to some other competent Court.

Mr. *Kirkpatrick*, for the Petitioners.

ORDER.—This is an application for transfer of the case from the Court of Sardar Bahadur Captain Umda Singh, Honorary Magistrate, Bhiwani. It is not necessary for me, however, to go into the various grounds set forth in the application, which Mr. Kirkpatrick contended were amply sufficient for the grant of this application, as it appears that the complainant in the case is dead. The case was one under section 328, Indian Penal Code, which is a compoundable offence. It was urged before me that on the death of the complainant the case came to an end, and as authority for this proposition I have been referred to *Ishar Das* v. *Emperor* (1) and *Krishna Behari Sen* v. *Corporation of Calcutta* (2). These two decisions refer to cases of defamation, but, in my opinion, the principle therein enunciated applies equally to an offence under section 323, Indian Penal Code. Just as a prosecution for defamation is essentially a personal action, so, in my opinion, is a prosecution under section 323, Indian Penal Code. This being the case, it follows that the right to carry on a prosecution under this section does not survive to the legal representatives of the deceased, see section 89 of Probate and Administration Act (V of 1881). In my opinion, therefore, the Magistrate ought to have dismissed the case on the death of the complainant, and I accordingly treat this application as a revision and direct the dismissal of the case.

*Petition accepted.*

(1) 10 P. R. 1908 Cr.; 8 P. W. R. 1903 Cr. 7 Cr. L. J. 290; 112 P. L. R. 1908.

(2) 31 C. 993; 8 C. W. N. 745.

END OF VOLUME XL.

# GENERAL INDEX

## VOLUME XL—1917.

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ADVERSE POSSESSION *against lessee, when adverse against lessor.*

The possession of a trespasser of land let out on lease does not become adverse as against the lessor until the termination of the lease. **C** HAJRA SARDARA *v.* KUNJA BEHARI NAG, 25 C. L. J. 635; 21 C. W. N. 1001 **271**

——, *whether question of law—Burden of proof.*

A question of adverse possession may be a question of law where the facts are not in dispute and where the conclusion depends upon inferences to be drawn from admitted facts. **A** CHAMPA LAL *v.* MANGAL CHAND **420**

——*Trespassers in succession—Title to properties, by whom acquired.*

Where there are successive independent trespassers who have been continuously in possession for the statutory period, the first trespasser gets the title and not the last who is in possession at the time when the title of the real owner is extinguished. **M** SUBBAIYA PANDARAM *v.* MAHAMAD MUSTAPHA MARACAYAR, 21 M. L. T. 62; 5 L. W. 690; 32 M. L. J 85 **50**

ALIENATION—Gift—Suit for declaration of invalidity of gift Non-ancestral property **237**

ALLUVION—*Accretion, principle of, relating to Indian rivers*—Lankas, *formation of—Title—Derelict and alluvial lands Bengal Regulation II of* 1825.

Land, to be an accretion, must, according to the Common Law, be formed by gradual, slow and imperceptible degrees. By 'imperceptible' is meant imperceptible in its progress, *i.e.*, step by step as the accretion is being formed and not imperceptible in the result, *i.e.*, after a long lapse of time. It is the manner of the formation, not the result, which decides whether the addition is an accretion or not. If the addition was by gradual and insensible degrees, it is an accretion, while if a considerable increase takes place at one time, it is not an accretion. The increase must be imperceptible to an ordinary person as the addition is being formed.

ALLUVION—concld.

Natural silting up, if gradual and imperceptible, will give the land to the adjoining owner.

A perceptible addition made in the course of a single year during the annual rise of a river is a sudden increase and is not an accretion to the adjoining riparian land.

There is no reason for giving the mud and sand deposited in large quantities in the bed of a river, which belongs to the Crown in trust for the public, to the adjoining owner simply because the deposit is also adherent to the adjoining land, so long as such deposits are distinguishable from the adjoining land. The principle of identity is applicable only to derelict lands exposed by the sudden recession of the sea or change of a river's course.

In adopting the law as to alluvion in India the Courts should be guided by local physical conditions. The principle laid down in Bengal Regulation II of 1825 affords the best practical guide in applying the law of accretion to the case of large Indian rivers. Under that Regulation, all that is necessary is that the accretion should be by gradual alluvial process; it need not be imperceptible, and it need not be slow.

The fact that original boundary is known or ascertainable does not render the law of accretion inapplicable. **M** SECRETARY OF STATE *v.* RAJAH OF VIZAYANAGARAM, 22 M. L. T. 57 **896**

ALLUVION AND DILUVION—*Re-formation in situ—Limitation—Burden of proof.*

A *char*, which was found to be a re-formation *in situ* of plaintiff's land, was occupied for some years by Government. It was then claimed by defendants as their property, and Government made over possession to them. On plaintiff's suing to recover possession, defendants pleaded limitation and to make out their plea claimed to tack on to their own occupation the period of Government's possession:

*Held*, that the defendants did not derive their liability to be sued "from or through" the Revenue Authorities within the meaning of section 2 (4) of the Indian Limitation Act and that, therefore, their plea must fail. **P C** BASANTA KUMAR ROY *v.* SECRETARY OF STATE, 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 BOM. L. R. 489; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 3 0 **337**

APPEAL (CIVIL)—*Admissibility of document admitted objection, whether can be questioned—Pleadings.*

Documentary evidence which is not altogether irrelevant and which has been admitted without objection, cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used. **C** PRASANNA DEB RAIKAT *v.* MOHANANDA DAS **553**

*Court-fees on memorandum of appeal—Objection.*

Where on an objection being taken as to the insufficiency of Court fee on a memorandum of appeal it appeared that the Court-fee was exactly the same as that on the plaint and that the Trial Judge had on an objection by the defendant framed an issue on the point and decided it in favour of the plaintiff and the defendant had accepted the decision and stamped his own appeal in the lower Appellate Court accordingly:

BENGAL TENANCY ACT—contd.

Where such entry conflicts with the established law, the established law must prevail over the entry and the presumption attaching to the entry must be deemed to have been rebutted. **PAT** RAGHUBIR MISSER *v.* BHAJAN SINGH, 2 P. L. W. 27 987

——— S. 111A, *suit under—Consequential relief.*

Where in a suit under section 111A of the Bengal Tenancy Act, the plaintiff tenant asks not only for a declaration of the occupancy right of which he claims he is in possession, but also asks for a declaration that the entry in the Record of Rights as to his status as tenure-holders is a nullity, the plaint comes within section 7, sub-section 4, clause *(c)*, of the Court Fees Act, inasmuch as a consequential relief is asked therein.

The proviso to section 111A of the Bengal Tenancy Act must be strictly applied. **C** MIDNAPUR ZEMINDARY CO. *v.* SECRETARY OF STATE, 41 C 352; 21 C W. N. 834 96

——— S. 116—*Mortgage—Construction of deed—Mortgagor left in possession of part of mortgaged property, position of—Occupancy rights, acquisition of.*

Unless there are the strongest reasons for doing so, a Court ought not to give a construction to an alleged attornment clause in a mortgage-deed which will have the effect of creating rights of tenancy in derogation of the mortgagee's rights.

In order to determine whether a clause in a mortgage deed, allowing the mortgagor to remain in possession of a portion of the mortgaged property on payment of a nominal rent, amounts to an attornment clause, what is to be looked at is the real intention of the parties, and the facts of each particular case must be taken into account in order to see what the intention of the parties was. If the intention was to create the relationship of landlord and tenant, then the rent law of the country will apply.

Even when the alleged attornment is created by a conveyance other than the mortgage-deed, it is open to the Court to hold that the mortgage and the lease constitute one transaction and that the mortgagee is entitled to count the alleged rent as a charge upon the mortgaged property *qua* principal and interest.

Out of 200 *bighas* of *zerait* land mortgaged by the defendants to the plaintiff in 1896, an area of 50 *bighas* was left in possession of the former who were liable to pay a nominal rent of 8 annas per *bigha* for use and occupation. In 1902, a further area of 4 *bighas* was by a *kabuliyat* let out to the defendants at a rental of Rs 11. Plaintiff brought a suit for arrears of rent and for *khas* possession in terms of the mortgage:

*Held*, (1) that the clause relating to the 50 *bighas* was not an attornment clause, but was merely an arrangement made by favour of the landlord by which the mortgagor was allowed to remain in possession in the capacity of something like a licensee, and that the land being *zerait* land, the protection afforded by section 116 of the Bengal Tenancy Act against the acquisition of occupancy rights applied;

(2) that the *kabuliyat* in respect of the 4 *bighas* created the relationship of landlord and tenant between the parties, and that the defendants had acquired occupancy rights in the land as against the plaintiff.

BENGAL TENANCY ACT—contd.

The law does not preclude a mortgagor from securing the status of an occupancy *raiyat* under his mortgagee. **PAT** UDAI CHAND *v.* JANG BAHADUR SINGH, 2 P. L. J. 352; 2 P. L. W. 118 500

S. 167—*Incumbrance, annulment of—"Date of sale," meaning of.*

The words "date of sale" in section 167 of the Bengal Tenancy Act mean the date when the sale is confirmed, and not the date when the property is actually sold to the purchaser. This is especially so where the sale took place when the Civil Procedure Code of 1882, under which the purchaser could acquire no interest until the sale certificate was issued, was in force. **C** NANDA LAL *v.* UMES CHANDRA DAS, 26 C. L. J. 328 996

——— Ss. 170 (3), 161—*Transferee of portion of occupancy holding not transferable by custom, whether entitled to make deposit Interest of transferee—Interest and encumbrance, difference between.*

Per *Curiam* (*Mullick, J*, dissenting).—The transferee of a portion of an occupancy holding not transferable by custom is not a person who has in the holding proclaimed for sale an interest which is "voidable on the sale" within the meaning of section 70 3), Bengal Tenancy Act, and is not, therefore, entitled to deposit the amount of the landlord's decree and costs under that section.

The interest of such a transferee is not an encumbrance as defined in section 161 of the Act.

Per *Mullick, J*—The purchaser of a portion of an occupancy holding not transferable by custom has an interest voidable on the sale, and is entitled to deposit the arrears under section 170 (3), Bengal Tenancy Act. The interest of such a person is not an encumbrance within the meaning of section 161, Bengal Tenancy Act. The word "interest" in section 170 is a wider term than encumbrance and includes rights other than those falling within the narrow limits of section 161, Bengal Tenancy Act. **PAT** MAHADEO LAL *v.* LANGAT SINGH, 1 P. L. W. 504; (1917) PAT. 169; 2 P. L. J. 457 257

——— S. 174, *order under—Appeal, whether lies—Dispute between parties to suit.*

Where a decree-holder himself is the auction-purchaser an appeal lies from an order dismissing an application of the judgment-debtor under section 174 of the Bengal Tenancy Act seeking to deposit the money due under the decree. **PAT** AKHOURI PREM NARAIN *v.* FAHIMUNNISSA, (1917) PAT. 244; 2 P. L. J. 625 662

——— SCH. III, ART. 3, applicability of 594

———, ART. 3, *applicability of—Dispossession by landlord as such, whether necessary—Limitation.*

In order that the special rule of limitation as comprised in Article 3 of Schedule III of the Bengal Tenancy Act may apply, it is not necessary that the dispossession must be by the landlord as such.

A suit by a *ryot* to recover possession of a holding, from which he was dispossessed by the defendants with whom it was settled by the landlords after they had purchased it in execution of a decree, is governed

CIVIL PROCEDURE CODE—1908—contd.

——— S. 11 587

——— S. 11—*Estoppel—Landlord and tenant—Decision in rent suit that there is no relationship of landlord and tenant—Suit for* khas *possession by landlord*—Res judicata.

In a suit for rent in which the only issue was whether the relationship of landlord and tenant subsisted between the parties, it was found that the plaintiff had failed to prove such relationship. Thereupon the plaintiff brought a suit to recover possession of the land from the defendant on the allegation that the defendant having in the previous rent suit denied the relationship of landlord and tenant, the plaintiff was entitled to recover *khas* possession:

*Held*, that the Court was precluded by the estoppel created by the decision in the rent suit, from finding that the plaintiff was the landlord, so that the plaintiff's suit for *khas* possession must fail. **C** JATINDAR NATH BOSE *v.* MAHAMMAD MALLIK **659**

——— S. 11—Res judicata *as between co-defendants—Finding on issue not in active controversy between defendants* inter se, *effect of—Vendor and purchaser—Mortgage by vendee, declaration of validity of, in action by vendor against vendee and his mortgagee—Transfer pending suit*—Lis pendens—*Transfer of Property Act* (IV *of* 1882), *s.* 52.

*M.* sold certain properties to 1st defendant, who mortgaged them to plaintiff's father after purchase. *M.* brought a suit against 1st defendant and plaintiff for a declaration that both the said sale and mortgage were colourable transactions. The Court held that they were both valid. During the pendency of that litigation 1st defendant sold the property to 2nd defendant, who, in turn, transferred it to 3rd defendant. In a suit by the plaintiff to enforce the mortgage security:

*Held*, per Curiam, that the previous decree in favour of *M.*, wherein the validity of the mortgage was admitted by both 1st defendant and the plaintiff's predecessor and which was not in active controversy between them, did not operate as *res judicata* in the present suit.

*Held*, by *Phillips, J.* (whose opinion prevailed under section 98, Civil Procedure Code), *Oldfield, J., dissenting*, that under section 52 of the Transfer of Property Act, the transfer to 2nd defendant could not affect the plaintiff's right to a valid mortgage over the property, a right which he obtained as the result of the suit during which the property was transferred. **M** MANJESHWARA KRISHNAYA *v.* VASUDEVA MALLYA **826**

——— S. 11—Res judicata—*Finding on point on which opinion not invited—Construction of decree.*

A finding or decision given by a Court on a matter on which its opinion is not invited does not operate as *res judicata*.

If a Court construes a decree as a final decree in any contested execution proceeding between the parties, that construction will operate as *res judicata*. **M** SETHURAMA SAHIB *v.* CHOTTA RAJA SAHIB, (1917) M. W. N. 327 **820**

——— S. 11—Res judicata—*Parties, different, in subsequent suit.*

CIVIL PROCEDURE CODE—1908—contd.

*D.* sued *P.* for rent on the allegation that he had settled certain *kasht* lands with him as under-tenant on produce rent. *P.* denied settlement under *D.* but set up direct tenancy under *D* and his other co-sharers who were no parties to the suit. The suit was decreed. *P.* then instituted the present suit against *D* and his other co-sharers for a declaration that he was a tenant directly under them:

*Held*, that the decision in the rent suit was *res judicata* so far as the question of settlement between *P.* and *D* was concerned but not so with regard to the question of *P*'s title. **PAT** PALKI PANDEY *v.* DWARKA PANDEY, 1 P. L. W. 634 **530**

——— S. 11, O. XXIII, R. 1—*Res judicata*—Relinquishment of portion of claim without leave, consequence of **408**

——— S. 11—Res judicata—*Rent suit—Decision as to annual rent payable—Subsequent suit.*

Where in a suit for rent, the question as to what is the rent annually payable for the holding is directly raised and decided by the Court, the decision operates as *res judicata* in a subsequent suit between the parties or their representatives, unless it is shown that the rent has been subsequently changed. **C** JOGESH CHANDRA ROY *v.* RAM KEBAL NATH **460**

——— S. 11—Suit to recover share of inheritance—Suit, subsequent, to recover share of gifted property, whether barred—*Res judicata* **455**

——— S. 11, O. XXIII, R. 1—Withdrawal of claim, order for—Incompetency of Court to permit withdrawal, effect of—*Res judicata* **611**

——— S. 20—*Jurisdiction—Contract for sale and purchase of cotton and grain*—Pukka arhat *system*—*Accounts, rendition of, place of.*

Plaintiffs, residents of Bareilly, sued the defendants, commission agents doing business in Bombay, in the Bareilly Court on the allegation that the defendants made a contract with the plaintiffs for the sale and purchase of cotton and grain under *pukka arhat* system and agreed to render accounts at Bareilly. The defendants pleaded *inter alia* that the Bareilly Court had no jurisdiction. The plaintiffs gave no evidence of the contract:

*Held*, that, under the circumstances of the case, the Bombay Courts had jurisdiction. **A** LALTA PRASAD *v.* RAM SARUP **505**

——— Ss. 22, 23, 24, *scope of—Transfer of case to Court not subordinate to same High Court, whether competent.*

Section 24, Civil Procedure Code, 1908, is exhaustive of the judicial power to transfer suits, and no Court has jurisdiction to transfer any suit from one Court to another unless both Courts are subordinate to it.

Even where a High Court has power to declare whether or not a suit shall proceed in a Court subordinate to it, it has no power to compel its institution in any Court beyond its jurisdiction.

The transfer of a suit from one Court to another is something entirely different in character and legal effect from making an order for the return of a plaint by one Court with a view to its being presented in another. **N** ABU BAKAR ABDUL RAHIMAN & Co. *v.* RAMBUX, 13 N. L. R. 81 **393**

——— S. 24—*Transfer of suit—Notice to parties, whether necessary.*

The transfer of a suit under section 24 of the Civil Procedure Code without giving notice to the parties is illegal. **P** ALI NAKI *v.* DAMODAR DAS, 33 P. W. R. 1917 **111**

S 34 2)—*Decree silent as to interest, construction of.*

Where a decree is silent with respect to further interest from date of decree to date of payment, the Court must be deemed to have refused such interest and a separate suit will not lie for its recovery.

The matter must be treated as if the Court had exercised its discretion and refused to give interest, unless it can be shown that its silence was due to oversight or mistake. **L B** YAGAPPA CHETTY *v.* MAHOMED **858**

——— S 44—*Presidency Small Cause Courts Act (XV of 1882), ss. 3, 35—Foreign Courts, decrees of, whether executable by Presidency Small Cause Courts—Registrar, power of, to issue process—Jurisdiction.*

A Judge of a Presidency Small Cause Court has jurisdiction to execute the decree of a foreign Court transmitted to it under section 44, Civil Procedure Code.

But the Registrar of a Presidency Small Cause Court has no power, under section 13 or 35 of the Presidency Small Cause Courts Act, to issue processes in execution of a foreign decree.

A decree transmitted for execution does not become the decree of the Court to which it is transmitted, although its powers of execution are similar to the powers conferred on it in respect of the execution of its own decrees. **M** SRINIVASA AIYANGAR *v.* NARAYANA AIYANGAR, (1917) M. W. N. 498; 6 L. W. 361 **670**

——— S. 47, O. XVII, R. 1—*Application falling within s. 47 purporting to be under O. XLVII, r. 1—Form of application—Appeal.*

On an application purporting to be made by the decree-holder certifying satisfaction of the decretal amount and asking for the dismissal of the execution case, the Munsif dismissed the case. Thereafter the decree-holder put in two other petitions questioning the genuineness of the application certifying satisfaction of the decree, and asking that the order passed thereon should be cancelled and the execution case allowed to proceed. The Munsif on an enquiry dismissed both the petitions on the finding that the decretal money had really been paid:

*Held*, that although the words "Order XLVII, rule 1" were to be found in the decree-holder's petitions and in the order sheet, yet having regard to their substance they must be treated as applications under section 47, Civil Procedure Code, so that an appeal did lie to the District Judge from the Munsif's order of dismissal. **C** JAGANNATH MONDUL *v* JALADHAR MONDUL, 26 C. L. J. 377 **639**

——— S. 47, O XLV, R 15 *Revenue sale of* ijmali *share—Annulment of sale and recovery of possession of shares in* ijmali *share, suit for—Order in Council—Decree—Partition of* ijmali *share—Execution—Decree-holder, whether entitled to share substituted by partition for share decreed.*

Plaintiffs brought a suit for the annulment of a revenue sale and recovery of possession of separate



and distinct shares in an *ijmali* share and got a decree The share had in the meantime been partitioned. On appeal the High Court reversed the judgment of the Subordinate Judge and dismissed the suit. Seven of the original plaintiffs then appealed to His Majesty in Council and their appeal was allowed Some of the appellants then applied to the High Court under Order XLV, rule 15 of the Civil Procedure Code. The matter was sent down to the Subordinate Judge, who held that the applicants were not entitled by means of proceedings in the Execution Department to ask the Court to enquire and determine what estates or interests had been substituted by the partition for the shares originally claimed and that the decree-holders could not get possession without bringing a regular suit to establish their title to the substituted estates or interests:

*Held*, that the decree-holders were entitled to ask the Subordinate Judge under section 47 of the Civil Procedure Code to ascertain in execution proceedings what estates and interests had been substituted for their original shares in the *ijmali mahal* and to give them possession of the substituted estates or interests. **PAT** RAVENESHWAR PRASAD *v.* BAIJNATH GOENKA, 1 P. L. W. 711; (1917) PAT. 205; 2 P. L. J. 496 **508**

——— S. 48 **820**

——— S. 60 (c)—*Insolvent possessed of* zemindari, *whether agriculturist House, whether can be sold.*

Where the chief source of income of an insolvent at the time of his application is his *zemindari*, he is not an agriculturist in the true meaning of the word, although he cultivates some land, and his house is not, therefore, exempt from sale under section 60 (c) of the Civil Procedure Code. **A** TEJ SINGH *v.* BANWARI LAL, 10 A. L. J. 540 **544**

——— Ss. 80, 2 (2), 97—*Suit against public servant—Notice, necessity of.*

Plaintiffs sued defendant, the Bench Clerk of a Sub-Divisional Judge, for the recovery of a sum of money which they alleged had been lost through his carelessness in losing or concealing an application for the execution of a decree, which became time-barred through the loss:

*Held*, that the suit could not be instituted without giving the defendant a notice under section 80 of the Civil Procedure Code.

The adjudication referred to in the definition of a decree in section 2 (2) of the Civil Procedure Code is an adjudication granting or refusing any of the reliefs claimed in the plaint and embodied in a formal declaration. **U B** NGA MEIK *v.* NGA GYI, 3 U. B. R. (1917), **677**

——— S. 9, scope of—Calcutta Municipal Act (III B. C of 1899), s. 336, whether controls s. 91, Civil Procedure Code Public highway, dedication of **74**

——— S. 92, *applicability of—Trustee, de son tort.*

Section 92 of the Civil Procedure Code, 1908, applies to the case of persons who are trustees *de son tort*. **A** SIDDHAN LAL *v* GAURI SHANKAR **165**

——— S. 92—*Management of trust—Court, discretion of.*

In a suit under section 92 of the Civil Procedure Code, 1908, a Court has complete discretion in arrang

ing for the management of a trust to which the section applies, although it is the duty of the Court to take into consideration such matters as the wishes of the founder where these can be ascertained) and also the past history of the institution and the way in which the management has been carried on theretofore. **A** DHARAM DASS *v.* SADHO PRAKASH **177**

—— S. 92—"*Such further or other relief as the nature of the case may require*", *meaning of—Separate suits for same trust, consolidation of—Judge, power of—Jurisdiction.*

The words "such further or other relief as the nature of the case may require" in section 92 of the Civil Procedure Code cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section.

Where more than two suits in the matter of the same trust have been sanctioned and are brought to trial, although with different parties, in the same Court, at the same time, on the same subject-matter, under the same circumstances and for the same kind of relief, a Judge has power under the Civil Procedure Code to consolidate the suits, that is to say, for the purpose of the hearing to merge them into one and treat them as one for all practical purposes.

A Judge making an express order consolidating such suits even without the consent of the parties acts within his jurisdiction. **A** DHARAM DAS *v.* DHARAM DAS **182**

—— S. 92—*Trust created for public purposes of religious nature—Muhammadan, religious, founder of new religious order—Mausoleum, mosque and* khanqah *built to his memory, management of—Offerings, title to.*

The management of the mausoleum, mosque and *khanqah* of a religious Muhammadan, who was the founder of a new religious order and to whom there could be no succession under any recognised rules, is a constructive trust created for public purposes of a religious nature, such as a Civil Court is competent to interfere with. **O** SHARFUDDIN *v.* MAQBULUNNISA, 4 O. L. J. 174 **101**

—— S. 99, O. XXXIV, R. 1—Mortgage—Redemption, suit for—Adverse claimants, joinder of, whether irregular—Misjoinder—Practice—Procedure **414**

—— S. 100 **126**

—— Ss. 100, 101—*Finding of fact grossly erroneous—Appeal, second, whether maintainable.*

The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

Where in a suit for pre-emption the lower Appellate Court found that a portion of the consideration stated in the sale-deed was fictitious and that the price had not been fixed in good faith, the finding being based on the evidence of the vendee produced by the plaintiff as well as certain books of account:

*Held*, that the Chief Court was precluded from disturbing the finding in second appeal, even though the correctness of the lower Appellate Court's conclu-



sions was open to doubt. **P** PHARAYA MAL *v.* ILAHI BAKHSH, 104 P. W. R. 1917; 89 P. R. 1917 **772**

—— S. 100 (a)—'*Usage having the force of law,*' *meaning of—Private right, whether falls under s.* 100 (a)—*High Court.*

The expression 'usage having the force of law' in section 100 (*a*), Civil Procedure Code, should ordinarily be confined to the usages of the country or of the community, the law merchant and usages referred to in section 1 of Act VIII of 1865. It is doubtful whether questions as to private rights fall within the section. **M** PANKAJAMMAL *v.* SECRETARY OF STATE, 5 L. W. 346; 32 M. L. J. 237; 21 M. L. T. 411 **510**

—— S. 102—Appeal, second **655**

—— S. 102—Suit for damages for breach of contract—Appeal, second, whether lies—Mortgage—*Zar-i-peshgi* lease—Ejectment by lessor—Mortgagee, right of, to recover damages for dispossession **578**

—— Ss. 104 (2), 47, O. XXI, R. 90—Appeal, second, whether lies from appellate order setting aside sale—Fraud, antecedent to sale proclamation, allegation of **450**

—— S. 105 (2)—*Decision on interlocutory matter, failure to appeal against, effect of.*

Apart altogether from the doctrine of *res judicata*, a decision in a suit given on an interlocutory matter whether appealable or not, if not appealed from is binding upon the parties in every proceeding in that suit. **A** HANSRAJ *v.* BIJAI RAM SINGH **624**

—— S. 107 (2) **846**

—— Ss. 109, 110, O. XLV, R. 3—*Privy Council, appeal to—Certificate, conditions for grant of—Easement, decree as to, rights of—Value of subject-matter—Value of claims or right affected—'Substantial question of law,' meaning of—'Property' in section* 110, *para.* 2, *meaning of.*

Where the subject-matter of a suit is an alleged easement right, which is negatived by the final decree of the High Court, the real value of that right, for the purpose of an appeal to the Privy Council under the first paragraph of section 110, Civil Procedure Code, can be properly ascertained only on the basis of the detriment or injury which the party claiming the right would sustain by its being negatived. And where the actual detriment or injury caused does not amount to Rs. 10,000, it is not a fit case for the grant of a certificate under paragraph 1 of section 110, Civil Procedure Code.

Paragraph 2 of section 110, Civil Procedure Code, is intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which *rights and claims* are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards.

Under paragraph 3 of section 110, the case must involve a question of law of general interest or importance, and not the application of the law to the particular facts of the case.

Per *Sadasiva Aiyar, J.*—The word 'property' in the second paragraph of section 110, Civil Procedure Code, means rights in property inferior to full

——— O. VI, R. 16—*Pleadings—Plaint, amendment of—Inconsistent allegations—Court, position of.*

The rule that the Court is not to dictate to the parties how they should frame their case is one that ought always to be preserved sacred, subject to this limitation that the parties must not offend against the rules of pleadings which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass and delay the trial of the suit.

Where in a suit for possession, the plaintiff denied the genuineness of the deed of *wakf* set up in defence and pleaded in the alternative that the deed had been obtained from her by the defendants by fraud and undue influence:

*Held*, that there was nothing in the above allegations that could be regarded as likely to embarrass, delay or prejudice the trial, so as to justify the Court in taking action under Order VI, rule 16, Civil Procedure Code. **O** FARID-UN-NISA *v.* MUKHTAR AHMAD, 4 O. L. J. 230 **488**

——— O. VI, R. 17, S. 115—*Plaint, amendment of—Revision—High Court, power of, to interfere.*

Plaintiff brought a suit claiming certain shares in the property in dispute. Before issues were settled he filed an application under Order VI, rule 17, Civil Procedure Code, praying for leave to amend the plaint so as to increase the number of shares claimed. The lower Court rejected the application:

*Held*, (1) that the plaintiff should have been given leave to amend the plaint;

(2) that the Chief Court could interfere in revision with the order refusing leave to amend. **P** IMDAD ALI SHAH *v.* SAYED ALI, 26 P. R. 1917 **65**



——— O. VII, R. 11—*Rejection of plaint—Court-fee, deficient.*

The provision of rule 11, Order VII, Code of Civil Procedure, is mandatory, so that a Court has no alternative but to reject a plaint written upon an insufficiently stamped paper, when the plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court fails to do so. **C** MIDNAPUR ZEMINDARY CO *v.* SECRETARY OF STATE, 44 C. 352; 21 C. W. N. 834 **96**

O. VIII, Rr. 1 to 10, O. IX, Rr. 6 (1) (a) (7), 13—*Omission of defendant to file written statement—Declaration of ex parte, validity of.*

A defendant in a suit appeared in person on 4th September 915; he was then ordered to file a written statement and given time till 21st September 1915; on the latter date, he appeared and asked for further time. The request was refused, and he was declared *ex parte*.

*Held*, per *Ayling, J.* (*Seshagiri Aiyar, J.*, dissenting), that the order declaring the defendant *ex parte* was not *ultra vires*.

Per *Ayling, J.*—The rules in Order VIII of the Civil Procedure Code, intervening between rules 1 and 9, are all directed to making clear what should be



contained in a written statement referred to in rule 1. They are really of the nature of explanations to rule 1. Rule 10 of Order VIII relates back to rule 1 as well as to rule 9

Per *Seshagiri Aiyar, J.*, (dissenting.)—A party should not be declared *ex parte* when he appears in person, though his defence may be struck out

The omission to make a provision in rule 13 of Order IX, regarding the non-filing of a written statement, is a clear indication that a declaration of *ex parte* can be made only for the non-appearance of a party.

The words "from whom a written statement is required" in rule 9 of Order VIII, cannot be read as referring back to rule 1. A whole mass of matter intervenes between the two rules and it would be doing violence to the language to read those words as referring to rule 1. Rule 10 cannot be connected with rule 1 of Order VIII. **M** RANGASAMI UDAYAN *v.* MANICKAM PILLAI, (1917 M. W. N 241 **223**

——— O. VIII, R. 6—*Set-off, principles governing.*

In a suit for the recovery of money the defendant is not allowed to set off against the plaintiff's demand any sum which is not an ascertained sum legally recoverable and the claim with respect to which does not arise out of the same transaction. **PAT** BISHUN CHAND *v.* AUDH BIHARI LAL, 1 P. L. W. 615; 2 P. L. J. 45; (1917 Pat 279 **350**

——— O. IX, R. 5—*Defendant not served—Suit consigned to record room—Second suit on same cause of action, maintainability of*

In a suit on a bond it appeared that the plaintiff had, on the 19th February 1909, brought a suit for recovery on the same bond against the same defendants, but as one of the defendants could not then be served, the Court had, on the 10th March 1909, consigned the suit to the record room, making a reference to Order IX, rule 5, Civil Procedure Code:

*Held*, that it was impossible for the Court to dismiss the first suit under Order IX, rule 5, Civil Procedure Code, that it was still pending and that, therefore, a second suit on the same cause of action was not maintainable **P** NANAK CHAND *v.* NUR-UD-DIN **448**

——— O. IX, R. 13—*Suit against principal and surety Decree ex parte against principal whether can be set aside without discharging surety—Plaintiff withdrawing suit against principal, effect of.*

A decree was passed against a principal debtor and his surety, the decree being *ex parte* against the principal debtor. He thereupon applied to have the decree set aside. Plaintiff consented to have his suit against the principal debtor dismissed on condition that he was allowed to execute his decree against the surety. The Small Cause Court Judge passed an order in these terms:

*Held*, (1) that the Judge was in error in setting aside the decree against the principal debtor without setting it aside against the surety as well;

(2) that the plaintiff having withdrawn his suit against the principal debtor, his suit against the surety was liable to be dismissed. **P** MUNSHI RAM *v.* MADAVA RAM **400**

CIVIL PROCEDURE CODE—1908—contd.

inadequacy of the prices stated in the sale proclamation was caused in consequence of the irregularity alleged.

A sale proclamation stating two separate valuations, the decree-holder's valuation and the judgment-debtor's valuation, is not irregular. **PAT** NAND KISHWAR SAHAI *v.* KEDAR NATH 849

——— O. XXII, R. 4—*Preliminary decree—Death of defendant before final decree—Application for substitution*

A preliminary decree does not put an end to a suit; it must be continued up to the stage of the final decree.

Where after the passing of a preliminary decree in a suit the defendant died, and an application to bring his representatives on the record was made more than six months after his death:

*Held*, that the application was barred by time. **A** MOTI LAL *v.* RAM NARAIN, 15 A. L. J. 549 1006

——— O. XXII, RR. 10, 11; O. XLIII, R. 1 (1), Ss. 107 (2), 146—*Devolution of interest pending suit—Application under O. XXII, r. 10, after decree, maintainability of—Appeal, right of, by person acquiring interest who was no party to decree appealed against—Merits of appeal—Court, duty of.*

Order XXII, rule 10, Civil Procedure Code, does not apply to cases wherein the new party alleging acquisition of an interest takes action after the decree and before the appeal against it is begun. The discretion of the Court to allow or refuse the substitution of a new party under the rule should be exercised only in connection with pending proceedings in which the material considerations of immediate convenience are within its knowledge. The new party cannot apply, under the rule, to be impleaded only for the purpose of preferring an appeal against a concluded decree.

The appeal can, however, be entertained under section 146, Civil Procedure Code, if the merits are in favour of the appellant, so that substantial justice may not be defeated. **M** SUBBA PILLAI *v.* RANGASAMI, (1917) M. W. N. 306 846

——— O. XXII, RR. 10, 11—*Official Receiver, appeal by—Continuation of proceedings by successor without amendment of cause Title, validity of—Intimation of change to Court—Decision on merits, effect of*

*Quære*—Whether, on the resignation of his office by an Official Receiver maintaining a suit or appeal his successor can continue the proceedings without his name being brought on the record.

Where, however, the change of *personnel* was intimated to the Court, which proceeded notwithstanding to pronounce a decision on the merits, the record must be deemed to have been amended by substitution of the name of the new officer in place of the one who had vacated office. **M** RAMAKRISHNA IYER *v.* OFFICIAL RECEIVER, TINNEVELLY, 5 L. W. 507; 32 M. L. J. 6 170

——— O. XXIII, R. 1, S. 11—*Appeal—Withdrawal of suit*—Res judicata.

Once a case is taken on appeal it cannot be said to have been finally determined until the Appellate Court has adjudicated upon the question in issue between the parties, and by reason of the Court allowing the suit to be withdrawn by the plaintiff it cannot be said that its order possesses that necessary degree of finality so as to operate as *res judicata* relative to the rights of the parties to the antecedent litigation. **PAT** RAM LOCHAN SINGH *v.* JATADHARI SINGH 853

——— O. XXIII, R. 1, S. 115—*Leave to withdraw with liberty to bring fresh suit—Insufficient grounds—Revision—High Court, interference by.*

The mere fact that the Primary Court granted leave to a plaintiff, to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on insufficient grounds is no ground for the High Court's interference in revision under section 115, Civil Procedure Code, unless the lower Court in granting leave acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. **C** BASUDEB NARAYAN SINHA *v.* KADAMBINI DASSI 77

——— O. XXIII, R. 1, S. 11—Res judicata—*Relinquishment of portion of claim without leave, consequence of.*

In a suit for recovery of possession of land, the plaintiff included within the boundaries described in the plaint two parcels A and B, and put forward his claim for ejectment in respect of both on the allegation that the defendants had dispossessed him therefrom, but before the Commissioner at the local enquiry, and at the trial, the plaintiff relinquished his claim without leave of the Court in respect of the parcel B, with the result that the suit was dismissed with regard to that parcel:

*Held*, that a subsequent suit for recovery of possession of parcel B against the same defendants was *res judicata* and was also barred under Order XXIII, rule 1, Civil Procedure Code, as the dispossession which was the cause of action in both the suits was in reality the same, although the plaintiff falsely alleged, in his plaint in the subsequent suit, dispossession at a later date. **C** DANESH MOLLA *v.* DHANANJOY BISWAS 408

——— O. XXIII, R. 1—Will—Probate, application for, withdrawal of—Court, duty of—O. XXIII, R. 1, applicability of, to Probate proceedings 345

——— O. XXIII, R. 1, S. 11—*Withdrawal of claim, order for—Incompetency of Court to permit withdrawal, effect of*—Res judicata—*Jurisdiction, irregular exercise of.*

An order permitting the withdrawal of a claim under Order XXIII, rule 1, Civil Procedure Code, which is beyond the competency of the Court to pass, is not a nullity but an order passed in the irregular exercise of jurisdiction, and such an order does not operate as *res judicata* so as to bar a subsequent suit for the same relief.

Even if the order in the earlier suit be treated as a nullity, a second suit for the same relief is not barred as the claim remains undisposed of. **M** THULJARAM ROW *v.* GOPALA AIYAR, (1917) M. W. N. 234; 2 M. L. T. 229; 32 M. L. J. 434 611

O. XXIII, R. 3—*Agreement dealing with matters not included in claim, whether lawful.*

A compromise is not unlawful within the meaning of Order XXIII, rule 3, Civil Procedure Code, merely because it deals with matters not included in the

CIVIL PROCEDURE CODE—1908—contd.

claim. In such a case the Court should see how far it relates to the matters in suit and should pass a decree in regard to those matters. **P** HARI CHAND *v.* MAGHI MAL, 95 P. W. R. 1917; 112 P. L. R. 1917; 78 P. R. 1917 **675**

——— O. XXIII, R 3, O. XXXIV, R. 5—*Preliminary decree—Part payment out of Court—Adjustment of such payment, whether permissible at final decree.*

There is nothing in Order XXXIV, rule 5, of the Civil Procedure Code to justify the view that Order XXIII, rule 3, does not apply to adjustments of accounts made between the date of the preliminary decree and the date on which the accounts between the parties are finally settled.

If a preliminary decree is satisfied in part out of Court, the Court at the final taking of accounts will permit such payment towards the satisfaction of the decree. **PAT** JOGENDRA PRASAD NARAIN SINGH *v.* GOURI SANKAR PRASAD SAHU, 2 P. L. W. 66; 2 P. L. J. 533 **138**

——— O. XXXII, R. 4—*Guardian* ad litem, *appointment of—Adverse interest—Consent of guardian—Minor, decree against—Suit to set aside decree—Prejudice to minor—Proof.*

The mere omission to obtain the consent of the person whom it is proposed to appoint guardian *ad litem* of a minor is not fatal to the proceeding. It must be shown that the minor was prejudiced by the defect.

A minor when he comes of age can attack a decree obtained against him during his minority upon the ground that the person who represented him in the litigation had an adverse interest, but he must show that in that particular case that particular person had in fact a particular adverse interest. He cannot be allowed to succeed on mere surmise.

Where S., a minor, was sued on a mortgage-bond executed on his behalf by his mother for legal necessity and benefit of the minor, and the mother, who was also the certificated guardian of the person and property of the minor, was appointed his guardian *ad litem*, but she failed to appear in the suit though notice was served upon her, and a decree was passed against the minor:

*Held*, that the decree could not be set aside merely on the ground that the mother's consent to act as guardian *ad litem* was not obtained, when it was proved that the minor was in no way prejudiced by the procedure adopted **PAT** SURAJ DEO NARAIN MISSRA *v.* SARJUG PRASAD MISSRA, 1 P. L. W. 647; (1917) PAT. 198; 2 P. L. J. 390 **227**

——— O. XXXII, R. 4 (3)—*Minor—Guardian* ad litem.

The provisions of rule 4 (3) of Order XXXII of the Civil Procedure Code are mandatory and imperative in their nature and it would amount to want of jurisdiction in the Court to appoint a guardian *ad litem* on behalf of a minor without his consent. **PAT** MOHAN KRISHNA DAR *v.* HAR PRASAD **2**

——— O. XXXII, R. 7—*Agreement varying terms of decree—Parties minors—Agreement, whether can be avoided.*

An agreement varying the terms of a decree between parties who are minors, which is not sanctioned by the Court under Order XXXII, rule 7, Civil Procedure Code, can be avoided by each of the parties as against the other. A party who is barred by limitation from actively avoiding it as plaintiff can, however, defend a suit brought against him on that agreement by pleading the voidability of the transaction as against him. **M** SETHURAMA SAHIB *v.* CHOTTA RAJA SAHIB, (1917) M. W. N. 327 **820**

——— O. XXXIV—*Mortgage—Scheme for payment under decree for foreclosure, sale or redemption.*

The procedure under the provisions of Order XXXIV, Civil Procedure Code, is essentially different from the procedure in a mortgage suit under the terms of the repealed sections of the Transfer of Property Act and the method of payment to the mortgagee as authorised by the Transfer of Property Act has been abolished.

The scheme stated under the terms of Order XXXIV, Civil Procedure Code, for the payment of mortgage money under a decree for foreclosure, sale or redemption noted. **C** PIRAN BIBI *v.* JITENDRA MOHAN, 25 C. L. J. 553; 21 C. W. N. 920 **845**

——— O. XXXIV, R. 1—*Mortgage-decree against father—Execution—Sale—Redemption, suit for, by son not in existence at date of decree, maintainability of—Right of son not made party to suit.*

A son, who was not born at the date of a mortgage-decree and sale, cannot bring a suit for redemption of the mortgage; nor can a son succeed in a redemption suit after sale on the sole ground that he was not impleaded as a party in the mortgage suit against his father, even though the mortgagee had notice of his existence, unless it is proved that he was intentionally omitted from the mortgage suit in order to defeat his right to redeem. **PAT** SUBALAL SINGH *v.* RAMESHWAR SINGH, 1 P. L. W. 736 **525**

——— O. XXXIV, R. 1, S. 99—*Mortgage—Redemption, suit for—Adverse claimants, joinder of, whether irregular—Misjoinder—Practice—Procedure.*

In a suit for redemption of a mortgage, it is not irregular to implead persons claiming title to the mortgaged property adversely to the mortgagor.

Even if the joinder of such persons amounts to misjoinder and the Trial Court does not take the necessary steps to cure the defect before deciding the suit, the Appellate Court should not reverse the decision of the Court of First Instance on the ground of misjoinder alone, unless such misjoinder has affected the merits of the case or the jurisdiction of the Court.

The question whether merits or jurisdiction have been affected should not be assumed but should be deduced from the facts of each case, the evidence and the course of the trial in the Court of First Instance. **M** PUMULLI MANAKAL NARAYANAN *v.* VENKITAJELA AIYAR, 5 L. W. 615; (1917) M. W. N. 417 **414**

——— O. XXXIV, R. 1—*Mortgage suit—Stranger to mortgage—Proper parties.*

Where a prior mortgagee of an entire property brought a suit against his mortgagor and the subsequent mortgagee of a portion of the property, and the applicants sought to be made parties to the suit on the allegation that they were the owners of the whole property and had executed the subsequent mortgage:

CIVIL PROCEDURE CODE—1908—contd.

*Held*, that the applicants were not strangers, but proper parties, to the suit. O NAGESHWAR SHUKUL *v.* JASODRA, 4 O. L. J. 352 **288**

——— O. XXXIV, R. 5—*Instalment decree—Default—Application for final decree, nature of—Limitation Act (IX of 1908), Sch. I, Art.* 181.

Under the Civil Procedure Code, 1908, an application for a final decree is not an application in execution.

In a suit on a mortgage a compromise was effected by which the defendant was required to pay the money by certain instalments and in default of payment of any one instalment the property was to be sold for the full amount of the claim. On default being made, the decree-holder applied under Order XXXIV, rule 5, of the Civil Procedure Code, for a final decree. The application was dismissed on the ground that the decree was barred by time:

*Held*, that Article 181 of Schedule I of the Limitation Act applied to the case and that time began to run from the date when default was made. A RAMJI LAL *v.* KARAM SINGH, 15 A. L. J. 448 **424**

——— O. XXXIV, R. 5, O XXIII, R. 3—Preliminary decree—Part payment out of Court—Adjustment of such payment, whether permi-sible at final decree **138**

——— O. XXXIV, RR. 14, 15—*Transfer of Property Act (IV of 1882), s. 99—Decree on security bond—Execution—Property charged, whether can be sold—Rateable contribution—Value of properties, determination of.*

The respondent executed a security bond in favour of the appellant by which some properties were made security for a certain sum. A money decree was obtained by the appellant on the bond which, though it declared a lien on the properties mentioned in the bond, did not amount to a decree on the footing of a mortgage:

*Held*, that the decree-holders could not bring the charged properties to sale in execution of the decree and that their only course was to institute a suit on the lien declared by the decree.

The distinction between section 99 of the Transfer of Property Act and rule 14 of Order XXXIV, Civil Procedure Code, pointed out.

*Semble*—Where several properties are made security for a debt, in order to determine the liability of each property to contribute rateably to the debt, the practice of the High Court is to take the valuation of the properties at the date of the instrument creating the security. C GOBIND CHANDRA PAL *v.* KAILASH CHANDRA PAL, 25 C. L. J. 354 **230**

O. XXXVIII, R. 6 **816**

——— O. XL, R. 1, O. XLIII, CL. (s)—*Receiver, order for appointment of, without naming person, nature of—Appeal.*

Per *Abdur Rahim and Srinivasa Aiyangar, JJ.*—The pronouncement by a Court that a Receiver should be appointed without naming a specific person is an order under Order XL, rule 1, Civil Procedure Code, and is appealable under Order XLIII, clause *s*.

Per *Srinivasa Aiyangar, J.*—An order for the appointment of a Receiver is as much an order appointing a Receiver as an order naming a particular person as Receiver and the right of appeal conferred by clause (*s*) of Order XLIII, Civil Procedure Code, against orders under Order XL, rule 1, is not restricted to any particular kind of order but against all orders under the latter rule.

Per *Spencer, J.* dissenting.—An order that a Receiver should be appointed is merely interlocutory and as it cannot be put into operation until some one is actually appointed, an appeal against the same is premature. M PALANIAPPA CHETTY *v.* PALANIAPPA CHETTY, 32 M. L. J. 504; 40 M. 18; (1917) M. W. N. 393; 5 L. W. 776 **185**

——— O. XLI, R. 4, *applicability of.*

The provisions of Order XLI, rule 4, of the Civil Procedure Code do not apply to a case where the grounds of appeal are not common to all the appellants. P NANDA *v.* JAI CHAND, 35 P. W. R. 1917 **184**

——— O. XLI, R. 10, CL. (2)—*Appeal, dismissal of—Re-admission—Judge, power of.*

A Judge has jurisdiction to re-admit an appeal dismissed by an order under clause (2), rule 10, Order XLI, Civil Procedure Code.

But an order re-admitting such an appeal without notice to the other side is not binding on it. C GOLJAN BIBI *v.* NAFAR ALI **234**

——— O. XLI, R. 22—*Appeal—Practice—Respondent, whether can maintain decree on ground decided against him—Cross-objections—Suit for declaration of invalidity of gift—Non-ancestral property.*

One *B.* made an oral gift of his landed property to his unmarried daughters and mutation of the gifted land was effected in favour of the donees. On *B.*'s death his collaterals in the sixth degree sued for a declaration to the effect that the gift made by *B.* to his daughters should not affect their reversionary rights after the death of the widow. The Subordinate Judge, holding that the land was ancestral but that by custom applicable to the parties the gift was valid, dismissed the suit. In appeal it was contended by the defendants that the plaintiffs had no *locus standi* to question the gift because the land in suit was not the ancestral property of *B.* The District Judge refused to hear arguments on the point because no cross-objections had been filed against the finding that the land was ancestral:

*Held*, (1) that the decree of the Subordinate Judge being one dismissing the suit, the defendants in their capacity of respondents in the District Judge's Court were entitled to maintain that decree upon any ground decided against them by the Subordinate Judge without filing any cross-objections under Order XLI, rule 22, Civil Procedure Code, and that the District Judge acted illegally in declining to hear arguments on the question whether the land in dispute was ancestral or not:

(2) that the evidence on the record was insufficient to prove that the land was ancestral and that the plaintiffs' suit was, therefore, liable to be dismissed upon this ground alone. P PARSANI *v.* MANGAL SINGH, 103 P. L. R. 1917 **237**

——— O. XLI, RR. 23, 25—*Remand—Preliminary point—Decision on some issues—Order, proper.*

Under Order XLI, rule 23 of the Civil Procedure, Code, 1908, it is only when the Appellate Court re-

who are not present, either in person or by proxy, cannot be taken into consideration to make up the majority in number representing three-fourths in value of the share-holders and creditors. O KASHMIRI BANK, LTD. v. GOKUL CHAND, 4 O. L. J. 1 0 57

——— S. 153—*Scheme of composition, when takes effect—Declaration, suit for, that plaintiff's liability on pro-note has ceased—Frame of suit.*

Plaintiff had a deposit of Rs. 4,000 in the defendant Bank payable on the 10th October 1914. On the 3rd September 1914 he borrowed Rs. 2,000 at 12 per cent. per annum on the security of his deposit and executed a pro-note for the amount. On the 8th October 1914 the Bank suspended payment, and on the 12th and 13th October the plaintiff wrote to the Bank to pay him the balance after deducting Rs. 2,000, and received a reply that as the Bank had stopped business no action could be taken. The Bank started business again on the 1st July 1915 under a scheme sanctioned by the Allahabad High Court, by which debentures and preference shares were to be issued to all "fixed depositors" in lieu of their deposits. The plaintiff brought this suit for a declaration that his liability on the pro-note had come to an end and for an injunction that the Bank be directed to make entries in the books accordingly:

*Held*, (1) that the operation of the scheme sanctioned by the High Court did not date back to the time when the Bank suspended payment but that it affected only those persons who were creditors at the time when the sanction was accorded by the Court;

(2) that at the latter date the plaintiff's debt had come to an end and he was a creditor to the extent of Rs. 2,000 and that the arrangement must, therefore, be confined in its operation to his position as a creditor to that extent;

(3) that inasmuch as the Bank wanted the plaintiff to accept the position of a creditor to the extent of Rs. 4,000 and that of a debtor for Rs. 2,000 and the plaintiff repudiated his liability as such, urging that he was a creditor to the extent of Rs. 2,000, and was prepared to accept the terms of the scheme to that extent, no other remedy was open to him to have an adjudication upon his alleged liability as a debtor other than the action for declaration and injunction as brought by him and that he was, therefore, entitled to the relief claimed. P CHHUNNU LAL v. BANK OF UPPER INDIA, LTD, DELHI, 106 P. W. R. 1917 904

CONFESSION, how to be made—Magistrate, duty of, when recording confession 721

——, retracted—Corroboration 703

CONSTRUCTION OF DOCUMENT—*Bond authorising suit on default of payment of yearly interest or of principal after fixed period—Suit for principal sum—Cause of action.*

Where an unregistered bond executed on the 1st of July 1906 provided that the borrower was to pay interest yearly and the principal sum was to be paid within a period of six years and the general clause relating to what was to happen in case of default was, "*dar surat wada khilafi mahajan mazkur ko ikhtiar hasil hai ki jaidad mankola wa ghair mankola se wasul kar len*"



*Held*, that on the proper construction of these words, the plaintiff had a cause of action for a suit for the principal sum, if he brought it within three years from the date of the period fixed for payment, but that the suit for interest which had not been paid for more than three years was barred. O AMIR HAIDAR KHAN v. RAM DAT, 20 O. C 152 229

———*Intention.*

For the purpose of construing a document the Court has to look at the whole of the document and consider all its terms one with the other, and for the purpose of ascertaining the intention of the parties the Court is also entitled to look at the position of affairs at the time when the document was entered into and also at the position of the parties who executed the document.

Per *Chatterjea, J.* If the expressions used in a deed are capable of two constructions, that construction should be adopted which is consistent with the law to which the parties are subject. C MOHAMAD UMAR v MAN KOER, 21 C. W. N. 905 783

———*Kabuliyat*—Agreement to deliver half produce or pay fixed sum—Landlord's right to insist upon half produce 836

——— Lease—Heritable rights—Lessee holding over, position of 116

——Sale-deed, interpretation of 361

*CONTEMPORANEA EXPOSITIO*, doctrine of, applicability of 581

CONTRACT, *construction of—Contract for supply of goods by agent of enemy firm—Declaration of hostilities before arrival of vessel—Commercial Intercourse with Enemies Ordinance (VI of 1914)—Capture of vessel and condemnation by Prize Court—Subsequent release, effect of—Breach of contract—Damages, liability for—Contract Act (IX of 1872), s. 56, illus. (d).*

Defendants, agents of a German firm, contracted on 25th August 1914 to deliver to plaintiff at Madura certain casks of dye in 3 instalments of 2 casks each 'to be delivered on arrival of the steamers, one lot of two casks to be delivered each time at Rs. 501-1-0 for each cask.' The defendants were not to be responsible if the steamers did not come to Madras or Tuticorin, the port for Madura, where the goods were to be consigned One of the steamers, *Barenfels*, left Hamburg and Antwerp before the outbreak of war but before it could arrive, war had broken out and the Commercial Intercourse with Enemies Ordinance was in force. The *Barenfels* and her cargo were captured in October 1914 and condemned by the Prize Court. She was, however, subsequently released and allowed to proceed on her voyage to Colombo. The defendants were precluded from taking delivery of the goods, unless they deposited a sum amounting to twice the invoice value of the goods In an action for damages for breach of contract against the defendants:

*Held*, that the defendants were not liable inasmuch as:

(1) on the true construction of the contract the defendants were not liable to deliver the goods even if the steamer did arrive when there were no such goods in it;

CONTRACT ACT—contd.

—— —— Ss. 45, 38—*Payment to one of several joint promisees, whether valid discharge.*

A payment to one of several joint promisees does not operate as a complete discharge of the debt. **S** JERAMDAS *v.* WADERO SHAH ALI, O S L R 2 3
03

—— —— S. 55—*Mortgage of agricultural land—Redemption to be had in* khali fasl Jeth *Time, whether essence of contract.*

In cases of mortgage with possession in respect of agricultural land, providing for redemption only at a particular season of the year known as *khali fasl Jeth*, time is of the essence of the contract, and the mortgagor, in order to maintain a suit for redemption, must show that he made a full offer to redeem in *khali fasl Jeth* and that such offer was refused. **O** KARIM BAKHSH *v.* IDU SHAH, 4 O. L. J. 33 81

—— —— S. 56—*Performance rendered impossible by outbreak of war—Rights and liabilities of parties—Contract of affreightment with alien enemy before war, whether subsists after outbreak of war—C I F contract, incidents of—Executory contract, dissolution of—Estoppel—Vendor and purchaser.*

Under a C. I. F. contract the defendants (vendors) sent out an order to Europe for supply of certain goods to the plaintiffs (purchasers) in Calcutta The goods were shipped on the 2nd July 1914 in a German vessel which was on the high seas when war broke out between England and Germany, and the vessel was captured by the Government as an enemy ship and brought before the Ceylon Court of Admiralty. On the 25th August 1914 the ship was condemned as a lawful prize, but the cargo was released on condition that on its conveyance by the Crown to its destination the Crown would be authorised to recover certain expenses against the cargo released and delivered in Calcutta On the arrival of the goods in Calcutta, the defendants asked the plaintiffs to take delivery on payment of those expenses. On the plaintiffs' refusal to do so the defendants disposed of the goods in the market, whereupon the plaintiffs instituted a suit for recovery of damages for failure of the defendants to deliver the goods in terms of the contract:

*Held*, that the plaintiffs were not entitled to recover damages, as the contract between them and the defendants became void under section 56 of the Contract Act, inasmuch as by the outbreak of the war, one essential element of the contract, namely the contract of affreightment, became unlawful and the fact that the defendants at one stage offered to deliver the goods to the plaintiffs on certain terms did not estop them from pleading that the contract had become void under section 56 of the Contract Act.

The incidents of a C. I. F. contract explained.

An executory contract made with an alien enemy in peace time is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy or if it is in its nature incapable of suspension

A contract is deemed in its nature incapable of suspension, if its proper performance necessitates intercourse with the enemy during the war or where time is of the essence of the contract, or the parties cannot on the restoration of peace be put on a footing of equality.

A contract of affreightment may be dissolved without execution not only by act of the parties, but in many cases by the act of the law If the voyage becomes unlawful or impossible to be performed, or if it is broken up, either before or after it has actually commenced, by war or interdiction, complete or partial, of commerce with the place of destination, the contract is dissolved.

Per *Mookerjee, J*—Where a ship is condemned as a prize but the cargo is released, the Crown is entitled to impose the payment of freight as a condition of its release and has a lien on the goods till it is paid.

The ultimate conveyance of the goods by the condemned ship to its destination is in no sense a continuation of the original voyage in fulfilment of the contract of affreightment but is essentially a new voyage under new conditions. **C** MADHORAM HURDEODASS *v.* G. C. SETT, 21 C. W. N. 670; 2 C. L. J. 6
**383**

—— —— S 56, illus. *d*) **851**

—— —— S 65, *applicability of—Broach and Kaira Incumbered Estates Act* (*XI of 1881*), *s* 28—*Mortgage by* talukdar, *validity of—Mortgagee, right of, to recover mortgage money.*

Section 65 of the Contract Act has no application to a case of transfer of property by way of mortgage, where the transfer is perfectly valid when made and remains valid for a certain period of time fixed by the law, *i e.*, the lifetime of the mortgagor.

Therefore, where a mortgage effected by a *talukdar* becomes void under section 28 of the Broach and Kaira Incumbered Estates Act, 1881, after the death of the *talukdar*, the mortgagee is not entitled to recover back the money advanced by him on the mortgage. **B** PARSHOTTAM VERIBHAI *v.* CHHATRASANGJI MADHAVSANGJI, 19 BOM. L R. 545; 41 B. 546
**100**

—— —— S 70, *scope of—Transfer of Property Act (IV of 1882), s. 51—Trespasser in good faith, improving land—Owner, liability of, to pay costs of improvement.*

The defendant encroached upon the land of the plaintiff, believing in good faith that it belonged to him as forming part of his adjoining land, cleared it of jungle and rendered it fit for cultivation at his expense:

*Held*, that the defendant was not entitled to a charge upon the land decreed to the plaintiff for the expenses, as it was not established that the plaintiff or his predecessor was aware of the encroachment but as what was done by the defendant for the improvement of the land was done by him lawfully and was not intended to be done gratuitously and as the plaintiff enjoyed the benefit of it, the defendant was entitled, under section 70 of the Contract Act, to be compensated for the money spent by him and the plaintiff should get a decree to recover possession upon payment of the amount which was laid out by the defendant in improving the land of the plaintiff.

Section 70 of the Contract Act is not limited to cases where the person lawfully doing the thing for another person knows who the other person is. **C** BHUPENDRA KUMAR *v* PYARI MOHAN ROY **464**

—— —— S. 74—*Mortgage—Mortgagor, stipulation by, to pay by instalments—Default—Interest, whether penalty.*

A mortgagor undertook to pay the mortgage-money in instalments and it was agreed that in case of breach of promise the creditors would have the right to realize the instalment money as regards the expired and unexpired period, principal with interest at 2 per cent. per month from the expiration of the *kist* till realization:

*Held*, that the stipulation to pay the interest was not by way of penalty. **PAT** SAHDEO SINGH *v.* KARIMAN SINGH **770**

——— S. 74—*Penalty—Stipulation to pay interest at higher rate on default of payment of lower rate—Court, power of, to give relief.*

A stipulation to pay interest at a higher rate on default of punctual payments of interest at a lower rate is a penalty. But in the converse case, *i. e.*, where the stipulation is for a certain rate of interest which would be reduced to a lower rate, if punctually paid, the stipulation for the higher rate would not be treated as a penalty, although if the question were *res integra* there is no reason why the stipulation for the higher rate of interest should not be regarded as a penalty in both cases.

Section 74 of the Indian Contract Act does away with the distinction between penalty and liquidated damages, and under the section, as amended by Act VI of 1899, the Court has the power to grant relief if the contract contains any stipulation by way of penalty, even where the contract was entered into before the amendment by Act VI of 1899.

Where a mortgage-deed stipulated for the payment of interest at 9½ per cent. to be reduced to 7½ per cent on punctual payment, but the scheme for liquidation of the mortgage debt, which was a material part of the deed, showed that interest was calculated at 7½ per cent. only:

*Held*, that, as it appeared from the construction of the mortgage deed taken together with the scheme that the intention of the parties was that interest should be paid at 7½ per cent. and on default at 9½ per cent, the mortgagees could not recover interest at more than 7½ per cent but that they were entitled to reasonable compensation for non-payment of interest punctually—which compensation would be interest at 7½ per cent. on the interest which was not punctually paid. **C** SYAM PEARY DASSYA *v.* EASTERN MORTGAGE & AGENCY CO., LTD. **865**

——— Ss 78, 56—*Effect of s. 78 on concluded C. I. F. contract—War Proclamation of 12th September 1914 (Commercial Intercourse with Enemies Ordinance VI of 1914)—Contract, C. I F., for sale of goods by enemy firm—Declaration of hostilities before delivery of documents, effect of—Impossibility of performance—Non-enforceability of contract—Release of goods, effect of.*

The effect of a C. I. F. contract is that the buyer under it is entitled to the documents of title only on payment of the money due on those documents. Until then, he has no right to the goods.

Where the documents of title are made out to the order of the shippers vendors, the buyer does not acquire any right to the goods before he obtains the documents of title in exchange for payment and a contract of that description is not overridden by section 78 of the Contract Act which expressly reserves from its operation any special contract



which the parties may enter into and impliedly accept the ordinary incidents attached to it by mercantile usage.

A buyer who had contracted for the supply of goods by an enemy firm before the commencement of hostilities under a C. I. F. contract cannot enforce its performance if, before delivery of documents to him, war had been declared. The contract had become impossible of performance and void by the combined operation of section 56 of the Contract Act and the Proclamation of 12th September 1914.

The fact that the goods were released by Government after having been temporarily detained will not have the effect of reviving the contract or renewing the validity of the contract which had become void before the order of release was passed. Its only effect is that the Government withdraws its hands so that any party entitled to the goods may establish his right to them. **M** SOORTHINGJEE SAKALCHAND *v.* MAHOMED NASURUDEEN, 32 M. L. J. 146 **526**

——— Ss 102, 108, 178—Transfer of Property Act (IV of 1882), s. 137—Contract—Negotiability—Delivery order, whether negotiable Document of title—Test **86**

——— S. 128 **347**

——— Ss. 178, 79—*Bailment—Pledgor and pledgee, rights of—Pledge by person in possession of goods having limited authority—Principal, knowledge of.*

Section 178 of the Contract Act does not limit the scope of section 78, but saves a pledge to the extent of the pledgor's own interest, notwithstanding the presence of invalidating conditions falling under one of the provisos to section 178. In other words, whenever he has an interest the person in possession of the goods or documents has unconditional authority to charge at least that interest.

Plaintiffs, up-country cotton merchants, used to consign their cotton for sale to *A* and frequently called upon the latter to remit large sums of money, the security being the cotton in *A*'s hands. *A* used to raise this money by pledge of the cotton to *B*. Subsequently *A* became an insolvent, and the accounts between the parties showed a balance of Rs. 50,000 owing to *A* from the plaintiffs and Rs. 83,000 borrowed by *A* from *B* on the security of 757 bales of cotton. In a suit by plaintiffs to recover the cotton from *B*:

*Held*, that the plaintiffs were liable to pay *B* the money advanced by him to *A* on the security of the cotton, inasmuch as the plaintiffs knew the manner in which their cotton was being dealt with by *A* and consequently approved of the pledging and had urged *A* to pledge the cotton, when necessary. **B** LAKHAMSEY LADHA & CO. *v.* LAKHMICHAND PADAMSEY, 19 BOM. L. R. 335 **148**

——— S. 211—*Principal and agent—Agent for sale of goods—Delivery order received from broker—Payment to broker, whether discharges agent.*

A delivery order for certain goods belonging to the plaintiffs' firm was handed over to the defendants, for the purpose of enabling them to sell the goods at a commission, by a broker who, in the

three persons to hear and decide it, the hearing and decision by two Magistrates was in accordance with law;

2 that the mere fact that three or any other number of Magistrates happened to be present during any part of the hearing did not invalidate the trial of the case by two Magistrates. **A** KHUDA BAKSH *v.* EMPEROR, 15 A. L. J. 463; 18 CR. L. J. 749 **749**

—— — S. 54, *scope of—Cognisable cases—Police, power of, to arrest when warrant already issued by Magistrate.*

Section 54 of the Criminal Procedure Code does not prevent any Police Officer from arresting a person where a warrant for his arrest has already been issued by a Magistrate, and the exercise of the power is not restricted only to the officer to whom the warrant is directed.

Per *Napier, J*.—The object of the Code is to give the widest powers to the Police in cognisable cases and the only limitation is the necessary requirement of reasonability and credibility of the information to prevent the misuse of the powers. **M** RATNA MUDALI, *In re*, 18 CR. L. J. 709 **709**

—— Ss. 54 (1), 537—*Arrest without warrant—Arrest without notifying substance of warrant—Omission, effect of.*

The omission to notify the person arrested of the order for his arrest is an irregularity covered by section 537 of the Criminal Procedure Code.

The writing out of a warrant or an order for arrest when the person to be arrested comes within the first clause of section 54 of the Criminal Procedure Code is a superfluous act but cannot be considered illegal. **A** RANGPAL *v.* EMPEROR, 18 CR. L. J. 666 **314**

—— —— S. 72, *scope of—Summons to give evidence at Police investigation, disobedience to — Service not effected through departmental superior, effect of—Offence—Penal Code Act XLV of 1860, s. 174.*

Section 72 of the Code of Criminal Procedure requiring service of summonses to Government and Railway servants to be effected through the heads of their departments applies only to summonses issued by a Court of Justice, and not to orders of Police Officers investigating a crime under Chapter XIV of the Code.

Non-attendance, therefore, in obedience to a summons issued by a Sub-Inspector of Police and served personally on an *amin* requiring him to give evidence at a Police investigation constitutes an offence under section 174, Indian Penal Code.

The matter, however, is one to be departmentally dealt with. The practice of launching a prosecution without consultation with the delinquent's official superior deprecated. **M** GUMPARTHI VENKATARAMIAH, *In re*, 18 CR. L. J. 733 **733**

—— —— Ss. 110, 367—Evidence—Appellate Court, duty of—Judgment, nature of—Findings to be supported by reasons—Evidence, examination of **297**

—— —— S. 110—*Evidence as to suspicion, value of—Ex-convict, position of*—Locus penitentiæ.

Where a person bound over to be of good behaviour, under section 110, Criminal Procedure Code, was, shortly after his release, handed up again under the same section, and the evidence against him consisted of the suggestion that he had been suspected of having been concerned in two or three thefts:

*Held*, that in the absence of any tangible evidence to show that he had since his release been leading a life of crime and in view of the short period which he had had to reform himself, he could not be bound over again. **O** AKBARA *v.* EMPEROR, 4 O. L. J. 319; 18 CR. L. J. 710 **710**

—— —— S. 110 (d)—*Extortion and mischief—Habitually bringing false claims in Civil Courts—Offence.*

Section 110 (*d*) of the Criminal Procedure Code does not apply to the case of a person who has the reputation of habitually bringing false claims in the Civil Courts.

A person who brings a claim in the Civil Court which he knows to be false, commits an offence punishable under section 209 of the Penal Code, but he does not by so doing commit an offence either, if he succeeds, of extortion, or if he fails, of attempting to commit extortion. **O** KHUSHAL *v.* EMPEROR, 4 O. L. J. 143; 20 O. C. 129; 18 CR. L. J. 651 **299**

—— —— S. 137, *proceedings under—Magistrate, whether can act as arbitrator—Claim of right, bona fides of.*

Section 137 of the Criminal Procedure Code is imperative and mandatory.

In proceeding under that section a Magistrate is not justified in assuming the role of an arbitrator, simply because both the parties agree to his acting as such. Consent or waiver of the parties cannot invest a Magistrate with jurisdiction which he does not possess

Where in a proceeding under section 137 of the Criminal Procedure Code, a party appears and shows cause, alleging that what is claimed as a public pathway is not so, the Magistrate should record evidence on the matter of the complaint as in a summons case, and should at the outset enquire into the *bona fides* or speciosity of the claim. **C** CHANDRA MANDAL *v.* RAM MANDAL, 25 C. L. J. 349; 21 C. W. N. 926; 18 CR. L. J. 738 **738**

—— — S. 145—*Arbitration—Magistrate, whether can make reference—Jurisdiction.*

A Magistrate, acting under section 145 of the Criminal Procedure Code, has no jurisdiction even with the parties' consent to refer the dispute to arbitration, and to make an order in regard to the possession of the parties upon the award of the arbitrators. **PAT** HARI PRASAD TEWARI *v.* SEWAK DAS, 1 P. L. W. 748; (1917) PAT. 251; 18 CR. L. J. 685 **333**

—— S. 145—*Crops, dispute as to—Jurisdiction—Attachment.*

The right to make collections or to appropriate the crops or produce of a village or shares in a village comes within the purview of section 145 of the Criminal Procedure Code.

A Magistrate has jurisdiction under section 145 of the Criminal Procedure Code to pass an order restraining the disputing parties from interfering with the crops stored in the threshing floor or to attach such property. **PAT** PUNIT MAHTON *v.* SIRAJUL HAQ, 2 P. L. W. 67; 18 CR. L. J. 652 **300**

CRIMINAL PROCEDURE CODE—contd.

——— S. 145—*Proceedings, object of—Portion of property made subject-matter of dispute—Mistake in law—Non-joinder of party—Order giving party more than his claim, validity of—Revision—High Court, interference by.*

The purpose of a proceeding under section 145 of the Criminal Procedure Code is merely to prevent a breach of the peace and if the Magistrate thinks that it is sufficient to prevent a breach of the peace to include in his proceeding only a portion of the land which is the subject of the Police report there is nothing to prevent him doing so. The rule that if a suit is brought only in respect of a portion of the land claimed a subsequent suit for the remainder might be barred is not applicable to proceedings under this section.

A mistake of law is not a ground upon which the High Court can interfere with proceedings under section 145 of the Criminal Procedure Code, unless the mistake goes to the jurisdiction.

Failure to add a party interested in the land in dispute as a party to the proceedings under section 145 is not a ground for interference by the High Court.

A Magistrate goes beyond his jurisdiction if by an order under section 145 of the Criminal Procedure Code he awards to a party more than that party has claimed, and in such a case the High Court will interfere with the order. **PAT** MUKHAL SINGH *v.* RAMSARUP SINGH, 18 CR. L. J. 692 **692**

——— S. 145, *proceedings under—Symbolical possession of subject-matter delivered to party some time before proceedings—Evidence of actual possession on date of proceedings, whether can be discarded.*

Where symbolical possession of a holding was delivered to a party on the 2nd June 1915 and proceedings under section 145, Criminal Procedure Code, in respect of the same holding were instituted in November 1916:

*Held*, that it was incumbent on the Magistrate to go into the question of actual possession between those two dates and consider the evidence tendered by the parties on that question before he could properly pass a final order under section 145, Criminal Procedure Code and that it was not competent to him to wholly discard and leave out of consideration the evidence of actual possession on the date on which the proceedings were instituted. **C** HAZANI KHAN *v.* NAFER CHANDRA PAL, 18 CR. L. J. 718 **718**

——— S. 145, *scope of—Order of ejectment, whether competent—Magistrate, whether can decide claims to hold possession and reap crops—Irregularity—Jurisdiction—Revision—High Court, power of interference of.*

The scope of section 145 of the Criminal Procedure Code is merely a determination of actual possession for the purpose of preventing a breach of the peace pending a decision on the merits in a civil dispute.

The section does not provide for eviction by the Magistrate or for a decision by him of any claims to a right to hold possession or to reap crops.

Clause (1) of section 145 is imperative with regard to the necessity of serving an order in writing on the parties. The mere omission to record such an order gives the Chief Court power to interfere in revision.

CRIMINAL PROCEDURE CODE—contd.

Where the proceedings under section 145 of the Criminal Procedure Code are irregular and the Magistrate has acted without jurisdiction, the Chief Court can interfere in revision.

Where the lands in question were attached to a *dera* and there being two rival claimants to the *mahantship*, each claiming to be in possession through his tenants, the Magistrate passed an order directing the men of one of the parties to leave at once and not to re-enter or interfere with the crops under penalty of a prosecution under section 188, Indian Penal Code:

*Held*, that the order was bad inasmuch as the Magistrate had neglected to come to any clear finding on the one point on which a decision was really necessary, the date of forcible possession, and had passed orders for which the section gave no authority whatever.

It is not sufficient for a Magistrate to come to a general finding that certain fields are in the possession of one party and certain others in the possession of the other and that the latter has taken wrongful and forcible possession. The date of such forcible possession must be determined and unless there is a finding that the forcible possession occurred in the case of all the fields at the same time, there must be a finding as to the date of possession with regard to each field separately. **P** KAKU *v.* HARNAMAN, 18 CR. L. J. 660; 28 P. W. R 1917 CR; 40 P. R 1917 CR. **308**

——— S. 145 (6)—"*Due course of law*," *meaning of.*

The phrase "due course of law" in section 145 (6) of the Criminal Procedure Code does not necessarily mean a decree of a Civil Court, but an order which evicts a party must either be an order of a Civil Court or of a Court acting under statutory authority. In the latter case, there must be a clear indication, express or implied in the terms of the Statute itself, to show that the order has the effect of a decree. **PAT** KRISHNA DEYAL GIR *v.* NIRMALI, 1 P. L. W. 642; 18 CR. L. J. 582 **230**

——— Ss. 147, 148, 537—'*Local enquiry*,' *meaning of—Evidence, recording of, by Magistrate deputed to make enquiry, legality of—Order on report and evidence—Jurisdiction—Waiver of objections, effect of—High Court—Revision, grounds for—Government of India Act* (5 *&* 6 *Geo. V, Ch.* 61), *s.* 107—*Letters Patent* (*Mad.*), *s.* 15.

Per *Curiam*.—The High Court does not interfere, under section 15 of the Charter Act, with orders passed by a Magistrate under section 147 of the Criminal Procedure Code, unless such orders were passed without jurisdiction.

The words 'local enquiry' in section 148, Criminal Procedure Code, are not synonymous with mere local inspection, and a person deputed to make an enquiry under the section is competent to examine witnesses.

Per *Ayling, J.*—Whatever may be the scope of the enquiry contemplated by section 148, the Magistrate delegating the enquiry to a Subordinate Magistrate is not absolved, on receipt of the latter's report from the duty imposed on him by section 145 (4) of receiving any evidence produced before him by the parties and taking any further evidence he may find necessary.

Where a first class Magistrate acts on the evidence recorded by the Magistrate who was deputed to make the enquiry without objection by the parties and bases his order thereon, the order is not one passed without jurisdiction and the High Court cannot interfere with it in revision.

*Quære.*—Whether such an order would amount to a defect of jurisdiction where the first class Magistrate refuses to take evidence tendered before him.

Per *Seshagiri Aiyar, J.*—Where a first class Magistrate acts upon evidence taken by a Subordinate Magistrate the former must be deemed to have acted without jurisdiction, but the defect is cured by section 537 where the parties do not object to the procedure and are not prejudiced thereby. **M** MUTHUSWAMI NADAN *v.* KALIANGA MOOPAN, 33 M. L. J. 78; 18 CR. L. J. 715 **715**

—— S. 164—*Confession—Recording of confession by Magistrate - Magistrate, power of, to put questions—Inspection of scene of occurrence by Judge accompanied by confessing accused—Additional statements made by confessing accused and recorded by Judge, admissibility of.*

Though the law does not contemplate or authorise inquisitorial procedure by a Magistrate who is called upon to record a confession under section 164 of the Code of Criminal Procedure, he is not forbidden to ask questions to satisfy himself that the statement proposed to be made is voluntary or for the purpose of making clear and intelligible any particular passage of a statement made to him.

A Magistrate not trying a case can only record the confession of an accused person if voluntarily made under section 164 of the Code of Criminal Procedure, and it is not permissible for him to question the accused closely and at great length for the purpose of extracting statements to be afterwards used as evidence.

The statement of an accused elicited by the Magistrate in this way is not admissible in evidence.

In a case while the trial of several accused, one of whom had made a confession, was in progress, the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused, who showed him over the ground and made certain additional statements by way of comment or illustration of his confession, and the Judge made note of them:

*Held*, that the Judge was wrong in allowing the accused to make these additional statements which ought not to have been regarded. **O** KESHO SINGH *v.* EMPEROR, 20 O. C. 136; 18 CR. L. J. 742 **742**

—— S. 164 (3)—*Confession, how to be made—Magistrate, duty of, when recording confession.*

Under section 164 (3) of the Criminal Procedure Code, no Magistrate should record any confession unless upon questioning the person making it he has reason to believe that it is made voluntarily. What is meant by the Code is that the Magistrate should ask the accused some such question as "why are you confessing? Are you sorry for your crime or is it that some one has told you that you will gain something by a confession?" and should refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question. **PAT** RAGHO LAYA *v.* EMPEROR, 18 CR. L. J. 721 : 21



—— S. 181 (2)—*Property subject of offence—Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Jurisdiction.*

Where accused was entrusted with a railway receipt for goods in one district with instructions to take delivery of the goods at their destination in another district and sell them on complainant's account and accused did so sell them and misappropriated the sale proceeds:

*Held*, (1) that the offence was triable within the jurisdiction of the Court where the goods were sold and the money was received and misappropriated;

(2) that the property which was the subject of the offence in the case was not the railway receipt but the money received on sale of the goods. **L B** P. L. T. A. KASI CHETTY *v.* V. V. KASI CHETTY, 10 BUR. L. T. 50; 18 CR. L. J. 645 **293**

—— —— S. 190 (1) (*a*) **289**

—— —— Ss. 195, 476—Prosecution of complainant—Sanction, form of—Court, duty of **328**

—— S. 195 (7)—*Sanction for prosecution of witness during pendency of suit, propriety of—District Judge, whether can revoke sanction granted by Subordinate Judge.*

Sanction for the prosecution of a witness for deposing falsely in a suit which is still pending is improper, particularly when the witness is a near relative and *am mukhtiar* of the plaintiff, a lady who depends upon him for the proper prosecution of her suit.

Generally speaking, it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose is still pending.

On a petition to the High Court for the revocation of a sanction for prosecution granted by a Subordinate Judge, the High Court having formed a firm opinion as to the impropriety of the sanction, set it aside, though it felt that the proper course for the petitioner should have been to apply to the District Judge under section 195 (7) of the Criminal Procedure Code. **C** RAJ KUMAR DEOTY *v.* SATISH CHANDRA GHOSH, 21 C. W. N. 753: 18 CR. L. J 735 **735**

—— —— S. 200 **289**

—— —— Ss. 234, 235—*Charges, misjoinder of—Trial, legality of—Offences of same kind—Forgery and giving false evidence—"Same transaction," meaning of.*

Where an accused was charged at one trial with four offences, *viz.*, of having abetted an unknown person to fix a false thumb impression purporting it to be of someone else on a summons issued by a Civil Court, and of swearing false affidavits in regard to such service on different dates:

*Held*, that the offences being more than three and being neither of the same kind, nor committed in the course of the same transaction, there was a misjoinder of charges in contravention of the provisions of sections 234 and 235, Criminal Procedure Code, and that consequently the proceedings were illegal and should be quashed

The expression "same transaction" in section 235 of the Criminal Procedure Code is not applicable to

CRIMINAL PROCEDURE CODE—contd.

cases in which the offences are separated by distinct intervals of time or place and which require to be proved by distinct evidence. **S** GERIMAL *v.* EMPEROR, 10 S. L. R. 192; 18 CR. L. J. 664 **312**

——— S. 235 (1)—*Joint trial for distinct offences against different persons committed at different times, whether legal—"Same transaction," meaning of.*

The trial of several accused in respect of several distinct offences committed at different times and at different places against different persons is illegal. The fact that the complaints were lodged on the same day or that the motive for the commission of the offences was the same in all the occurrences does not at all go to show that the offences were committed in the course of the same transaction. **PAT** GHASI RAM *v.* SUKRA URAON, 18 CR. L. J. 739 **739**

——— S. 239—*Several tenants holding separate lands of same landlord charged with mischief, whether can be tried together.*

Where five tenants who act in concert are charged with the offence of mischief, committed in respect of different plots in their respective possessions they can be jointly tried under section 239 of the Criminal Procedure Code. **PAT** EMPEROR *v.* LALU GOPE, 1 P. L. W. 691; 18 CR. L. J. 687 **335**

——— S. 253—*Discharge, effect of—District Magistrate, power of, to hold or direct further inquiry*

Where an accused is discharged by a Magistrate under section 255 of the Criminal Procedure Code, the District Magistrate has jurisdiction to hold a further inquiry himself or to direct a further inquiry by a Subordinate Magistrate. **A** PARBHU LAL *v.* JANKI, 18 CR. L. J. 706 **706**

——— S. 271.

Section 271 of the Criminal Procedure Code, though it directs that a plea of guilty shall be recorded, does not direct that the accused shall be convicted thereon but only that he may be so convicted, that is to say, it is left to the discretion of the presiding Judge in each particular case to determine whether in spite of the plea it is or is not desirable to enter upon the evidence. **B** LAXMYA SHIDDAPPA *v.* EMPEROR, 19 BOM. L. R. 356; 18 CR. L. J. 699 **699**

——— Ss. 271, 164—*Joint trial of several accused—Plea of guilty entered by one of accused—Procedure.*

The trial of an accused does not necessarily come to an end as soon as he offers a plea of guilty, and where a Judge does not convict on such a plea the only other course open to him is to proceed with the trial of the accused.

When a plea of guilty is entered by one of several co-accused who are to be tried jointly, a Judge has, under section 271 of the Code of Criminal Procedure, a discretion to decide either that the accused be convicted on such plea or that he should be put on his trial in spite of his plea of guilty. The proper procedure to follow in such cases is that if the Judge convicts the accused on his plea of guilty, he should be removed from the dock, in which case he can be called as a witness against the other accused: or the Judge should put it on record that he decides to put accused on his trial in spite of his plea of guilty.

CRIMINAL PROCEDURE CODE—contd.

The Judge is bound to read and explain the charge to the accused and he ought to satisfy himself by interrogation of the accused, if necessary, that he fully understands the responsibility which he assumes in making a plea of guilty. Having done so, the Judge is then in a position to exercise properly the discretion which the law allows and to put upon record the reasons which guide his discretion. The course which it is intended to pursue should not be left in doubt.

It is, however, not illegal for the Court to proceed with the trial of an accused who has pleaded guilty without previously placing upon record its reasons for doing so **O** KESHO SINGH *v.* EMPEROR, 20 O. C. 136; 18 CR. L. J. 742 **742**

——— S. 288—*Evidence transferred to Sessions record, value of—Conviction—Confession, retracted—Corroboration.*

Evidence brought on to the Sessions record, under section 288 of the Criminal Procedure Code, must be treated as substantive evidence and there is nothing illegal in basing a conviction on such evidence, but it would not be safe to do so without any other evidence to support it, and no responsible tribunal would permit the conviction of a person upon such evidence if it stood by itself.

Such evidence cannot be accepted as proper corroboration of a confession made to a Magistrate and subsequently retracted **P** PIRTHI *v* EMPEROR, 19 P. W. R. 1917 CR.; 18 CR. L. J. 703; 37 P. R. 1917 CR. **703**

——— S. 345 (1)—Penal Code (Act XLV of 1860), s. 323—Compounding of offence—Compromise, who can **729**

——— S. 367—Appellate Court, Criminal—Judgment, contents of **689**

——— Ss 367, 424—Appellate Court, judgment of, contents of—Finding, definite, necessity of **698**

——— Ss. 367, 110—*Evidence Appellate Court, duty of Judgment, nature of—Findings to be supported by reasons—Evidence, examination of.*

It is the duty of an Appellate Criminal Court to show by its judgment that it has duly weighed and examined the evidence against the accused, has appreciated the points both for and against him, and has brought a judicial mind to bear upon the case. Its findings must be supported by reasons, however brief they may be.

Where the judgment of a District Magistrate was, "It is obvious that if one quarter of the evidence for the prosecution is true, and I see no reason to doubt that it is, the appellant is a most proper person to be bound over under section 110, Criminal Procedure Code:"

*Held*, that it was no judgment at all and could not stand. **O** BANSI DHAR *v* EMPEROR, 4 O. L. J. 141; 18 CR. L. J. 649 **297**

S. 403 (4)—*Acquittal by second class Magistrate Offence, different, constituted by same facts—Subsequent charge before first class Magistrate - Previous acquittal, whether operates as bar Penal Code (Act XLV of 1860, ss. 406, 409.*

The accused was charged under section 406 of the Penal Code and was tried and acquitted by a Magistrate with second class powers. He was subsequently

CRIMINAL PROCEDURE CODE—contd.

charged on the same facts under section 409 and was brought before a Magistrate with first class powers to take his trial:

*Held*, that the subsequent charge being with relation to an offence which the first Magistrate could not try, *vide* section 403 (4) of the Criminal Procedure Code, the previous order of acquittal with respect to the minor offence for which the accused had already been tried was no bar to the subsequent proceedings **M** VENKATARANGA JOSIAR, *In re*, 18 CR. L. J 643 **291**

——— S 424—*Appeal, criminal—Judgment, contents of—Possession, determination of* factum *of—Court, duty of.*

The judgment of a Court of Criminal Appeal must show on its face that the Court has considered the facts and evidence in reasonable detail.

A person in possession of land has a right to protect his possession by show and use of reasonable force against trespassers and wrongdoers.

Where the *factum* of possession is the determining element in a case, a Magistrate must find which of the parties was in peaceable possession on the date of the offence and was trying to protect such possession, and which party was trying to acquire possession by use of force. **M** VEERAPPA NAICK, *In re*, 18 CR. L. J. 752 **752**

——— Ss. 424, 367—*Appellate Court, Criminal—Judgment, contents of.*

The judgment of a Criminal Appellate Court must show that the Court has fully considered the evidence on both sides and the pleas raised in appeal and that its conclusions are well supported by reasons. **O** BENI *v.* EMPEROR, 4 O. L. J. 80; 18 CR L. J. 689 **689**

——— Ss. 424, 367—*Appellate Court, judgment of, contents of—Finding, definite, necessity of.*

A Court of Appeal dismissed a criminal appeal with the observation that the evidence for the prosecution was, on the whole, slightly stronger and that the story of the prosecution as regards probability was far more likely than the story set up by the defence:

*Held*, that the opinion expressed by the Court was not sufficient for a conviction in a criminal case and that unless the Court could come to some more definite opinion regarding the guilt of the accused, the latter ought to be acquitted. **C** KOBBAT ALI *v.* EMPEROR, 21 C. W. N. 530; 18 CR. L. J 698 **698**

——— S. 424—*Judgment of Appellate Court, rules to be observed in writing.*

Section 424 of the Criminal Procedure Code requires that a judgment, whether it be under section 421 or under section 423, should be written by an Appellate Court in accordance with the rules laid down in Chapter XVI, including section 367 of the Code, for the recording of a judgment.

When the order of an Appellate Court is liable to revision by the High Court, the former Court should give some reason for dismissing an appeal to show that the points raised in the appeal were properly considered by it. **PAT** TALEBAR *v.* EMPEROR, 2 P. L. W. 49; 18 CR. L. J. 750 **750**

——— S. 437—*Discharge of accused District Magistrate, power of, to order further enquiry, limits of.*

CRIMINAL PROCEDURE CODE—contd.

A District Magistrate should not exercise his powers under section 437 of the Criminal Procedure Code promiscuously, whenever he forms a different estimate of the witnesses, whom he has not seen from that which was formed by the Magistrate who did see them.

A District Magistrate should not order a further enquiry merely upon the strength of his own appreciation of the evidence in a case where the accused has had a perfectly fair trial reaching a lawful conclusion, and the Trial Magistrate's discussion of the evidence has been apparently quite reasonable. **B** NARAINAH VENKATESH, *In re*, 19 BOM L R. 350; 18 CR L J. 646 **294**

S 439 *Acquittal, petition against—Revision—High Court, power of interference of—Jurisdiction.*

A High Court has jurisdiction to interfere on revision with an acquittal, but it should exercise this jurisdiction sparingly, and only where it is urgently demanded in the interests of public justice.

By a long established practice of the Bombay High Court, revisional applications against orders of acquittal are not entertained from private petitioners except on some very broad ground of the exceptional requirements of public justice. **B** FAREDOON COWASJI PARBHU, *In re*, 19 BOM. L R. 354; 18 CR. L. J. 668; 41 B. 560 **316**

——— S. 439—*Acquittal, setting aside of—Revision—Mistake of law as to accused's right to property—Penal Code (Act XLV of 1860), s. 379—Theft—Bona fide claim of right—Execution—Land delivered to decree-holder in execution of decree—Crops growing, whether pass.*

Where, in execution of a decree in a title suit, possession of land is given to the decree-holder the growing crops pass with the land.

The accused, having cut and removed paddy from a land of which possession had been delivered to the complainant in execution of a decree in a title suit, was prosecuted for theft, but was acquitted by the Magistrate on the ground that h had grown the paddy prior to the delivery of possession:

*Held*, (1) that the case had not been properly tried and, therefore, the order of acquittal could not stand;

(2) that the case should be re-tried but that the accused should not be convicted of theft if it was proved that though he may have made a mistake as to his rights under the law, he was acting in the exercise of a *bona fide* claim of right. **C** UDAI NARAIN GAIN *v* RAMANATH MIDDA, 18 CR. L. J. 732 **732**

——— S. 439—*Appealable and non-appealable sentences—Appeal—Conviction set aside Sessions Judge, duty of—Revision—High Court, power of.*

If at one and the same trial an appealable sentence is passed against one or more accused and non-appealable sentences are passed against others and the Sessions Judge, hearing the case on the merits on the appeals of those convicts who had a right of appeal, comes to the conclusion that the convictions are bad as against all the accused persons, he should consider it his duty to refer to the High Court the case of those persons against whom non-appealable sentences were passed, and the matter should then

CRIMINAL PROCEDURE CODE—contd.

be dealt with by the High Court under section 439 of the Criminal Procedure Code, 1898. **A** BHOLA *v.* EMPEROR, 15 A. L. J. 574; 18 CR. L. J. 684 **332**

——— S. 439—*Penal Code Act XLV of* 1860), *s.* 323 *Conviction Loss of record, whether ground for acquittal Sentence, petty Re-trial, whether can be ordered.*

Petitioner was convicted under section 323 of the Penal Code and sentenced to pay a fine of Rs. 50. He moved the Sessions Judge to exercise his revisional powers and to refer the case to the High Court. It was discovered that the record of the case was lost, so that the Sessions Judge could obtain no materials upon which to make his reference. He, therefore, asked the High Court to set aside the conviction and sentence and to order a re-trial:

*Held*, that the loss of the record after conviction was no ground for the acquittal of the accused and that the sentence being a petty one no re-trial could be ordered. **PAT** SHEO JHAWAN PANDA *v.* RAM SAKHI KUARI, 18 CR. L. J. 737 **737**

——— S. 439—*Revision—Enhancement of sentence—High Court, interference by.*

The enhancement of a sentence by the High Court, under section 439 of the Criminal Procedure Code, is a serious proceeding. The High Court should not ordinarily interfere where a substantial sentence has been passed by the Trying Court and will be always slow to interfere, unless the sentence passed is manifestly inadequate. **S** EMPEROR *v.* PARIO, 10 S. L. R. 207; 18 CR. L. J. 708 **708**

——— Ss. 476, 195—*Prosecution of complainant—Sanction, form of—Court, duty of.*

Where the prosecution of a complainant is justifiable in the general public interest, it should be carefully guarded against becoming a means of oppression or revenge in the hands of individuals.

Therefore, under such circumstances an order under section 476, Criminal Procedure Code, is more appropriate than an order for sanction under section 195, Criminal Procedure Code.

Per *Walsh, J.*—The absence of an authority whose duty it is to decide upon and undertake prosecutions under section 211 is a flaw in the criminal procedure in this country.

There is no higher duty laid upon a Court of Law than that of strict enforcement of a strict adherence to truth.

Per *Piggott, J.*—Where one of two Judges constituting a Bench is clearly of opinion that the case under consideration is a proper one for the institution of further proceedings, it would be improper for his colleague to refuse to concur. **A** HANSRAJ SINGH *v.* BHAGWANA, 18 CR. L. J. 680 **328**

——— S. 476—*Penal Code (Act XLV of* 1860), *s.* 193—*Sanction to prosecute—False statement—Materials arising out of cross-examination, whether sufficient.*

An order directing a prosecution for perjury merely upon materials arising out of cross-examination is a very unsafe proceeding, especially where the cross-examination has been protracted. **PAT** RAKTOO RAI *v.* EMPEROR, 2 P. L. W. 99; 18 CR. L. J. 727 **727**

——— S. 488 (9)—*Complaint Husband complained against living temporarily in Calcutta—Jurisdiction of Calcutta Courts.*

CRIMINAL PROCEDURE CODE—contd.

Respondent who lived in Darjeeling came to Calcutta where he resided from the 16th to 23rd January. While he was residing in Calcutta an application under section 488, Criminal Procedure Code, was made by his wife to the Presidency Magistrate's Court in Calcutta:

*Held*, that the residence of the husband in Calcutta from the 6th to the 23rd January, when the application under section 488, Criminal Procedure Code, was made, was sufficient to give the Presidency Magistrate's Court in Calcutta jurisdiction, having regard to sub-section 9 of section 488, Criminal Procedure Code. **C** JOLLY *v.* JOLLY, 21 C. W. N. 872; 18 CR. L. J. 706 **706**

——— Ss. 497, (1), 498—*Bail—High Court, power of.*

The power of a High Court to direct admission to bail under section 498 of the Criminal Procedure Code is unfettered and in no way limited by the provisions of section 497 (1) of the Code; but the High Court will not grant bail in non-bailable offences except when special circumstances are disclosed. **S** HARCHAND JHAMATMAL *v.* EMPEROR, 10 S. L. R. 208; 18 CR. L. J. 642 **290**

——— S 526—*Refusal to allow accused to cross-examine complainant—Transfer.*

An application for transfer of a case was made on the ground that the accused had not been allowed to properly cross-examine the complainant and that certain orders and remarks recorded by the Magistrate clearly indicated that he had formed a strong opinion against the petitioner. It appeared that the Magistrate considered that the accused should be allowed to inspect certain bank books before cross-examining the complainant and the bank having objected to allowing the necessary inspection, the Magistrate passed an order on the 18th July 1916 directing the bank to give the accused's Counsel opportunity to inspect the necessary registers On the 4th of August, however, in the absence of the accused's Counsel and without any reference to the previous order relating to the registers, the evidence of the complainant was closed. The complainant was then summoned as a witness by the defence but when Counsel wished to cross-examine him his request was refused:

*Held*, (1) that although the Magistrate's refusal may have been strictly legal, it was improper in the circumstances of the case and the Magistrate would have been well advised to have allowed at any rate a reasonable amount of cross-examination, especially when the prosecution raised no objection to such cross-examination;

(2) that inasmuch as the case had reached a very advanced stage, the charge having been framed and a certain amount of the defence evidence having been recorded, it could not be transferred but that the Magistrate should allow the accused to cross-examine the complainant after giving him an opportunity of examining the bank registers. **P** SUJAN SINGH, *v* JIA LAL, 18 CR. L. J. 690; 29 P. W. R. 1917 CR. **690**

——— S. 526—*Transfer of case—Altercation between Judge and Counsel, whether ground for transfer.*

It is for the High Court, exercising its jurisdiction under section 526 of the Criminal Procedure Code,

HINDU LAW—contd.

restricted interest possessed by the lessor at the time of the grant may be an important piece of evidence in judging of what interest the transferee contracted to take, but such knowledge cannot by itself disentitle the transferee to the benefit of Article 134 of the Limitation Act. M BALUSWAMI AIYER v. VENKITASWAMY NAICKEN, 32 M. L. J. 24; 40 M. 745 531

——*Religious office, appointment to—Appointment by compromise, effect of—Compromise of doubtful claims, applicability of principles of, to appointment of successor by head of religious institution—Family settlement*—Mutt, *head of, whether trustee*—Mutadhipathi, *powers of*—Laches *in contesting validity of appointment, effect of*—Chinnapatam, *nature and duties of—Limitation Act (IX of 1908), Sch. I, Art. 120.*

The head of a *mutt* does not stand in relation to the *mutt* properties in the position of a trustee in the absence of evidence to the contrary, and no suit lies to remove him from office under section 92, Civil Procedure Code.

The appointment by the head of a religious institution of his successor-in-office in accordance with the usage of the institution is invalid if made as the result of a compromise, whereby the appointor either averts a danger or secures an advantage to himself:

The Chinnapatam is an office inferior in sanctity to that of the Pandarasannadhi or head of a Mutt and the position of the Chinnapatam is analogous to that of an ordinary reversioner with a mere *spes successionis* dependent on his surviving the Pandarasannadhi who appoints him.

The cause of action for a suit to remove a person from the office of Pandarasannadhi arises from the date of the vesting of the said office in him on the application of Article 120 of the Limitation Act, and not from the date when he was appointed to the Chinnapatam office.

During the progress of litigation between *T.* and *N.* in which the latter questioned the appointment of *T.* as Pandarasannadhi under an alleged forged Will, *T.* entered into a compromise with *N.* whereby, in consideration of *N.* abandoning the contest and refraining from putting *T.* to proof of the Will, *T.* appointed *N.* to succeed him to the office of Pandarasannadhi on his death, and immediately appointed him Chinnapatam, giving him large properties of the *mutt*:

*Held*, that the appointment was invalid.

Per *Wallis, C. J.*—The principles relating to family settlements and compromises of doubtful claims are inapplicable to agreements to fill up a religious office of importance in the eyes of Hindu worshippers, which raise very different considerations.

Per *Napier, J.*—The trustee of a religious and charitable trust has, in respect of litigation not affecting the office, the same right of compromise as an ordinary trustee has, and a compromise even of conflicting claims to an office is not necessarily unlawful or opposed to public policy, but must be scrutinized by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trust of the institution or affects adversely the interests of the religious office.

A mere irregularity in the appointment may be cured by efflux of time. If the qualifications of a person appointed fall little short of those required by usage and the appointment is otherwise unobjectionable and is made in the interests of the institution, the Court will not interfere with the appointment. But the case is different where the appointment is not made in the interests of the institution. M KAILASAM PILLAI v. NATARAJA TAMBIRAN, 32 M. L. J. 271 627

—— ADOPTION *by minor widow, validity of—Ratification of imperfect adoption, legality of—Majority Act (IX of 1875), s. 2.*

The age of capacity of a person, whether male or female, to make a valid adoption under Hindu Law commences at the age of 16, that is, on the completion of the 15th year.

A widow, therefore, has not the legal discretion to adopt a proper boy to her husband before she finishes the 15th year of her age.

It is only the widow's discretion exercised after she attains majority and is thus capable of legal discretion in civil matters that can validate the adoption made by her to her husband. The discretion cannot be replaced, when she is less than 15, by her guardian's intelligent and disinterested advice.

Where a widow is directed by her husband to adopt a particular boy and she has no discretion in the matter, her adoption of that boy, even when she is under 15 years of age, is valid.

An imperfect adoption by a minor widow cannot be ratified by her after her attainment of majority.

Per *Oldfield, J.*—The ratification of an adoption should not be interpreted loosely as covering estoppel, which debars the party from denying, or conduct, which would establish against him a consent when the adoption was made. The only doctrine that is akin to it in its relation to adoption is the definition of ratification given by Lord Watson in *Stewart v Kennedy*, (1890) 15 A. C. 75, as the 'confirmation of an imperfect obligation by the party who was not legally bound by it.' M KOVVIDI SATTIRAJU v. PATAMSETTI VENKATASWAMI, 32 M. L. J. 119, 5 L. W. 63 518

—— ALIENATION—*Father, transfer by—Mortgage for legal necessity—Interest, onerous—Mortgagee, position of—Court, duty of—Decree on mortgage obtained against father alone—Sons, position of.*

Where a Hindu father makes a mortgage for legal necessity at an onerous rate of interest, the sons, although bound by the mortgage, are not bound by the rate of interest, unless the mortgagee establishes that such rate of interest was justified by the legal necessity of the family. If the mortgagee fails to prove this fact, the Courts not only have a discretion but are under an obligation to vary the rate of interest to a reasonable limit.

Where a decree is obtained by the mortgagee against the mortgagor alone on the basis of a mortgage executed by a Hindu father and carrying interest at an onerous rate, his sons, who were no parties to the said decree, can, in a subsequent suit against the mortgagee decree-holder, be granted relief to the effect that if they pay to the mortgagee

HINDU LAW—contd.

property. **P C** LACHHMAN PRASAD *v.* SARNAM SINGH, 15 A. L. J. 584 2 P. L. W. 29; 21 C. W. N. 99; 33 M. L. J. 39; 19 BOM. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334 **284**

— JOINT FAMILY — *Mitakshara — Partition, suit for, dismissed, though right to partition admitted Status, whether joint or several.*

A member of a Hindu joint family instituted a suit for partition The suit was dismissed on the ground that though he had a legal right to partition, he had in the Judge's opinion no proper motive for exercising that right. Thereafter he mortgaged his share in the family property, and on the mortgagee suing on his mortgage he claimed to be still joint:

*Held*, that notwithstanding the judgment the mortgagor had become separate from the date of his suit and that the mortgage of his share was valid. **P C** KAWAL NAIN *v.* BUDH SINGH, 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 BOM. L. R 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330 **286**

——— *Money advanced by one member—Presumption—Burden of proof*

Where a member of a joint Hindu family advances money on a mortgage, the presumption is that the money is advanced from the joint funds and the burden of proving to the contrary lies on those who allege that he advanced the money out of his self-acquired funds. **A** PUNNU *v.* KOUSA **463**

——— *Partition, partial, effect of—Possession of undivided property by one member Right of other members*

Where after a partial partition of joint family property one member continues in possession of certain properties not divided between the members of the family, his possession still continues to be the possession of the other members of the family though they may be divided, till some event happens which renders his possession exclusive or hostile to the others. **PAT** JAGDAMB LAL *v.* BIKU LAL **115**

——— *Partition—Presumption—Burden of proof—Assignment of property to different sons for business purposes, effect of—Property acquired by member from nucleus of family property, nature of—Acquisition in name of one member, whether exclusion—Suit for partition—Hotchpot.*

Where a Hindu family has been found to be join at a certain date the presumption is that it continues to be joint, and the onus of proving that there was a partition or separation subsequent to that date is on the person who alleges it.

The mere assignment by the father of certain property to his sons to enable them to start in business on their own account has not the same effect as a formal partition of the joint property.

Where a family is joint and there is a nucleus from which property may be acquired, the presumption is that property acquired by any member is joint property and the onus of proving that it is self-acquired is on those who allege it.

The mere fact that any particular acquisition is in the name of one or more of the brothers does not warrant the assumption that it is the exclusive

HINDU LAW—contd.

acquisition of the person or persons named and not of the whole of the joint family.

In a suit for possession of joint family property by partition, it appeared that *R.* the deceased father of the parties had three sons, one of whom had received a share of the property and executed a deed renouncing all further claim thereto on the 25th April 1886 Subsequently *R* and his other two sons continued to live together, but some years before 1895 *R.* gave a house, a shop and some moveable property to the plaintiff who thereafter lived separately and conducted a separate business. On the 28th October 1895 *R.* executed a Will in which after reciting these facts he bequeathed all his remaining property to the defendant who was then in possession. On the 4th April 1896 the plaintiff sued for a declaration to the effect that this Will should not affect his rights of inheritance in the property to the extent of a half share. This suit was decreed as it was held that there had been no formal partition or separation of the plaintiff from the family and he was not, therefore, bound by the terms of the Will. The plaintiff brought this suit for possession of his share:

*Held*, (1) that the family having been found in the earlier suit to be joint and there being no formal partition thereafter, all property acquired by the defendant out of the original nucleus of ancestral property was joint family property, as also was the property in the possession of the plaintiff which must be brought into hotch-pot at the time of the partition;

(2) that the plaintiff was entitled to a half share in all the family property which was in the defendant's possession as well as in his own possession. **P** NANAK CHAND *v.* LACHHMAN DAS, 97 P. W. R. 1917; 82 P. R. 1917 **775**

——— JOINT FAMILY *property used for joint purposes—Right of one member to build upon joint land - Right of other members.*

Defendant, a member of a joint family, during the absence of the plaintiff, another member of the family, erected a building on a portion of the joint land which had been used for many years by the members of the family for certain purposes:

*Held*, that as the portion of the land on which the building was erected was such that neither party could have exclusive use of it without injury to the other, the plaintiff should have joint use of the building with the defendant, though the strict right of the plaintiff would have been to have the building demolished and to have the land restored to its original condition as it was before the defendant put up the building. **C** JATINDRA MOHAN RAY *v.* RAMESH CHANDRA RAY **504**

—— Specific performance—Agreement to sell by manager—Minor members, contract on behalf and for benefit of **142**

PARTITION—*Declaration in writing of unilateral intention to become divided in status*

An unequivocal declaration by a member of an undivided family of his intention to be divided in

status is sufficient to effect a partition, although division by metes and bounds may be deferred. **M** SIKHAMANI PANDITHAR *v* AMMANI AMMAL 36

——— PARTITION—*Father or grandfather, right of, to effect partition—Share of co-parcener, gift of, validity of.*

The right of a father to partition family property between himself and his sons and their sons includes the right to make such partition when the sons are dead and the grandsons are living. A partition at the will of the father or grandfather can only be valid if it is equal and fair.

Ordinarily a co-parcener cannot make a gift of his undivided share; but once the co-parcenary is converted into a tenancy in common by means of a partition, there is no bar to a member of the family disposing of his share by gift and it can make no difference in law that both the partition and gift were effected by means of one and the same instrument. **M** AIYAVIER v. SUBRAMANIA IYER, 32 M. L. J. 439; 6 L. W. 22 205

——— SUCCESSION—Naikins—*Daughters and sons*

In the case of a *naikin* or prostitute dancing girl, daughters are preferential heirs over sons. **B** JAVA MADAV KALAVANT *v.* MANJUNATH TAI CHANDU, 19 BOM. L. R. 320 78

——— Sudras—*Illegitimate son, rights of—Share, claim for, after partition between father and legitimate sons, maintainability of.*

An illegitimate son of a *Sudra* can, under Hindu Law, take a share equal to that of a legitimate son at his father's choice, and, after his father's death, can demand of the legitimate sons a share equal to half that of a legitimate son

Where, however, a partition has already been effected between the father and his legitimate sons, in which nothing is reserved for the illegitimate son, the latter cannot claim his share.

An illegitimate son does not take a share in his father's estate at birth. **M** NATHAMUNI MUDALI *v.* PARTHASARADI MUDALI, 22 M. L. T. 39; 6 L. W. 188; 33 M. L. J. 203 830

——— WAKF—Mahant, *power of, scope of—Removal of* mahant, *whether can be effected through surrender.*

The head of a religious or charitable institution has no power to bargain away his office or alter the constitution of the institution of which he is in charge.

Where the right to remove a *mahant* had never rested with the plaintiff in the past:

*Held*, that he could not acquire that right or take it out of the hands of the Court or other lawful authority by inducing the *mahant* for the time being to agree to surrender that right to him. **PAT** KRISHNA DAYAL GIR *v.* LALDHARI GIR 276

——— WIDOW, *compromise of suit by, whether binding on reversioners—Adoption, suit to set aside, by reversioners in lifetime of widow, whether maintainable.*

A Hindu widow has power to compromise a suit so as to bind all the reversioners, provided the compromise is for the benefit of the whole family.



Where out of collusion or connivance a widow fails to have an adoption set aside, the next reversioners have a right to have it set aside or declared invalid during her lifetime. **PAT** SUNDAR PRASAD SINGH *v.* RAMBATI KUER 150

——— WIDOW—*Co-widows—Sale of house by one co-widow—Improvements by vendee—Death of vendor—House reverting to other co-widow—Vendee, right of, to compensation.*

Where a transferee of a house from a co-widow chooses to spend a large sum of money upon the house, he does so at his peril and is not entitled to the amount so spent on the house reverting to the other co-widow on the death of the vendor co-widow. **A** NANDI *v.* SARUP LAL, 15 A. L. J. 509; 39 A. 463 71

——— ——— *Mortgage by widow Consent given by reversioners—Necessity Presumption.*

The consent given by the reversioners to a mortgage executed by a Hindu widow raises a presumption of the existence of legal necessity, even where a sum of money is paid to one of the reversioners for obtaining his consent **C** SYAM PEARY DASSYA *v.* EASTERN MORTGAGE & AGENCY CO., LTD. 865

——— , *re-marriage of—Forfeiture of property granted for maintenance.*

A Hindu widow on her re-marriage, although such re-marriage is permissible and legal according to the custom of the caste to which she belongs, forfeits her interest in the property allotted to her by a family arrangement based upon her right to maintenance out of the interest which her deceased husband had in the ancestral estate.

It would make no difference in her position whether section 2 of Act XV of 1856 does or does not apply to her case, as that section has not introduced any change in the Hindu Law so far as it relates to the forfeiture of a widow's interest on her re-marriage. **C** MOHAMAD UMAR *v.* MAN KOER, 21 C. W. N. 906 783

——— *Sale of inherited property without legal necessity or consent of reversioners, validity of—Purchaser, position of*

The sale by a Hindu widow without legal necessity or the consent of the reversioners of property inherited from her husband, is not void, but is only voidable at the instance of the reversioners or persons claiming under them.

*Obiter.*—A purchaser under such a sale is entitled to sue in ejectment **C** MAHENDRA CHANDRA DATTA *v.* ABHOY CHARAN SARMA 355

——— ——— *Surrender Gift of whole estate to presumptive reversioner, validity of.*

A Hindu widow is competent to surrender by way of gift the whole of her husband's estate in favour of the presumptive reversioner of her deceased husband. **A** SHAM RATHI RAI *v.* JAICHHA KUNWAR, 15 A. L. J. 361 117

——— WILL—*Ancestral property—Dispositions in favour of female members, validity of.*

The father in a joint and undivided Hindu family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by Will in favour of the female members of his family, provided the said provisions are reasonable in extent and value.

LANDLORD AND TENANT—contd.

thereof by filing a law suit; and it further provided that of through default of the tenant in properly carrying on the cultivation, good crops are not grown, then the tenant shall deliver without objection such quantity of crops as would be in proportion to the output of the neighbouring lands:

*Held*, that the landlord was entitled to recover the value of half the crops raised on the land and was not bound to accept the sum of Rs. 40 as its equivalent. **C** KALI KANTA DAS *v.* MOHESH CHANDRA KANTA **836**

——— *Co-sharer landlord, right of, to recover his share of rent by suit.*

A co-sharer-landlord can by a suit recover his share of the rent when there has been separate collection in respect of that share. **C** MOHENDRA NATH MADAK *v.* PARESH CHANDRA GHOSH **506**

——— —*Covenant by tenant not to transfer his interest, enforceability of.*

Where there is no condition of forfeiture in a lease, a covenant by the tenant not to transfer his interest cannot restrain the latter from transferring the same, unless proper conditions are put in for enforcing the rights of the landlord on a breach of the covenant. **C** ANNODA CHARAN NAYA *v.* DASARATH HALDAR **444**

———Decision in rent suit that there is no relationship of landlord and tenant—Suit for *khas* possession by landlord—*Res judicata* **659**

——— *Ejectment of under-*raiyat *on expiry of term of* kabuliyat—*Stipulation for second settlement—Under-*raiyat *not expressing willingness to carry out stipulation, consequence of—Pleadings—Time, whether of essence of contract.*

In a suit brought by the plaintiff, a *raiyat*, to eject the defendant, an under-*raiyat*, on the expiry of the term of his *kabuliyat* which contained a condition to the effect that on the expiry of the term of the lease the tenant shall take a second settlement and unless he does so he shall have no interest in the land, the defendant pleaded that the *kabuliyat* was improperly obtained from him by the plaintiff and he was, therefore, not bound by the terms thereof, but he did not say that he was willing to take a fresh settlement nor did he express such willingness until after the close of the evidence and apparently when the case was being argued:

*Held*, that the plaintiff was entitled to a decree for ejectment when it was found that the terms of the *kabuliyat* were binding upon the defendant and that the defendant was not entitled to plead an equitable defence against the plaintiff's right to possess the land, as he never pleaded that he was ever ready and willing to take a second settlement and did not prove that he was ready and willing to perform his part of the contract.

In a case of this nature, time is not of the essence of the contract unless it is made so. **C** RAHMATULLA SHEIKH *v.* ISABUDDIN SARKAR **616**

——— Kabuliyat, *construction of—Tenure, nature of—Heritable and permanent—Burden of proof.*

A permanent tenure may bear a variable rent.

LANDLORD AND TENANT—contd.

Per *Richardson, J.—Quære.*—Whether a non-transferable tenure can be a permanent tenure?

Per *Walmsley, J.*—The descent of a tenancy from father to son and then to the son's widow is not enough to establish that the tenancy is heritable.

A tenant who claims an hereditary right under a lease which does not contain the words "from generation to generation" has a heavy onus to discharge.

The right of alienation though not an essential feature of a permanent tenure, is commonly regarded as an invariable incident.

Per *Curiam.*—Where a tenancy was held for a long time and for a period of 70 years out of it only four *kabuliyats* were executed and the tenancy descended from father to son and then to the son's widow, but the *kabuliyats* bound the tenant to keep the trees intact and restrained him from making any transfer or partition of the lands and there were no words of heritability in the *kabuliyats*:

*Held*, that the tenancy was a non-permanent tenure. **C** PRODYOT COOMAR TAGORE *v.* KRISHNAMONI DASYA, 21 C. W. N. 809 **513**

——— *Lease by Government for 99 years—Covenant not to do any act 'which may grow to the detriment or annoyance' of existing tenants—Permanent occupancy rights, implication of—Trusts Act (II of 1882), s. 90—Transfer of Property Act (IV of 1882), s. 43—Tenancy by estoppel, when created—*Contemporanea expositio, *doctrine of, applicability of.*

The doctrine of *contemporanea expositio* must be restricted to the acts and conduct of the grantor beginning contemporaneously with the grant and continued for a long course of years and should not be extended to acts and conduct done, say, 40 years after the date of grant.

Government, which absolutely owned certain lands, leased them to the plaintiffs. On the date of the lease, there were tenants already on the land. One of the terms of the lease which the plaintiffs obtained on renewal and on which date the tenants claimed permanent rights of occupancy) was that the lessees will not do any act "which may grow to the grievance or damage of the Government of India or the Government of Madras or their tenants." Subsequent to the grant, one of the grantees described himself as a *mirasidar* in the *pattas* granted to the tenants and 11 years before the renewed lease one of the lessees recognised the right of permanent occupancy in the tenants and issued *pattas* in recognition thereof:

*Held*, that this covenant was the usual one in English indentures creating leases by which the lessor protects himself against the acts of his lessees which might injure other tenants of his, and could not be construed as conferring permanent rights of occupancy on tenants in the occupation of the land.

*Held*, also, that it could not be said in the circumstances of this case that the plaintiffs represented themselves as acting on behalf of these tenants also or ever did represent these tenants when or before they obtained a renewal of the lease from Government and that in such circumstances they could not be presumed to have secured an advantage which they must hold for the benefit of the tenants as trustees under section 90 of the Indian Trusts Act.

Where land really belongs to Government, no question of estoppel and no question under section 43 of Act IV of 1882 arise so as to interfere with the rights of the subsequent grantee from the Government.

A tenancy by estoppel cannot be created where the act of the landlord which is relied upon and which created a lesser right than the landlord represented himself to be entitled to create, did confer upon the tenant a right as lessee for some term, however short. **M** SWAMINATHA MUDALI *v.* SARAVANA MUDALI, 33 M. L. J. 370 **581**

———*—Lease, construction of—Agreement not to vary rent until actual measurement—Bengal Tenancy Act (VIII B. C. of 1885), s. 52, applicability of.*

Where by a permanent lease, a piece of land described as a plot of one thousand *bighas*, then in jungly state, was let out rent free for six years and thereafter at a progressive rent rising to 8 annas per *bigha*, and the lease provided that the tenant shall pay Rs. 500 every year, and after the rent-free period and the period of progressive rents were over, on a measurement being made....., for land found to be in excess the tenants should pay additional rent at the above rate from the time of the measurement and should from that time get an abatement at the above rate for land which was found to be less, and the tenant or his heirs or successors should never have to pay any additional *jama* for the above lands, and the landlord or his heirs and successors should never receive or be entitled to receive any additional *jama*:

*Held*, (1) that upon a proper construction of the lease what was demised was the land lying within the boundaries mentioned in the schedule to the lease at Rs. 500 per annum, with an option to the tenant or the landlord to have an actual measurement made of the land, and until that was done the rent was fixed at Rs. 500 per annum;

(2) that section 52 of the Bengal Tenancy Act did not apply because the lease was a permanent one, but that when the measurement would be actually made the tenant or the landlord would get the benefit of section 52 according as the measurement showed the land to be less or more than one thousand *bighas*. **C** RAJ KUMAR MISSRA *v.* RAMA NATH SINGHA **494**

———*—Lease—Lessee, holding over, whether bound by conditions of lease*—Thekadar, *position of—Ejectment without landlord's consent, whether permissible—Tenant, knowledge of.*

A lessee holding over after the expiration of the lease is bound by the conditions of the lease.

A *thekadar* cannot issue a notice of ejectment without his landlord's permission, if his powers are in that respect restricted under the terms of the *theka*, irrespective of the fact whether or not such restriction is known to the tenants. **U P B R** PARMESHAE DAT *v.* BISHESHAR, 4 O. L. J. 146 **41**

———Lease, permanant, by head of *mutt*, validity of—Suit for possession by successor of *matadhipathi*—Adverse possession, plea of **531**



———*—Mokhasa holding—Rent—Co-sharer tenants, liability of, nature of—Fractional sharer, right of, to pay proportional rent—Burden of proof*—Kattubadi, *suit for—Interest on arrears, claim for—Madras Rent Recovery Act (VIII of 1865), s. 37—Rent payable by instalments—Limitation—Receipt for payment of rent, form of—Evidence.*

The liability of co-sharer tenants in a *mokhasa* holding to pay rent to the landlord is joint and several.

The onus of proving that the landlord, by his conduct, treated each fractional sharer as liable only for a proportionate share of the rent, and released each of the fractional sharers from liability for the rest of the *mokhasa kattubadi* rent lies on the party setting it up.

The release of one or more of joint obligees of his or their liability in one year cannot affect their joint and several liability for the rents of the subsequent years unless there has been a contract as between the landlord and all the joint tenants to divide a joint holding and the total rent in definite shares or unless there have been several such agreements between the landlord and each of the several joint tenants by which the landlord relinquished his right to proceed against that tenant in all future years for more than a particular fraction of the total rent.

The party, therefore, who sets up that the joint and several liability which once existed has been split up so as to oblige the lessor to sue the separate sharers for only specific fractions of the rent, ought to prove by cogent evidence the number of shares into which the holding was put up and the definite rent payable by each such sharer and the agreement of the landlord to substitute several liabilities for the original joint and several liability.

Section 37 of the Madras Rent Recovery Act (VIII of 1865) which provides for interest at 12 per cent. per annum on arrears of rent due, is applicable to claims for rent of the nature of *kattubadi*.

In a suit for *kattubadi* brought before the Madras Estates Land Act came into force, the relation between the parties is governed by the Madras Rent Recovery Act, VIII of 1865, and the landlord is entitled to interest on arrears at 12 per cent. per annum till date of suit.

The decree should provide for subsequent interest at 6 per cent.

A landlord cannot stipulate with his tenant that only a particular form of receipt for payment would be accepted if tendered as evidence in Court.

Where rent for a particular *fasli* is payable in instalments, the cause of action for rent due for that *fasli* accrues only from the date on which the last instalment becomes due. **M** PENUMETSA BAPIRAJU *v.* GOPISETTI NARAYANASWAMI NAIDU **590**

——— Mortgagee of lease-hold interest, liability of, for rent to lessor—Privity of estate—Privity of contract—Sub-lessees, rights and liabilities of **841**

*Non-transferable occupancy holding—Purchaser in execution of money-decree not recognized by landlord—Suit for recovery of possession by purchaser against another purchaser recognized by landlord,*

LIMITATION ACT (1908)—contd.

——— S. 10 —*"Assign for valuable consideration."*

A purchaser in Court auction is an "assign for valuable consideration" within the meaning of section 10 of the Limitation Act, although he knows he is purchasing trust properties in which his alienor has only a limited interest.

The omission of the words 'good faith' from section 10 of the Limitation Acts of 1877 and 1908 is a clear indication that an "assign for valuable consideration" under that section need not have acted in "good faith"; it is enough if he pays valuable consideration. That intention is also clear from Article 134 of Schedule I of the Limitation Act. That Article does not apply to the case of a purchaser in Court auction. **M** SUBBAIYA PANDARAM *v.* MAHAMAD MUSTAPHA MARACAYAR, 21 M. L. T. 62; 5 L. W. 690; 32 M. L. J. 85 **50**

——— S. 10, SCH. I, ART. 134 **531**

——— Ss. 12, 5—*Time requisite for obtaining copies —Application on day of delivery of judgment—Exclusion of day twice over, whether permissible —* Bona fide *mistake.*

Where copies of a decree and judgment are applied for on the same day on which judgment is pronounced, the appellant is entitled to exclude that day from the period of limitation only once, as the day on which judgment is pronounced.

The period of limitation, with reference to the provision as regards time for obtaining copies, means the period of limitation beginning to run from the day after the delivery of judgment, and, therefore, no portion of time previous to this period can be deducted as time requisite for obtaining copies. **N** SALAMSINGH *v.* HIRA, 13 N. L. R. 89 **425**

——— S. 14—*Suit filed in wrong Court—Good faith—Limitation, saving of.*

A suit which ought to have been filed in the Court of Small Causes was filed in the Court of a Munsif and the *munsarim* of that Court certified that the plaint was one within the jurisdiction of the Court of the Munsif. A few days afterwards the Munsif transferred the case to another Court which decreed the suit *ex parte*. On an application by the defendant the *ex parte* decree was set aside and on trial of the suit the Munsif returned the plaint to be filed in the proper Court, as the Munsif's Court had no jurisdiction to try it. The plaint was filed in the Small Cause Court next day and the plaintiff was met with a plea of limitation:

*Held*, that inasmuch as the plaintiff had acted throughout in good faith he was entitled to the benefit of section 14 of the Limitation Act. **A** FORD AND MACDONALD, LTD. *v.* MEYER, 15 A. L. J. 573 **447**

——— S. 15—*Attachment of decree before judgment, whether stay of execution.*

An attachment before judgment is not an injunction or order staying execution within the meaning of section 15 of the Limitation Act, no matter whether the subject-matter of the attachment is a decree or any other property. **C** MUNSUR ALI *v.* ARHOYA CHARAN DAS, 21 C. W. N. 1147 **816**

——— S. 18, SCH. I, ART. 62—*Fraud, effect of—Limitation.*

The period of limitation for the recovery of money payable by the defendant to the plaintiff for money received for his use is three years from the date when the money was received. But if the knowledge of the plaintiff's right to institute the suit has been kept from him by the fraud of the defendant, under section 18 of the Limitation Act, the period of limitation runs from the date when the fraud first becomes known to the plaintiff. **A** LAKHPAT PANDEY *v.* JANG BAHADUR PANDEY **37**

——— S. 20—*Payment of principal by guardian for benefit of minor—Minor, liability of.*

Where a payment of money due under a mortgage bond is made by the *de facto* guardian of a minor in order to avoid the immediate bringing of a suit on the bond against the minor, the period of limitation is extended under section 20 of the Limitation Act as against the minor. **PAT** GITA PROSAD SINGH *v.* RAGHO SINGH, 1 P. L. W. 777 **809**

——— S. 21 (b)—*Part-payment—Payment of interest by one heir, whether binds other heirs.*

Payment of interest by one of his heirs on a debt due by a deceased person does not save limitation as against the other heirs. **L B** YAGAPPA CHETTY *v.* MAHOMED **858**

——— S. 28—*Bar of limitation—Extinction of debt.*

The provisions of the Limitation Act should be construed strictly. Limitation is not extinction and the bar created by it does not operate to discharge a debt except in the particular circumstances of section 28. **M** NATHAMUNI PILLAI *v.* VENGAMMAL, 5 L. W. 593 **358**

——— SCH. I, ARTS. 44, 144, Ss. 6, 7, 28—*Guardian and ward—Alienation by guardian, suit for cancellation of, and possession—Article applicable to suit—Statutory bar, effect of—Extinction of right—Bar against adult brother, when affects minor under disability—Scope and applicability of s. 7—Alienee, claim of prescriptive title by—Child in womb, rights of—Hindu Law—Civil Procedure Code (Act V of 1908), O. I, r. 1—Non-joinder of minor brother in suit to set aside alienation, effect of.*

An alienation by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in Article 44 of the Limitation Act and till it is so set aside, the title vests in the alienee.

Though Article 44 describes the suit to be brought by the ward as a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained and is in possession and the ward has, therefore, to add a prayer for possession, Article 44 alone still applies to the suit, though it is brought for both reliefs.

On failure of the ward to sue to set aside the alienation within 3 years of his attaining majority under Article 44 of the Limitation Act, his right to the property is wholly extinguished under section 28 of the Act and title vests exclusively in the alienee from that date.

A person whose right to set aside an alienation is barred under Article 44 cannot avoid it as defendant by denouncing it in a suit for possession brought by the alienee

Plaintiff purchased certain lands from the mother of defendants Nos. 2 and 3 in 1893. The vendor described herself in the sale-deed as the guardian of the 2nd defendant alone, who was then 8 years old. The 3rd defendant was in her womb at the time.

Per *Krishnan, J.*, (dissenting).—Section 41 of the Court of Wards Act cannot possibly continue to apply to an estate which has been freed from the control of the Court of Wards and to which the Act itself has ceased to apply. The question whether the disabilities once imposed on any particular creditor by the application of the section continue to have effect even after such application has ceased, depends upon the character of the disability, whether it is necessarily of a permanent character or is only of a temporary one.

The words "shall not be paid until after the discharge or satisfaction of the claims notified or admitted under section 38" in section 41 of the Act merely prescribe an order of priority to be followed in payment of certain debts but does not put an end to them: such an order can be availed of when the payment is made or demanded, only if it is in force at the time It is worded in the form of an injunction not to pay until a certain thing is done and like other injunctions it can have effect only when it is in force, it has not any permanent effect.

The term "ward", wherever it occurs in the Court of Wards Act, is not applied to a person who was once a ward, but has ceased to be so.

A joint undivided Hindu family, one member of which was an insolvent, had as one of the assets of the family a mortgage-decree for a lakh of rupees against an estate under the management of the Court of Wards. One-twenty-fourth part of the decree debt passed to another person by assignment. He notified his claim to the Collector under section 41 of the Court of Wards Act but the holder of the mortgage-decree failed to notify his claim. The estate ceased to be under the management of the Court of Wards and the mortgaged villages were subsequently sold at the instance of a money-decree-holder and there were surplus sale-proceeds. The Official Assignee on behalf of the insolvent applied for execution of the mortgage-decree and for payment of the surplus sale-proceeds in execution of the mortgage-decree:

*Held*, (*Krishnan, J.*, dissenting), that the omission to notify the mortgage-debt had not merely the effect of making the interest cease altogether, but also entirely postponed the payment of the debt until the other creditors who had notified their claims had been satisfied. **M** SRINIVASA RANGA ROW *v.* RAJAH OF KARVETNAGAR, 5 L. W. 725 **811**

MADRAS ESTATES LAND ACT (I MAD. OF 1908), S. 3 (2) (d)—*Tanjore Palace Estate, whether 'estate' under the Act—Grants, irresumable, of land revenue only, whether 'estates'*—'Inam', 'jagir', *meaning of*—*Suits for rent due to Tanjore Palace—Jurisdiction.*

The Tanjore Palace Estate, which is a grant by Government of land revenue alone to persons not owning the *kudivaram* right, is an 'estate' within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act.

Section 3 (2) (*d*) of the Act does not exclude villages in the granted revenues of which the Government reserves no reversionary interest.

The word *inam* should not be given a restricted meaning and includes all *jagirs* and grants of a



dignified character which for that reason are styled *mokhasa* and covering a number of villages in which Government do not claim a reversion.

Suits for rent due to the Tanjore Palace Estate under section 77 of the Act are cognizable by the Revenue Courts.

Per *Wallis, C. J.*—Clause (*d*) of section 3 (2) of the Madras Estates Land Act restricts the operation of the Act by including only the *inams* therein mentioned, thereby excluding the so-called minor *inams*, but the definition as a whole clearly shows the general intention of the Legislature to include all large estates held directly under Government and clause (*e*) extends it to estates consisting of one or more villages not held directly under Government but as a permanent under-tenure

All *jagirs* are a species of *inams*, though there are many kinds of *inams* that are not *jagirs*.

Per *Sadasiva Aiyar, J.*—When a Madras Statute uses the word '*inam*', it does not signify a gift of whatever kind of property by a superior individual of whatever status to an inferior. **M** SUNDRAM AYYAR *v.* RAMACHANDRA AYYAR, (1917) M. W. N. 362 **975**

Ss. 3 (5), 205—Board of Revenue, revisional powers of, extent of—Order refusing to recognise petitioner as landholder—Revision, whether lies **1007**

—— S. 3 (11) **159**

—— —— Ss. 3 (11), 143—*Landlord and tenant—Varam tenure—Cesses claimable as rent, levy of, conditions of*—Kanganam, *levy of, legality of—Recognition of rights by Court—Subsequent non-enforcement—Abandonment, presumption of.*

In considering whether the levy of particular cesses in a *varam* tenure must be disallowed under section 143 of the Madras Estates Land Act, a distinction must be made between fees which form part of the consideration for the *ryot's* holding and are leviable as incidental to the tenure and fees which by law or usage are payable in addition to the rent. For the former class of payments, the occupation of the land is the consideration, and, therefore, *prima facie* they are lawfully made.

Section 143 only applies to cesses which are additions to the rent. But if the fees claimed, instead of being cesses, are component parts of the rent by means of which the equality of *varam* is arrived at, the section will not apply.

A payment of fees claimed as rent for a series of years will not make them enforceable if they are not legally leviable. They will be payable. if there is a valid, express or implied contract to pay. A contract cannot be implied where the payment is without consideration and is a voluntary one.

If a cess is shown to have been levied for a special purpose, there can be no implied contract to pay it after the purpose has ceased to exist, and payment of it will not thereafter be enforceable unless there is a fresh contract founded on a fresh consideration to continue the payment.

If a cess is otherwise valid, a contract to pay it can be implied from payments for a series of years or where it is the established usage or *mamool* of the estate to pay it.

One of the elementary rules of equity is that once a mortgage always a mortgage, and that a mortgagee should not be allowed to obtain any undue advantage by his mortgage except the amount of the principal, interest and costs due on his mortgage.

Where under an usufructuary mortgage the mortgagee was put into possession to receive the usufruct of property in lieu of interest, and there was a condition in the mortgage that if the mortgagor should fail to pay the rent of the mortgaged holding to the landlord, the transaction will become an absolute sale in favour of the mortgagee:

*Held*, that the condition of forfeiture or the transaction becoming an absolute sale in the event of the mortgagor failing to pay the rent was void, being a clog on the equity of redemption **C** BADAL MOLLA *v.* CHEMAI MONDAL **894**

——— *Charge, creation of—Intention—Annuity granted under* ekrarnama, *whether charge.*

The question whether a charge was or was not created upon a certain property is one of intention. In equity no charge can be created unless there is an intent to charge.

Where the operative part of an *ekrarnama*, executed by a person in whose favour a lady released her claim to a certain share of a property, stated that the lady was to get an annuity from the said share and was entitled to recover it by suit from the share:

*Held*, that the annuity was made a charge upon the share, even though there was no specification of the property in the schedule attached to the *ekrarnama*, as the property was easily ascertainable without such schedule. **C** SYAM PEARY DASSYA *v.* EASTERN MORTGAGE & AGENCY CO., LTD. **865**

——— *—Clause restraining alienation by mortgagor, operation of.*

The clause restraining alienation of the mortgaged property, which is generally inserted in mortgage bonds in this country, does not prevent alienation subject to the rights of the mortgagee. **C** SYAM PEARY DASSYA *v.* EASTERN MORTGAGE & AGENCY CO., LTD. **865**

——— *by way of conditional sale—Proprietary rights of mortgagee, when called into existence.*

The proprietary title of a mortgagee is called into existence only when the right of redemption is extinguished. **P** JAGAT RAM *v.* DHARAM SINGH **446**



MORTGAGE—contd.



——— *Document, construction of—Usufructuary hypothecation bond—Hypothecation clause, claim on, barred—Redemption, suit for—Rights of mortgagor and mortgagee—Limitation Act (IX of 1908), ss. 3, 28.*

A mortgage-bond, entitled usufructuary hypothecation bond, for Rs. 3,000 provided that interest on the moiety of the amount advanced would be payable out of the usufruct and that interest at one per cent. per month would be paid on the balance by the mortgagor The final provision was that both sums were to be paid in a lump on the same day 10 years afterwards. After the right to sue on the hypothecation clause became barred, the mortgagor sued to redeem the mortgage and claimed that he was entitled to possession of the entire property on payment of Rs. 1,500 only:

*Held*, (1) that the document constituted only one mortgage transaction;

(2) that section 28 of the Limitation Act could not apply to the case and that the mortgagor was not entitled to redeem without discharging the whole debt.

The limitation of the mortgagee's right to recover must not be read as a good plea to be urged by a mortgagor endeavouring to redeem, and unless the mortgagee is compelled to bring a suit within the meaning of section 3 of the Limitation Act, he is entitled to set up every claim in defence that he has in law to support the debt which still remains due. **M** NATHAMUNI PILLAI *v.* VENGAMMAL, 5 L. W. 593 **358**



———*—Forfeiture, clause for, in default of redemption within given time—Transfer of Property Act (IV of 1882), s. 60—Clog on equity of redemption.*

The rule of English Equity Courts which forbids any clogging of the right of redemption is not applicable in India and a clause for forfeiture in a mortgage should be given effect to in the absence of any specific law or of any established practice to the contrary. **L B** MAUNG MA LA *v.* MAUNG CHOT **863**



———*Option of suit on failure to pay interest or on expiration of term fixed for payment, effect of—Waiver, effect of—Limitation, commencement of.*

A covenant empowering the mortgagee to sue for payment on the happening of a certain event or to wait till the period originally fixed for payment has expired, gives him an option which cannot be taken away by Statute unless there is anything to show that the grant of such an option is illegal or forbidden by law.

MORTGAGE—contd.

The option is for the benefit of the mortgagee and if he waives it, limitation cannot start running against him in spite of that waiver.

A mortgage bond provided for payment of principal money with interest in two years and contained a stipulation that if the interest was not regularly paid every month, the mortgagee shall be at liberty (*ikhtiar hoga*) either to sue for the unpaid interest or for the entire money due on the mortgage and further provided that on the expiry of the period fixed for re-payment (*ba surat inqizai wada*) the mortgagee shall be at liberty to recover the entire money due to him by the sale of the mortgaged property:

*Held*, that there being alternative contracts provided for in the mortgage bond, it was open to the mortgagee to forego the one and sue to enforce the other. **O** RAM PARSHAD *v.* QADRO, 20 O. C. 132; 4 O. L. J. 341 **232**

———*Redemption—Construction of document—Possession, loss of, authorising mortgagee to claim principal with interest—Revenue to be paid by mortgagee—Profits, enjoyment of, in lieu of interest—Conduct of mortgagee—Mortgagee, position of—Ouster, period of, interest for—Excess revenue, claim for.*

Under the terms of an usufructuary mortgage-deed, the mortgagee was to pay the revenue (the amount of which was mentioned in the deed) assessed on the mortgaged property and to retain the balance of the profits in lieu of interest on the mortgage-money, and was further entitled to claim his money with interest thereon at a certain specified rate immediately on a loss of possession over the property or on the accrual of any other injury. The mortgagee remained in possession for five years from the date of the mortgage, and lost possession for two years after this, but owing to no fault of the parties to the mortgage. He waited till possession was restored to him, but this time the revenue of the property was considerably enhanced. Nevertheless, he remained in possession for seventeen years, paying the enhanced revenue and enjoying the net profits of the property. Then on a redemption suit having been brought, he claimed, in addition to his mortgage-money, interest on it at the stipulated rate for the period of his dispossession, and the excess revenue that he had had to pay since the restoration of possession, together with interest thereon:

*Held*, that, in view of the terms of the mortgage-deed and the conduct of the mortgagee, he was entitled to interest on his mortgage-money for the period of his ouster, but only at a reasonable and not at the stipulated, rate; and that he was not entitled to the excess revenue paid by him, nor to any interest on the same. **O** MAHABIR SINGH *v.* MATA BADAL, 4 O. L. J. 348 **402**

———*Redemption—Integrity broken—Mortgagor, suit by one—Extent of share, redemption of.*

Where the integrity of a mortgage has been broken, one of the mortgagors is entitled only to redeem the share which he owns in the mortgaged property. **A** ZA BUNNESSA BIBI *v.* PARBHU NARAIN SINGH, 15 A. L. J. 625 **345**

——— Redemption—Mortgagee in possession, whether estopped from denying right of purchaser of mortgaged property to redeem **648**

MORTGAGE—contd.

———*Redemption suit—Compromise, non-registration of, effect of—Registration Act (VIII of 1871), s. 49—Mortgagee, possession of, under compromise—Adverse possession.*

By an unregistered deed of compromise a mortgagor and mortgagee consented to the complete transfer of the equity of redemption to the latter. The mortgagee took possession of the property in pursuance of the compromise and both parties acted upon it for nearly forty years:

*Held*, that the possession of the mortgagee since the compromise was adverse to the mortgagor and his heirs. **A** KHEDU RAI *v.* SHEOPARSAN RAI, 15 A. L. J. 306; 39 A. 423 **121**

——— *of shares—Company—Liquidation—Payment of calls by mortgagee—Mortgagee, whether can recover amount from mortgagor.*

Plaintiff advanced a sum of money to the defendant on the security of certain shares in the *S.* Bank in February 1913. In October 1913 defendant wished to overdraw his account with the plaintiff Bank, and this was allowed on a deposit of some more shares in terms of a formal overdraft agreement All the shares deposited were transferred to the plaintiff Bank's name on the share register of the *S.* Bank, and dividends when received were credited by the plaintiff Bank to the loan account of the defendant. In September 1913, the *S.* Bank shares bagan to fall, and the plaintiff Bank sold some of the mortgaged shares before a winding up order was made for the compulsory liquidation of the *S.* Bank. In the liquidation the plaintiff Bank was placed on the A list of contributories for the shares held by them, and on the B list for the shares sold by them, and were forced to pay calls:

*Held*, (1) that the plaintiff Bank could recover the amount of principal and interest advanced by it to the defendant, but that it was not entitled to the amount paid by it as calls or to any declaration of indemnity as to its liability in respect of the shares sold by it;

(2) that the plaintiff did not occupy the position of trustee for the mortgagors at the time of paying the calls and was, therefore, not entitled to an indemnity as trustee.

It is not an implied condition of a contract of mortgage that the mortgagor should indemnify the mortgagee against the consequences of holding property which he holds for his own security and not for the benefit of the mortgagor.

A forced payment of a call by the registered holder of shares upon a compulsory liquidation cannot be regarded as an expenditure for the preservation of the security. **B** BIRDICHAND JIVRAJ *v.* STANDARD BANK, LTD., 19 BOM. L. R. 341. **167**

———*Suit by mortgagee to recover mortgage-debt—Mortgagee unable to restore possession of mortgaged property—Procedure.*

There is no authority for the broad proposition that if the mortgagee cannot for any reason put the mortgagor in possession of the whole of the mortgaged property, he cannot recover the mortgage-debt. **M** KOTTAYAT GOPALA MENON *v.* KOLAT NARAYANA KURUP, 5 L. W. 339; (1917) M. W. N. 289 **70**

MORTGAGE—contd.

——— *Title of mortgagor decreed against in suit wherein mortgagee not impleaded—Appeal, right of, by mortgagee who purchased in Court auction.*

Where the title of a mortgagor to the mortgaged property is negatived by a decree in a suit to which the mortgagee is not a party and the mortgagee, who purchases the property in execution of a decree for enforcement of the security, is resisted in taking possession and driven to instituting a fresh suit to establish his mortgage, he can be permitted to appeal against the decree as representing the mortgagor or his representatives against whom the decree was passed **M** SUBBA PILLAI *v.* RANGASAMI, (1917) M. W. N. 306 **846**

——— *, usufructuary, construction of*—Malguzari, *meaning of*—*Mortgagee, enhanced land revenue paid by, position of*—*Redemption.*

The fact that a bargain becomes unconscionable if a particular meaning is attached to the words used in the instrument evidencing that bargain, affords no reason for holding that the intention of the parties to the bargain was otherwise if the terms are clear. But where a word used is capable of more than one interpretation, a Court is justified in adopting the interpretation which is consistent with the existence of a contract such as persons of ordinary intelligence would make and rejecting the interpretation which involves the acceptance of a contract such as no sensible person would be likely to agree to.

By an usufructuary mortgage the mortgagee was to retain profits arising out of the mortgaged property after paying the land revenue assessed on it, in lieu of interest on the principal money. The mortgage was to be redeemed on receipt of the principal money only:

*Held*, that the mortgagee was entitled, on redemption, to claim the difference between the original land revenue and the subsequently enhanced land revenue, but was not entitled to it if the amount of the profits was not shown to have been reduced owing to the enhancement of the land revenue. **O** CHARU CHANDRA BISWAS *v.* LALLAN SINGH, 4 O. L. J. 148 **42**

——— *, usufructuary—Redemption—Hypothecation by way of simple mortgage—Limitation.*

An usufructuary mortgage was executed in February 1891 and in September of the same year a further advance was made by the mortgagee to the mortgagor on the security of the same property, which was hypothecated by way of simple mortgage with a further covenant that the simple mortgage should be paid off before the redemption of the usufructuary one. The plaintiff claimed to redeem the usufructuary mortgage without paying any sum due under the simple mortgage of September 1891:

*Held*, that as a suit on the mortgage-deed of September 1891 would be barred, the plaintiff was entitled to redeem the usufructuary mortgage without paying off the simple mortgage. **A** ACHHAIBAR SINGH *v.* RADHI **404**

——— Zar-i-peshgi *lease—Ejectment by lessor—Mortgagee, right of, to recover damages for dispossession—Civil Procedure Code (Act V of 1908), s. 102—Suit for damages for breach of contract—Appeal, second, whether lies.*

MORTGAGE—concld.

Under the terms of a contract embodied in a registered instrument the plaintiff was entitled to remain in possession of certain land for five years. After the expiry of that period the proprietors of the land obtained a decree for the ejectment of the plaintiff from the Revenue Courts. The plaintiff then sued the defendants for a sum of Rs. 125 with interest on the allegation that he could not be legally ejected from his possession over the land without the payment of that sum:

*Held*, (1) that if the plaintiff's suit could be treated as a suit for damages for breach of contract, the second appeal to the High Court was barred by section 102 of the Civil Procedure Code, inasmuch as the suit was cognizable by a Small Cause Court;

(2) that if the contract upon which the plaintiff based his suit was a mortgage, then inasmuch as he was not in possession at the date of the suit he was not entitled to recover the sum paid by him. **A** BHAIRON PRASAD *v.* KURA MAL, 15 A. L. J. 534 **578**

——— Zar-i-peshgi—*Mortgagee, liability of, to pay certain annual instalments to mortgagor—Instalments, whether constitute rent under Bengal Tenancy Act—Suit to recover arrears of instalments—Limitation Act (IX of 1908), Sch. I, Art. 116—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, applicability of.*

An advance of Rs. 12,000 was made under a registered deed to a *zemindar*. In lieu of the advance he put the creditor in possession of his share in a *zemindari* in *zarpeshgi thicca*. The *thiccadar* was to deduct Rs. 620 out of the income of the property on account of interest and to pay Rs. 83-4-0 annually to the owner:

*Held*, (1) that the deed amounted to a usufructuary mortgage and that the person in possession was a mortgagee;

(2) that the annual payments to be made by the *thiccadar* were not of the nature of rent within the meaning of the Bengal Tenancy Act;

(3) that a suit for the recovery of arrears of these instalments was governed not by Article 3 of Schedule III, Part I of the Bengal Tenancy Act, but by Article 116, Schedule I of the Limitation Act. **PAT** BARHAMDEO NARAIN SINGH *v.* RAMANAND PRASAD SINGH, 1 P. L. W. 795 **594**

——— SUIT—*Paramount title, whether can be gone into.*

In a suit upon a mortgage no question of title paramount to the mortgaged property should be gone into. **C** SYAM PEARY DASSYA *v.* EASTERN MORTGAGE & AGENCY CO., LTD. **865**

MUHAMMADAN LAW—*Funeral ceremonies of deceased Muhammadan—Reasonable expenses.*

Funeral ceremonies of a Muhammadan should be performed in a manner suitable to the deceased's position in life and means.

In determining what is a reasonable amount in a particular case, the Court must take into considera-

MUHAMMADAN LAW—contd.

tion the social practices of the class to which the deceased belonged. P MUHAMMAD HAMID ULLAH KHAN *v.* MUHAMMAD MAJID ULLAH KHAN 374

——— CUSTOM, *whether can be proved in derogation of Muhammadan Law.*

Evidence is admissible to prove a custom although it is at variance with Muhammadan Law. A ALI ASGHAR *v.* COLLECTOR OF BULANDSHAHR, 15 A. L. J. 597 753

——— DOWER—*Discord between husband and wife—Dissolution of marriage at instance of wife—Court, whether can decrease or increase contracted amount —Divorce, effect of.*

Per *Sharfuddin, J.*—A Court of Law has no power to decrease or increase the contracted amount of dower.

Where there has been a divorce it is immaterial whether the dower was prompt or deferred, as after the cessation of the relationship of husband and wife either by death or divorce, the dower, if not already paid, becomes due.

Per *Roe, J.*—Under the Muhammadan Law when discords originate between married parties or when the wife herself is anxious to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage. PAT BIBI SOGRA *v.* MOHAMMAD SAYEED 672

——— GIFT, *essentials of—Possession of property in occupation of tenant, delivery of, mode of.*

The three essentials of gift under the Muhammadan Law are: offer by the donor, acceptance by or on behalf of the donee, and seisin.

As regards the delivery of possession what the law contemplates is that the possession required to be given must be such as the nature of the property permits. If the donor has done all that he could do to perfect the contemplated gift, which is attended with complete publicity, the mere fact that the donee was not present or that possession was obtained by him sometime after does not invalidate the transfer.

The possession of the property in the occupation of a tenant can be delivered by allowing the donee to collect rents and profits or by requesting the tenant to attorn to the donee

Where a deed of gift in respect of a vacant plot of land contained a recital as to delivery of possession and was subsequently registered:

*Held*, that under the circumstances, the donor could not be expected to do anything more to perfect the title and that the gift was, therefore, valid and binding. P MUHAMMAD HAMID ULLAH KHAN *v.* MUHAMMAD MAJID ULLAH KHAN 374

———INHERITANCE—*Co-heirs, nature of, estate of —Alienation by one co-heir in possession of estate, whether binding on others.*

If one of the co-heirs of a deceased Muhammadan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased, such sale is not binding on the other co-heirs or creditors of the deceased.

MUHAMMADAN LAW—contd.

Per *Abdur Rahim, J.*—The theory of Muhammadan jurisprudence, on which the right of succession and inheritance is based, is that even after death, the deceased's rights in his properties still inhere in him, to the extent necessary for meeting the funeral charges and the legal obligations and liabilities incurred in his lifetime and also for carrying out his wishes, as expressed in his last Will and testament, within the limits laid down by the law.

On the death of a Muhammadan, the inheritance vests in his heirs according to their respective shares, although in the administration of the estate the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs. It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies have been paid.

The co-heirs of a deceased Muhammadan take their shares in severalty, their rights being analogous to those of tenants-in-common, and not of members of a joint Hindu family.

According to the principles of Muhammadan Law one co-heir of a deceased Muhammadan has no right to deal with the shares of the other heirs. M ABDUL MAJEETH KHAN *v.* KRISHNAMACHARIAR, 32 M. L. J. 195; (1917 M. W. N. 346; 40 M. 243; 5 L. W. 767 210

——— INHERITANCE—*Offerings made at mausoleum of deceased Muhammadan, title to.*

The offerings made at the mausoleum not to the sect of the deceased but to his memory belong to his heirs and not to his followers. O SHARFUDDIN *v.* MAQBULUNNISSA, 4 O. L. J. 174 101

——— *Property held by owner of shrine, nature of.*

One *I*, who made a living by *piri muridi* and owned in a graveyard the tomb of an ancestor of his, executed a Will whereby he left the whole of his property to his wife with a reversion after her death to her brother *K*. He also appointed *K* manager of the estate on behalf of his wife after his death and also his own successor and representative for the continuation of the *urs* and for carrying out the duties and receiving the offerings connected with the *piri muridi*. On his death his daughter by an earlier wife sued for possession of her share of the property:

*Held*, that there was nothing to show that the testator appointed *K. sajjada nashin* in the usual acceptance of the term or that the property in dispute was ever dedicated to the upkeep of the shrine, but that it was held by the testator in proprietary right and not as a keeper of the shrine and that the plaintiff was entitled to her share under the Muhammadan law. P ZINAT BIBI *v.* EMNA 111 P. L. R. 917: 92 P. W. R. 1917 240

——— MARRIAGE—*Divorce*—Tafviz—*Delegation of power of divorce to wife, validity of—Contract Act (IX of 1872), s. 26, applicability of.*

It is lawful for a Muhammadan husband to delegate to his wife power to divorce herself on certain conditions, *e. g.*, on the husband marrying a second wife.

MUHAMMADAN LAW—concld.

A provision in a dower-deed whereby a Muhammadan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void under section 26 of the Contract Act.

*Quære.*—Whether there would be any difference in the law according as the dower-deed was an anti-nuptial or post-nuptial contract. **C** BADU MIA *v.* BADRANNESSA **803**

——— MARRIAGE—*Puberty, effect of.*

The Court cannot interfere in a case where a minor girl completes her fifteenth year of age and thus becomes competent under the Muhammadan Law to contract a valid marriage with a husband of her own choice. **A** MOHAMMAD FASAHAT ULLAH *v.* TAHIRA BIBI **136**

——— TRUST *or gift, deed of, operation of—Possession, delivery of, necessity of.*

In order to make a deed of trust or gift operative under the Muhammadan Law, it is necessary that possession should forthwith be delivered to the donee or trustee.

Where a deed of trust is divisible, and possession has been taken of some of the property comprised in the deed, the deed is operative only to the extent to which possession has been taken. **PAT** OFFICIAL TRUSTEE OF BENGAL *v.* NIM CHAND MARWARI **856**

——— WAKF—*Dedication, actual, necessity of.*

Under the Muhammadan Law no formality is required to be gone through for the purpose of creating a valid *wakf*, it is enough if the donor declares that he constitutes a property *wakf* or has constituted it *wakf*. There must, however, be not only a mere intention to dedicate property but an actual dedication. **P** MUHAMMAD HAMID ULLAH KHAN *v.* MUHAMMAD MAJID ULLAH KHAN **374**

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 28, *scope of—Payee, description of, by* vilasam *of firm—Mercantile usage*—Nattukottai Chetties, *custom among—Document, construction of.*

The principle underlying section 28 of the Negotiable Instruments Act that if a promissory note is made payable by a person as agent of another, the latter is not liable personally on the note, applies also to the case of a payee.

It is a well-known usage among Natukottai Chetties to draw *hundies*, bills and promissory notes in the name of the agent of a firm represented by the firm's *vilasam*, and in such cases it is the firm indicated by the *vilasam* which is intended to be the payee and not the agent whose name appears on the instrument.

The question is entirely one of construction of a document. **M** GHULAMSA RAVUTHAR *v.* VISVANATHAN CHETTIAR, (1917) M. W. N. 344; 5 L. W. 721 **347**

——— S. 80—*Hand-note 'payable on demand,' whether carries interest—'On demand', meaning of—Demand, whether necessary before institution of suit—'After demand', meaning of.*

Where a hand-note is silent as to the rate of interest payable, the lender is entitled, under section 80 of the Negotiable Instruments Act, to interest at the rate of 6 per cent. from the date when the money ought to have been paid.

NEGOTIABLE INSTRUMENTS ACT—concld.

The words 'payable on demand' have a legal meaning and sense, which convey that the note is payable on the date of its execution. In such a case no demand is necessary prior to the suit.

If, however, the words used are 'after demand', then a demand becomes necessary before a suit is instituted. **PAT** BISHUN CHAND *v.* AUDH BIHARI LAL, 1 P. L. W. 615; 2 P. L. J. 451; (1917) PAT. 279 **350**

OBJECTION OF LAW *not pressed by party, whether can be given effect to—Pleadings.*

An objection of positive law apparent on the face of the proceedings should be given effect to, even if it has not been pressed by the party in whose favour it would work. **C** GOBIND CHANDRA PAL *v.* KAILASH CHANDRA PAL, 25 C. L. J. 354 **230**

OUDH ESTATES ACT (I OF 1869), Ss. 3, 8 **555**

——— Ss. 8, 10, 14, 15, 22—*Crown Grants Act (XV of 1895), ss. 2, 3—Primogeniture sanad, applicability of—"Successor," meaning of—Lineal primogeniture, rule as to succession by—Hindu Law—Will, interpretation of—Will executed by talukdar in favour of person who would not have succeeded under the Act, effect of—Absolute estate conferred by Will—Devise, lapse of, by death—Ulterior disposition becoming operative on death of first devisee during lifetime of testator—Transfers made by persons having no title, effect of.*

One *G.* was the owner of a *taluka* to whom a primogeniture *sanad* was granted. He was succeeded by his son who died leaving two sons, *D. B.* and *S. B.* On the death of *D. B.*, *S. B.* succeeded to the *taluka* and in 1895 executed a Will, to the effect that after his death his wife was to succeed to the entire *taluka* as full proprietor and that upon her death the *taluka* was to go to his mother *D. K.* as absolute owner and on her death intestate to his daughter *S. K.* and her heirs. Adoption was also permitted to the widow and failing her to the mother. The wife of *S. B.*, the last *talukdar*, died during the lifetime of her husband. On the death of *S. B.* in 1899 his mother *D. K.* succeeded to the *taluka* under the terms of the Will of 1895. She made certain mortgages affecting the villages included in the *taluka* during her lifetime and died in 1906. After her death *S. B.*'s daughter *S K.* came into possession of the *taluka*, alleging that her mother *D. K.* had executed a Will in her favour in 1902, and she also executed certain transfers regarding portions of the *taluka* property. In 1911 two collaterals of the husband of *D K*, *viz.*, *S. B. S.* and *K. S.* instituted two suits for recovery of the entire *taluka* against the daughter *S. K*, alleging that she took nothing under the Will of 1895 and was not, therefore, entitled to the estates *S. B. S* claimed the whole estate on the ground that he was the nearest male heir according to the rule of lineal primogeniture. *K. S* claimed to be the nearest male relative and ignored the rule of lineal primogeniture. The daughter *S. K.* died during the pendency of the suit and the question was as to what interest *D. K.* took under the Will and which of the plaintiffs was entitled to succeed. *K. S.* died during the trial of the case

OUDH ESTATES ACT—contd

and *S. S.* and *D. S.* were brought on the record as his legal representatives. Subsequently *D. S.* relinquished his rights in favour of *S. S.*, who thereafter remained as the sole plaintiff in the suit brought by *K. S.*:

*Held*, (1) that the wife of *S. B.* took nothing as she died in her husband's lifetime, the devise in her favour having lapsed on her death;

(2) that on the death of the wife of *S. B.* the ulterior disposition in favour of *D. K*, his mother, became operative and she took an absolute interest in the *taluka* under the terms of the Will of 1895;

(3) that the Will of 1902 alleged to have been executed by *D. K.* in favour of the daughter *S K.* was not established;

(4) that under section 15 of Act I of 1869 the effect of the Will of 1895 in favour of *D K.*, who would not have succeeded to the estate except for that Will, was to take the *taluka* for the purpose of succession out of the Act and the successors of the husband of *D. K* were to be found out by the ordinary provisions of the Hindu Law;

(5) that the rule of succession laid down in the *sanad* granted to *G.* was not applicable to the case, because *D. K.* being a legatee under the Will of 1895 could not be considered as a "successor" under the terms of the *sanad*;

(6) that the provisions of the Crown Grants Act (XV of 1895) did not apply to the case;

(7) that the rule of succession by lineal primogeniture as laid down in the *sanad* being inapplicable, both the plaintiffs, being equal in degree in their relationship to the husband of *D. K.*, were entitled each to half of the *taluka*;

(8) that the transfers made by *D. K.* were binding on the reversioners, whereas those made by *S. K.* were inoperative and of no effect **C** SITAL SINGH *v.* SITLA BAKHSH SINGH, 4 O L. J. 193 **469**

——— Ss. 22, 23, 3, 8—*Crown Grants Act (XV of 1895), ss. 2, 3—Primogeniture* sanad, *effect of grant of, in cases of estates entered in lists IV and VI*—Sanad, *supersession of, under Oudh Estates Act—Ordinary law, whether includes* sanad *under s.* 23—*Revival under Crown Grants Act of* sanad *already superseded—Custom—Primogeniture—Proof—Exclusion of females—Single heir succession.*

One *A.* was the owner of *Taluka* Kundrajit before the annexation of the Province of Oudh. He had four sons, whose heirs subsequently under the British Rule divided the entire *taluka* among themselves giving four distinct names to the four portions so divided. One of the portions was the portion in dispute and was called *Taluka* Tajpur. It was allotted to *C.*, the eldest male in the line of the second son of *A.* The *sanad* granted by the British Government was a primogeniture *sanad*, with respect to the whole *Taluka* Kundrajit issued jointly in the names of the four descendants of *A*, but their names were entered in lists I and IV prepared under the provisions of the Oudh Estates Act. *C.* died in 1899 and on his death the *taluka* came into the possession of his only son *K.* On the death of *K.* his widow *H.*, the defendant,

OUDH ESTATES ACT—concld.

succeeded to the possession of the estate. The plaintiff alleged the *taluka* to be impartible and as the only son of one of the brothers of *C*, claimed the estate from the widow on the ground that he was the nearest male heir according to the rule of lineal primogeniture laid down in the *sanad* which governed the succession to the estate, as being part of the personal law under section 23 of the Oudh Estates Act and also according to an ancient custom of lineal primogeniture prevailing in the family to the same effect. He also impleaded in the suit the descendants of *B*, a brother of *C*, who according to the plaintiff were interested in denying his title to the property in dispute. The defendants denied that the estate was an impartible *taluka*, also denied the alleged family custom and contended that the estate having been entered in list IV, the succession to it was governed by section 23 of the Oudh Estates Act which prescribed the ordinary personal law as the rule of succession applicable to the case, and that the rule of succession laid down in the *sanad* was not applicable nor was the *sanad*, as contended for by the plaintiff, part of the personal law under section 23 of the Act. The descendants of *B* also alleged that on the death of the widow the nearest reversioners of *K.*, the husband of the widow, at that time would be entitled to the estate. The questions for determination in the case were whether the *sanad* still governed the succession to the estate both as part of the personal law and also in view of the Crown Grants Act XV of 1895, or whether it was superseded by Act I of 1869 and whether the family custom relied upon by the plaintiff had been established. It was agreed that if the rule of succession by male lineal primogeniture was established as applicable to the estate, the defendant being a female would necessarily be excluded from succession:

*Held*, per *Kendall, A. J. C.*, (1) that under section 23 of Act I of 1869, succession to the estate was governed by the ordinary law and not by the *sanad*; the *sanad* being part of the ordinary law only in cases of estates entered in lists III and V and not in the case of estates entered in lists II, IV and VI;

(2) that the operation of the *sanad* was superseded by Act I of 1869 and that the Crown Grants Act, XV of 1895, did not affect the provisions of Act I of 1869 and consequently had not the effect of reviving the *sanad* already declared inoperative under Act I of 1869;

(3) that on the evidence on the record the plaintiff had failed to establish the family custom of male lineal primogeniture by which females would be necessarily excluded.

Per *Kanhaiya Lal, A. J. C.*—(1) The *sanad* was not wholly superseded by Act I of 1869 and the *sanad* like custom must be considered as part of the personal law referred to in section 22, clause 2, and section 23 of the Act;

(2) the only family custom proved in the case was the custom of a single heir descent, which did not exclude the females from succession. **O** BADRI NARAIN SINGH *v.* THAKURAIN HARNAM KUAR, 4 O L J. 233 **555**

PROVINCIAL SMALL CAUSE COURTS ACT—concld.

——— SCH. II, ART. 7—*'Apportionment of rent', meaning of—Suit for apportioned rent on fraction of demised premises—Jurisdiction of Small Cause Court—Transfer of lessor's interest, effect of—Right to rent after transfer, when amount payable on fixed dates—Transfer of Property Act (IV of 1882), ss. 36, 2 (d)—High Court—Civil Procedure Code (Act V of 1908), s. 102—Appeal, second*

Per *Sadasiva Aiyar, J*—A suit for arrears of rent due under a lease after an apportionment has been made, in consequence of the interest of the lessor having been transferred in portions of the demised premises, either by simultaneous agreement between the parties or by one party with the consent of the other, is not a suit for apportionment coming under clause 7 of Schedule II of the Provincial Small Cause Courts Act.

Even if the apportionment was made only by the plaintiff and he alleges it to be an equitable apportionment binding on the defendant, a suit which prays for the recovery of a definite sum cannot be called a suit for an apportionment of rent.

The nature of the plaintiff's suit has to be found from the relief claimed by him and the fact that the Court may have to give findings as to the proper apportionment of rent does not alter its character.

Where the apportioned rent claimed is below Rs. 500 there is no right of second appeal.

Per *Spencer, J.*, (dissenting.)—Article 7 of Schedule II of the Provincial Small Cause Courts Act takes it out of the power of a Small Cause Court to adjudicate upon a question of what is a fair and equitable rent to be paid by a tenant to his landlord, having regard to the yield, fertility and extent of a holding and similar considerations, which is rather within the province of a Revenue Court for estates or a Court of original jurisdiction in other cases

A decision on what would be a fair and proper proportion out of a whole rent to a fraction of demised premises in consequence of the lessor ceasing to have an interest in the remainder is beyond the cognizance of the Small Cause Court.

All rents are, upon the transfer of the interest of the lessor, to be deemed to accrue due from day to day.

Where, before the date on which the rent becomes payable, the lessor ceases to have an interest in the land leased, he has no claim for rent subsequent to that date as there is no privity of interest between himself and the tenant. **M** VEMA RANGIAH CHETTY *v.* VADIVELU MUDALIAR, 6 L. W. 80 **655**

——— ART. 35 (g)—*Suit to recover money advanced as loan on condition of marriage—Jurisdiction.*

A suit to recover money advanced by way of loan, on condition that the debtor would marry his daughter to the creditor's nephew and on failure to do so would pay back the money, falls under Article 35 (*g*), Schedule II, of the Provincial Small Cause Courts Act and is, therefore, cognizable on the regular side. **O** RAMESHWAR *v.* GAURI, 4 O. L. J. 171 **67**

PUNJAB COURTS ACT (III OF 1914), SS. 37, 44—*Jurisdiction to transfer suits—Senior Subordinate Judge, powers of.*

A Subordinate Judge has no jurisdiction to exercise the powers conferred by section 24 of the Civil Procedure Code, unless such powers have been delegated to him by the District Judge with the previous sanction of the Local Government as provided by sections 37 and 44 of the Punjab Courts Act, 1914. **M** ALI NAKI *v.* DAMODAR DAS, 33 P. W. R. 1917 **111**

———S. 41 **176, 772, 1003**

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT (I OF 1900), SCH.—*Alienation—Suit to recover land alienated—Limitation, commencement of.*

In a suit to recover possession of ancestral land alienated by a male proprietor during his lifetime, limitation runs primarily from the date on which the alienation is attested.

Plaintiffs sued for possession of certain lands alleging that an alienation thereof by their father was without consideration and necessity. It appears that the original alienation was a mortgage executed in November 1897, which recited that if the property was not redeemed within two years it should be deemed to be sold. The mortgage not having been redeemed, the mortgagee instituted a suit for possession on the 9th March 1901. This suit was compromised on the understanding that if the mortgagor failed to redeem within a further period allowed to him the mortgagee was to get possession. The mortgagee accordingly took possession on the 19th August 1901, mutation of the proprietary right being effected on the 29th June 1903. On the 31st of March 1915, the mortgagor's sons instituted the present suit for possession:

*Held*, that the alienation by sale which the plaintiffs sought to attack not having been mutated till the 29th June 1903, time began to run from that date and the plaintiffs' suit was, therefore, not barred **P** JAGAT RAM *v.* DHARAM SINGH **446**

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 29—*Delivery of possession by attornment of tenants and by pointing out land sold—Pre-emption, suit for—Limitation.*

In a suit for pre-emption it appeared that the sale sought to be pre-empted was an oral one and had taken place some six months prior to 26th July 1907, and that possession was, in June 1907, delivered to the vendors by getting the tenants to attorn to the vendees and by pointing out on the spot each and every field which had been sold. The suit having been instituted on the st October 1909:

*Held*, that the vendees came into physical possession of the land sold in June 1907 within the meaning of section 29 of the Punjab Pre-emption Act and that the suit having been instituted more than one year after that date was, therefore, time-barred. **P** BISHEN SINGH *v.* FEROZ CHAND, 33 P. W. R. 1917; 13 P. L. R 1917 **618**

Where a document stamped with an eight-annas Court-fee stamp headed "*tasfianama ba adalat* District Judge, Ludhiana," commenced by describing the parties in detail and saying that they had various disputes between themselves and that certain property in the possession of the defendants shall be given to the plaintiff and concluded with a prayer to the Court that a decree to that effect may be passed in favour of the plaintiff:

*Held*, that the intention of the parties was that the document should be presented to the Court in order that a decree should be passed by the Court in accordance therewith, and that, therefore, it was a petition addressed to the Court and as such did not require registration. **P** HARI CHAND *v.* MAGHI MAL, 95 P. W. R. 1917; 112 P. L. R. 1917; 78 P. R. 1917 **675**

——S. 17 (1) (b)—*Letter reciting certain facts and delivery of possession, whether compulsorily registrable.*

A letter reciting certain facts and saying that the writer has given possession of certain property to a certain individual and has ceased to have anything to do with it, is not an instrument which of itself operates or purports to create or declare any right, title or interest in the property and does not, therefore, require registration. **P** KAJU MAL *v.* PARMA NAND **455**

——S. 17, CLS. (1) (*c*), (2) (XI)—*Endorsement unregistered, of payment on mortgage-deed, admissibility of.*

Endorsements of payments on mortgage-deeds are admissible in evidence, though unregistered. They fall within the scope of clause (2) XI, and *not* of clause (1) (*c*) of section 17 of the Registration Act **M** BOMMANABOYINA KOTINAGULU *v.* RAMARAJU ANKAYYA, 6 L. W. 44; (1917) M. W. N. 447 **89**

—— S. 49 Mortgage—Redemption suit—Compromise, non-registration of, effect of **121**

—— Ss. 49, 17, *"Transaction," unilateral, whether amounts to intention to become divided in status—Registration.*

Where such unilateral declaration is embodied in an instrument in writing prior to a division by metes and bounds, it does not amount to a "transaction" within the meaning of section 49 of the Registration Act and is admissible in evidence without registration. **M** SIKHAMANI PANDITHAR *v.* AMMANI AMMAL **36**

—— —S. 77—*'Refusal to register', meaning of—Suit to enforce registration—Jurisdiction of Court—Limitation.*

An order of a Registrar refusing to accept a document for registration on the ground that it was time-barred, is a 'refusal to register' within the meaning of section 77 of the Registration Act, and entitles the aggrieved party to sue for the enforcement of registration under the section.

There is no substantial distinction between refusal to accept a document for registration and a refusal to register within the meaning of section 77 read with sections 76 and 72.

The time for filing a suit under the section should be computed from the date of the appellate order of the Registrar refusing to register under section 72 or section 76, and not from the date of any prior order refusing to extend time. **M** GANGADARA MUDALI *v.* SAMBASIVA MUDALI, 33 M. L. J. 54; 40 M. 793 **192**



REGULATION. *See* PUTNI REGULATION.

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), Ss. 7, 8, 9, 10, 14—*Religious Endowments—Appointment of member of Committee—Appointment by Civil Court, whether administrative or judicial act.*

Section 10 of the Religious Endowments Act, 1863, does not appear to empower a Civil Court to direct the remaining members of a Committee appointed under that Act, when they have failed to hold an election for the choice of a new member, to hold such an election. It can direct them to fill up the vacancy, but such filling up is then their own act.

A proceeding of the Civil Court under this section is a judicial and not merely an administrative or ministerial act. In such matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal Tribunal. **P C** BALAKRISHNA UDAYAR *v.* VASUDEVA AIYAR, 15 A. L. J. 645; 2 P. L. W. 401; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501 **650**

RENT-FREE UNDER-PROPRIETARY HOLDING—*Resumption suit, whether maintainable.*

An under-proprietary holding, whether rent free or otherwise, being heritable and transferable, is, by its very nature, not capable of resumption. When it is rent free, the remedy of the superior proprietor is to apply to the Settlement Officer to have it assessed to rent under section 79 of the U. P. Land Revenue Act, unless the assessment is barred by a previous judicial decision or otherwise. If it is assessed to rent, and the rent is not regularly paid, the superior proprietor can only bring it to sale in execution of a decree for his arrears but cannot eject the under-proprietor.

The principle underlying the resumption or assessment is that the State is entitled by the ancient law of the country to a certain amount of the produce of the soil, for which revenue payable in cash has now been substituted, and it cannot be deprived of the same by any action of the owner of the soil, and that the latter is similarly entitled to recoup himself from the occupier or actual cultivator, unless the effect of the recoupment is to stultify his own contracts for valuable consideration **O** SHANKAR SAHAI *v.* GAJADHAR PRASAD, 20 O. C. 171; 40 O. L. J. 448 **200**

RENT SUIT—*Alternative claim for money-decree against plaintiff's co-sharers, maintainability of.*

A suit is maintainable in the form in which a decree for arrears of rent is claimed against the tenant-defendants, with an alternative prayer at the same time for a money-decree against the other set of defendants—the co-sharers of the plaintiff—in case it is held that they have realised the entire rent from the tenant-defendants. **C** BINODE LAL *v.* PREO NATH **173**

—— Bhauli *land—Produce, quantity of, proof of—Road-cess return, admission in, value of—Average rate of rent.*

Where a plaintiff sues for arrears of rent of *bhauli* land, he should be allowed to prove the actual produce for the years in suit and its prices. An admission of

service, on the allegation that the defendants by refusing to perform the requisite service had forfeited the tenancy:

*Held*, that if the service tenure be assumed to have been created before the Transfer of Property Act came into operation, it was competent to the plaintiffs, on the service thus ceasing, to resume and take possession of the land without reference to the Court at all, but if, on the other hand, the tenancy be assumed to have been created after the Transfer of Property Act came into operation then the position of the parties must be determined with reference to the terms of section 111, clause (*b*) or clause *g*), whichever was applicable to the case, and that in either case, the defendants were liable to be ejected without service of notice to quit. **C** RAMNATH SIL *v.* SIBA SUNDARI DEBYA, 25 C. L. J. 332 **348**

——— Ss. 122, 123—*Death-bed gift—Registration—Possession, delivery of, whether necessary.*

Under section 123 of the Transfer of Property Act delivery of possession is not essential to the validity of a gift, and a gift by registered deed would be valid without more. But where a gift involves questions of marriage, succession, inheritance or religious usage, the Buddhist Law will apply. **L B** MAUNG BA MAUNG *v.* MAUNG PYU **854**

——— S. 137—*Contract — Negotiability — Delivery order, whether negotiable—Document of title—Test—Contract Act (IX of 1872), ss.* 102, 108, 178.

Negotiability can be attached to documents by mercantile usage.

A document is negotiable if by the custom of the money market it is transferable as if it were cash; and its *bona fide* transferee obtains a good title to it (because of its currency) although his transferor might have stolen it.

The test whether a document is a "document of title" or a "document showing title" to goods is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented.

A delivery order is a document of title to the goods to which it relates and the property of the transferor in the goods passes to the transferee by delivery of the document; but when once delivery has been made to the person entitled, the delivery order is exhausted and ceases to have any effect.

A delivery order may or may not be negotiable according to the conditions attached to it or according to the usage of trade under which it is issued.

Case-law discussed.

A document may be negotiable although it contains conditions, but when a seller of goods issues a document the real effect of which is that he will hand over certain goods to any one producing the document provided he has them and he has been paid his price and all charges in connection with them, no usage or custom of trade can compel him to hand the goods over if he has not the goods or has not been paid the price and stipulated charges.

A document showing title to goods represents the goods to which it relates and the law governing its transferability is the same as the law which governs



the transferability of the goods themselves and is contained in sections 108 and 178 of the Contract Act. **L B** KHOO EO KHWET *v.* NANIGRAM JAGANATH FIRM **86**

TRESPASSER *in possession of demised land—Lessor, right of—Ejectment.*

The mere fact that a trespasser has been in actual possession of land let out on lease for twenty years is no reason why he should not be ejected from the land by the lessor, unless it is proved that the trespasser had taken a *bona fide* settlement from a third person whom he believed, in fact, to be the landlord and entitled to let out the land. **C** HAJRA SARDARA *v.* KUNJA BEHARI NAG, 25 C. L. J. 635; 21 C. W. N. 1001 **271**

TRUST, *creation of—Revocation—Author of trust, power of, to revoke.*

The position of a person who creates a trust of his property and declares himself to be the first manager becomes merely that of a manager and he is not competent subsequently to revoke the trust or to alter it or to appoint new managers. **A** SIDDHAN LAL *v.* GAURI SHANKAR **165**

—— Head of *mutt*, position of **531**

——*Purchase of trust properties in Court sale—Purchaser, whether can assign for value.*

One *S.* acquired large properties in the salt trade. In 1894 by an instrument of deed of trust he endowed certain charities with some properties and directed that a sum of Rs. 144 should be spent every year on account of the charity and directed the members of his family to act as trustees. In 1895 he died and *A.*, one of his sons, succeeded as trustee. In execution of a decree obtained against *A.* for debts due from his father the charity properties were attached and brought to sale. The first defendant became the purchaser and was in possession ever since 1898. In 1913, *A.* was removed from his trusteeship and *B.* was appointed in his place. In a suit by *B.* to recover possession of the properties on behalf of the charities:

*Held*, (1) that the suit was barred by limitation;

(2) that the power to apply Rs. 144 every year towards the charity properties was not a proprietary interest in the property alienated which could pass to an alienee but was only a power which the trustee had to exercise from time to time. **M** SUBBAIYA PANDARAM *v.* MAHAMAD MUSTAPHA MARACAYAR, 21 M. L. T. 62; 5 L. W. 190; 32 M. L. J. 85 **50**

——*Trustee for payment to creditors—Transfer of bonds and book debts to trustee—Accounts—Negligence in collection—Damage or loss, liability of trustee for—Mortgagee in possession—Interest, liability to pay—Trusts Act (II of 1882), s* 23.

A trustee, appointed by a person for payment to his creditors to whom the debtor transfers bonds and book debts for collection and payment as aforesaid is bound to realize the amounts due thereon with due diligence and is liable for loss caused to his appointor by his laches. The trustee should, in that event, be debited with the face value of the documents and should not be allowed the costs of suit incurred by him for his belated enforcement of the bonds.

In the matter of liability for interest, there is a difference between a trustee and a mortgagee in

VENDOR AND PURCHASER—contd.

entitled to do, to sell his share and dies before performing his contract, specific performance of that contract may be enforced against the other joint-tenants. The section and the illustration have no bearing on the question whether persons who are strangers to the contract and against whom it cannot be specifically enforced can be properly joined as defendants and partition claimed against them as co-parceners of the vendor.

In a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share against them.

The joinder of strangers, not parties to the contract, in such a suit would amount to misjoinder.

Per *Srinivasa Aiyangar, J.*—The right of the buyer in enforcing a contract for the sale of immoveable property is a right *in personam* against the vendor and arises out of the contract for sale, and is different from the title or the right of property which the purchaser obtains on the execution of the conveyance which enables him to sue in ejectment all persons in possession, including his own vendor. The fact that a buyer, when suing for specific performance of a contract of sale, does not seek recovery of possession would not prevent him from seeking that relief on his title which gives him another cause of action. It is doubtful whether the obligation under the contract of sale to give possession is one which is capable of being specifically enforced, and whether the proper relief is not damages for breach of the contract to give possession till execution of the conveyance, after which date the purchaser would be entitled to mesne profits from the person in possession, whether such person is the vendor or a stranger without title.

*Quære.*—Whether a suit for possession based on the obligation under a contract of sale can be brought against a subsequent purchaser with notice of the contract who has obtained possession as such purchaser.

If there is an existing cause of action for partition on the date of the institution of a suit for specific performance, the question whether the two causes of action, one for specific performance and the other for partition and possession, can be joined in one suit, would depend not only on the provisions of Order I, rules 3 and 5, Civil Procedure Code, which primarily regulate the joinder of parties, but also of Order II, rules 3 and 4, which provide for joinder of causes of action.

Per *Abdur Rahim, J.*—A purchaser from a co-parcener can enforce specific performance of his contract against the other co-parceners and in a suit for the said relief, the joinder of a prayer for possession or partition is permissible under section 27 of the Specific Relief Act and Order I, rule 3, Civil Procedure Code.

Under rule 3 of Order I it is sufficient if the right to relief exists in respect of or *arises out* of the same transaction or series of transactions, subject only to the condition that there be any common question of law or fact to be decided. It does not matter whether there are more than one and technically different causes of action, or the liabilities of the several defendants are different, nor is it necessary that every defendant should be interested in all the reliefs claimed in the suit.

The right to possession arises out of the contract of sale so as to be covered by the words of Order I, rule 3, Civil Procedure Code. The fact that by virtue of section 54 of the Transfer of Property Act, no interest in immoveable property is acquired by the contract does not affect the question. It is sufficient for the plaintiff to say that by the contract he obtained the right to acquire the property with the aid of the Court, the execution of a registered conveyance and delivery of possession being the means by which the right is to be enforced.

Nor does it make any difference that the right to possession is contingent on the plaintiff establishing his right to the execution of a proper conveyance by the defendant.

*By the Division Bench* (per *Oldfield and Sadasiva Aiyar, JJ.*)—Though an alienee of specific portions of joint family property does not, as of right, acquire any interest in it, his conveyance enables him to demand a partition of the family property and entitles him either to the specified property, if that can equitably be assigned to his vendor's share, or to its equivalent from such other property as that share may include.

The suit should not, in any event, be dismissed for joinder of prayers for possession and partition along with the relief for execution of a conveyance. The plaint should be allowed to be amended by deleting the prayers for possession and partition, and if not so amended, the Court should dismiss the suit so far as regards the objectionable prayers and dispose of it in so far as it relates to specific performance. **M** RANGAYYA REDDY *v.* SUBRAMANYA AIYAR, 32 M. L. J. 574; 40 M. 365; 5 L. W. 797; 21 M L. T. 385 **429**

——*Money left with vendee for payment to mortgagee—Redemption, no attempt made by vendee for—Mortgagee's suit decreed—Decree satisfied by vendee—Vendee, position of.*

On the sale of an immoveable property a portion of the sale-consideration was left with the vendee for payment to the mortgagee of the said property. The sale-deed provided that if the money so left with the vendee fell short of the sum actually due to the mortgagee the vendor was bound to discharge the excess money, and that if the vendee was put to any expense in connection with the deposit of the mortgage-money by reason of any bad faith or dishonesty on the part of the mortgagee he was to bear the burden of that cost himself. The vendee made no attempt to redeem the mortgage. Long after the date of the sale and the date when redemption of the mortgage first became possible the mortgagee sued both the vendor and the vendee on the basis of the mortgage and obtained a decree against them. The vendee discharged the whole decretal amount and then brought a suit against the vendor for